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Cha[s] Fox

Jeremy Bentham

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THE

WORKS

OF

JEREMY BENTHAM,

PUBLISHED UNDER THE SUPERINTENDENCE OF
HIS EXECUTOR,

JOHN BOWRING.

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THE

WORKS

OF

JEREMY BENTHAM,

NOW FIRST COLLECTED;

UNDER THE SUPERINTENDENCE OF HIS EXECUTOR,

JOHN BOWRING.

PART I.

CONTAINING

THE PRINCIPLES OF MORALS AND LEGISLATION.

ON THE PROMULGATION OF LAWS; WITH SPECIMEN OF A PENAL CODE: EDITED FROM THE FRENCH OF DUMONT, AND THE MSS. OF BENTHAM.

ON THE INFLUENCE OF TIME AND PLACE IN MATTERS OF LEGISLATION: — FROM THE MSS. OF BENTHAM.

A TABLE OF THE SPRINGS OF ACTION.

A FRAGMENT ON GOVERNMENT; WITH THE HISTORICAL PREFACE TO THE SECOND EDITION.

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GENERAL PREFACE.

THE Publisher of the first complete Edition of BENTHAM's Works thinks a brief prefatory explanation indispensable, in order that the reader may know what he has to look for. The literary executor of "the master," Dr. Bowring, being abroad, and others well qualified declining to undertake the task, it has devolved on the writer of the following pages, who sets to work on a somewhat hasty summons.

The science of legislation, and of morals as bearing on legislation, was invented by Bentham: he laid the foundations, and hitherto no one has carried the superstructure higher than he did. In order to appreciate what Bentham has accomplished — to indicate to the reader what he may expect to find in Bentham's writings, — it will be necessary to glance at — first, the state in which he found legislative science and public opinion; second, the development of his opinions, the objects and character of the works he produced; third, the effect his writings have already produced, and the farther effect they are in the act of producing.

I. Of the state in which Bentham found legislative science and public opinion.

These two topics are inseparable. Abstract principles, and that floating mass of incoherent opinions caught up and relinquished at random, which has hitherto formed the moral creed and rule of the masses, re-act upon each other. On the one hand, conclusions of the philosopher are adopted by many who are incapable or unwilling to appreciate their reasons: on the other, the opinions of men direct their actions, their actions constitute the events of society, and these events suggest the reflections out of which the philosopher elaborates his principles.

The events of European history had, about the time of Bentham's birth, established several true and important opinions as the political creed of all reflecting men: although the common principle, upon which the whole of them ultimately rested, not having been discovered, their necessary connexion was not felt — their exact import and extent was not clearly seen — and their important consequences were almost entirely overlooked.

The early religious reformers had deviated into the error of endeavouring to substitute one class of dogmatic opinions, sanctioned by law, for another. The stubbornness of contending sectarians had rendered in many cases a rude rule-of-thumb toleration unavoidable, but wherever a sufficient majority were of one way of thinking, formal creeds, sanctioned by legislative authority, were the order of the day. Again, the encroachments of Charles I. had led men to inquire into the basis on which the kingly power rested. The Long Parliament, finding the claims advanced by the King incompatible with security of person and property for the subject, overturned the throne: and the people, finding an irresponsible body of legislators equally dangerous, overturned the Long Parliament. The first experiment having failed, kings were restored, and were not long of driving the people to seek some new bulwark against their attacks. To soothe the superstitious veneration entertained for traditional establishments, the fiction of an original compact between the subject and sovereign was devised, and under its shelter, James II. was driven from the throne, and William III. seated in his place. But for one circumstance, the Bill of Rights would have transformed the "compact" from a fiction into a reality. That circumstance was, that the Revolution of 1688 transferred the excess of power from the king, not to the people, but to the aristocracy. The king dwindled to a puppet, moved by the largest faction of that privileged *caste*. A wider scope was given to aristocratical ambition; the British nobility split into two hereditary parties, which assumed the name of Whigs and Tories; and the structure of the representative body was ad-

mirably calculated for enabling whichever of them obtained the ascendency, to work its will with a House of Commons, which, seemingly the representative of the people, was in reality the hired servant of the aristocracy. The American revolution put an end to this delusion. The sturdy fathers of the Transatlantic Republic insisted upon the reality of what the mother country had been contented to enjoy in name only — the practical application of the doctrine that "taxation without representation is tyranny." Thus successively did these important truths come to be recognised: — That no religious opinions, honestly entertained, can be criminal; that power is vested in the chief magistrate by the people, and for their benefit alone, and may be resumed if abused; that the only safeguard for the persons and property of the citizens consists in their retaining the power of enacting laws and imposing taxes in the hands of representatives freely chosen by themselves. These principles, empirically discovered, were vaguely enough understood. To them came in time to be added some dim perception of the truths, that where men were left most free to form their own religious opinions, the intellect assumed a hardier and more energetic character — and that where industry was least trammeled, the comfort of individuals, and the general wealth of the nation, most abounded. As yet, however, no man had arisen of sufficient clearness and grasp of intellect to detect the one-pervading principle, of which all these theorems were only diversified manifestations.

Where the teachers were only half-learned, much wisdom could not be anticipated from the taught. The opinions of all men are composed partly of what they have come to know by their own exertions, partly of what they have received upon trust from the tradition of others. With the bulk of mankind, the latter ingredient preponderates to a great extent. Indolence makes them rest contented with what they are told. Indolence does more; it is annoyed by contradictory information startling it from its repose, and regards the occasion of the disturbance with ill-will. Thus interest is brought into play, and many an active spirit is forced to remain torpid as his neighbours, for fear of rendering them unfriendly, and incurring, at the very least, a suspension of their good offices. This is the secret of men's attachment to "things as they are:" herein consists the strength of "existing establishments." The mass of society in Great Britain, during the latter half of last century, could learn nothing precise or practical in politics from men whose views were, as a whole, vague and incoherent. Men's natural *vis inertiæ* made them acquiesce in what was taught them, notwithstanding the ill-concealed incongruity of its parts. And the whole fabric of British institutions was of a nature to render them friendly to the substitution of words for things. Nothing seemed the result of pre-disposition — every thing seemed, as it were, to have *grown up.* The constitution was a congeries of makeshifts. If a man remarked that the House of Commons did not represent the people, he was soothed with the phrase "virtual representation." If he complained of the voluminous, contradictory, and inaccessible nature of the law, he was silenced by grave panegyrics on the wisdom of the successive occupants of the Bench, who, by virtue of legal "fictions," had, as circumstances emerged, built up an artificial system of law, far superior to what any legislature could have devised. Civil life was one great and continuous practical lesson in the art of saying one thing and meaning another. The allied Church and the Universities completed the doctrine of insincerity. The most awful mysteries of religion were prostituted to a ceremony, compliance with which entitled to office: at the national seats of learning, young men were made to commence what was understood to be their search after truth, by professing to believe, and promising always to believe, what they were incapable of understanding.

Such paltering with public opinion could not fail to re-act dangerously on public morals. Men unfurnished with sound principles of action were tossed backwards and forwards between empty formulas of words. In books they might find professions of elevated sentiment; in active life, they found corruption everywhere. Walpole and Doddington systematized corruption: Gerrard Hamilton taught the art of veiling ugly practices with fair words. Lawyers trained in the school of fiction — divines, perverted from the beginning, by being taught to profess belief before they began to inquire, and thoroughly corrupted by rich pluralities, the reward of sycophancy and political intrigue, lent their aid to cement the fabric. There wanted not

counteracting instruments of good—the lofty sentiments of the poets,—the holy beauty of that book on which the church professed to stand,—the sense of evils flowing from a bad system,—the contagious example of America. But these accidental influences were, to the compact frame-work of the constitution, as a horde of guerillas to the organization of one of Napoleon's armies. The better spirits felt, rather than saw, the evils of society. They attempted to enforce their own views by the sophistical forms of reasoning devised by their antagonists, and were necessarily defeated. When the friends of parliamentary reform sought to make good their point by arguing that their system of representation was the real established one, and the other only a usurpation, the reason revolted against such perversion of fact. The struggle between good principles and evil practices seemed only to have made bad worse: virtue began to assume the aspect of a profitless disturber of the peace. But, as the German proverb says, "When the tale of bricks is doubled, Moses is near." It was indeed high time that our Moses should make his appearance.

II. Of the development of Bentham's opinions, the objects and character of the works he produced.

We are inclined to think that it was a fortunate thing for Bentham, that, connected as he was with the aristocracy, his connexions did not belong to the section of it which has affected to patronize liberal principles. If they had, he might, notwithstanding his purely intellectual cast of character, have, like so many others, commenced with being encouraged to make a display of fine sentiments, have proceeded to be gradually absorbed into the vortex of low personal struggles for office, under the delusion that he was enacting the part of a patriot, and ended by being as hollow and heartless a prating Whig as any of his compeers. Luckily for him, he was of a right Tory stock, and nurtured in the loyal and orthodox University of Oxford. His earlier studies rather inclined him to persevere in the family faith. "The writings of the honest but prejudiced Earl of Clarendon," he says in a note to his 'Fragment on Government,' "to whose integrity nothing was wanting, and to whose wisdom little but the fortune of living a little later, and the contagion of a monkish atmosphere: these and other concurrent causes had listed my infant affections on the side of despotism. The genius of the place I dwelt in, the authority of the State, the voice of the Church in her solemn offices: all these taught me to call Charles a martyr." But his disposition did not fit him for an intriguing partisan, and it is the nature of Toryism to favour, in all like him, devotion to any pursuits likely to keep them from criticising public affairs. Speaking of a considerably later period of his life, he says—"Party, I belonged to none: I knew not what sort of a thing party was." But however little calculated by his dispositions to be emmeshed in party contests, there was that in his nature which would not allow him to remain uninfluenced by the political questions which were then beginning to convulse the abysses of society as with a moral earthquake.

The predominant characteristics of Bentham's mind were:—sincerity, or love of truth; benevolence, or an ever active desire to contribute to the happiness of others; investigation, or a reckless craving which could only be satisfied by thoroughly examining whatever attracted his attention in all its bearings. If we add, that what phrenologists would call the faculties of order or classification, and of constructiveness, were in him peculiarly active, we have the key at once to the origin of his opinions, and their progressive development. Circumstances seem to have determined the field he selected for the exertion of those faculties; but it was the almost unparalleled power and energy of his mind that enabled him to cultivate that field to so much purpose.

The circumstance that seems to have given the first impulse to the inquiries which engrossed his future life, was the dispute between Great Britain and her colonies, which, during his law-studentship, was the universal topic of conversation. His inquiring turn of mind made him anxious to form such an opinion of the merits of the controversy as would be satisfactory to himself. His original leanings, we have seen, were towards monarchy: the shallow arguments of the then advocates of liberal opinions for a while confirmed him in his error. "Conversing with lawyers," he says, in the passage from which we have already quoted, "I found them full of the virtues of their Original Contract, as a recipe of sovereign efficacy

for reconciling the accidental necessity of resistance with the general duty of submission. This drug of theirs they administered to me to calm my scruples; but my unpractised stomach revolted against their opiate. I bid them open to me that page of history in which the solemnization of this important contract was recorded. They shrunk from this challenge; nor could they, when thus pressed, do otherwise than our Author (Blackstone) has done,—confess the whole to be a fiction. This, methought, looked ill. It seemed to be the acknowledgment of a bad cause, the bringing a fiction to support it." He elsewhere says, in reference to the same subject — "As to the American controversy, the badness of the only arguments employed against bad government, whether on the one side of the water or the other, had left me sticking to it." But the equal want of sound argument on the servile side of the question prevented him from long adhering to it. In his uncertainty he met with Hume's Essays, and found in them what he sought — an unassailable central principle, from which he might sally on his quests after truth, and to which he might retire to recruit his powers by repose whenever he was baffled. This was the principle of utility, or, as he subsequently expressed it with more precision, the doctrine that the only test of the goodness of moral precepts or legislative enactments, is their tendency to promote the greatest possible happiness of the greatest possible number. Armed with this discovery, he applied it on all occasions, thereby at once directing himself to the truth, and establishing, by a multiplicity of experiments, the trustworthiness of his test.

Bentham was guided to the recognition of this all-pervading principle at an early period of his career, by his strictly logical turn of mind, which saw through the empty veil of words substituted for things, and by his instinctive truthfulness of disposition. The profession, to which choice or the will of his guardians devoted him, the law, furnished ample materials for stimulating these propensities, and further developing his opinions. He has told us, that while attending in the Court of King's Bench during the years of his studentship, the chief objects of his admiration, and in part of his emulation, were Lord Mansfield and Mr. Dunning. Even in his advanced years, he recurred to his feelings towards the former in glowing language:—"From the first morning on which I took my seat on one of the hired boards that slid from under the officers' seats in the area of the King's Bench, at the head of the gods of my idolatry had sitten the Lord Chief-Justice. Days and weeks together have I made my morning pilgrimage to the chief seat of the living idol, with a devotion no less ardent and longing, and somewhat less irrational, than if it had been a dead one." Of Dunning he says — "If in my style, appropriate aptitude in any shape or degree is discernible, it is probably in no small degree to Dunning that it is due. Precision, correctness, clearness, guardedness in expression — closeness in argumentation — seemed to me his characteristic features: in these, combined with force, he seemed to me altogether without a rival.**** At the Bar, of all men I had ever heard, he had been the one whom I had heard with the greatest pleasure and attention,—the one, whose style in speaking, it seemed to me, that on all occasions it would be matter of the highest satisfaction to me to be able to imitate." Mansfield was the first who lent to the decisions of English courts the liberal views of the man of the world, and the graceful systematic coherence of the man of literary tastes. Dunning was nervous and perspicuous. They contributed by their example to cultivate that love of systematic arrangement, and clear unequivocal expression, to which Bentham was by his nature predisposed. At the same time, more minute acquaintance with the law convinced him, that, as he has forcibly expressed himself in the Introduction to the Rationale of Judicial Evidence — "The incomprehensibility of the law, a circumstance which, if the law were wise and rational, would be the greatest of all abuses, is the very remedy, which, in its present state, preserves society from utter dissolution; and that if rogues did but know all the pains that the law has taken for their benefit, honest men would have nothing left they could call their own." His sincerity was offended to find fiction the great staple of law. His benevolence was hurt by seeing the necessary tendency of the cumbrous and unintelligible system, by delay and accumulation of expense to destroy where it was meant to defend. His faculty of invention was stimulated to devise substitutes for the mischievous system of law and judicial organization which he found existing. To this

task he devoted his future life. This was thenceforth his business in the world, and all his investigations radiate from this as from a centre — are subordinate and auxiliary to this end. If we keep this fact steadily in view, many shallow objections to passages in his works are dissipated at once: the cavillers have mistaken practical applications of principle for abstract enunciations of principle.

We are now in condition, starting from this point, to trace the progressive development of Bentham's opinions, as manifested in his writings. There is, however, one preliminary to be first disposed of: this seems to be the most appropriate place for dissipating the absurd notion that he was a mere theorist. There never was a mind less disposed to wander in vague speculation: there never was a more thoroughly and essentially practical mind. Two instances may be given in confirmation of our assertion, that he was what is conventionally termed "a man of business," in addition to the fact of his admirable management of his own domestic affairs. About the date of his first publication, having paid a visit to Paris, he there contracted an intimacy with a painter, who was in search of an engraver for a portrait of Lord Mansfield. Bentham was employed to draw the articles of agreement between the two artists, and this document having accidentally come into the hands of Lord Mansfield, elicited from him expressions of unqualified approbation, which (the transaction being quite in the ordinary track of business) could only be occasioned by the style of execution. Again: the late Lord Lansdowne, a shrewd man of the world, gave a pretty unequivocal proof of the esteem in which he held Bentham's worldly wisdom, when he recommended him to the dowager Lady Ashburton, for a second husband, on the plea that he would make an excellent guardian for her son, a minor. But indeed, the subjects of Bentham's writings, and his mode of handling them, suffice to show the practical turn of his mind. In order to stimulate him to exertion, it was necessary that something to be *done* be at least the ultimate object: and in working to this end, not the slightest item that might throw an obstacle in the way of the practical application of his principles was ever overlooked; while every new mechanical invention that seemed to promise additional facility, was seized upon the moment it appeared.

Bentham's first publication was his "Fragment upon Government," — an examination of what is delivered on the subject of government in general, in the Introduction to Sir William Blackstone's Commentaries. It was published in 1776 (ten years after the author's entry at Lincoln's-inn,) and is interesting, as containing the germ of his whole system. He broadly avows his universal test — his fundamental principle of utility. He shows no mercy to the well-rounded periods of Blackstone, exposing with the most ruthless logic their ostentatious wrapping up of no meaning in sounding language. The first object of the treatise is to show, that correspondent to discovery and improvement in the natural world is reformation in the moral. With an energy unsurpassed in the works of his maturest genius, he vindicates adherence to stern simple truth on all occasions, laying down the principle as applicable to the defender of abuses, that "every false and sophistical reason that he contributes to circulate, he is himself chargeable with." He makes wild work with the figures of speech employed to plaster up the chinks and crannies of "Matchless Constitution." He tosses about and disperses "checks and balances," "blending of aristocracy, democracy, and monarchy, into a whole, combining all their advantages, and free from their defects," and the like. He paints the social structure of Britain as it existed, and in a great measure still exists, not in the dainty phrases of legal fiction. The work is critical: it shows the hollowness of what had been hitherto taught. It leads men to look about for a better teacher, and heralds his coming. It clears away the rubbish, that the true builder may commence operations. The whole tone of the work corroborates what we remarked above, regarding law reform being the starting-post of all Bentham's expeditions of discovery. It is legal reform alone that he seems to contemplate: if not wedded to monarchy, his divorce from it is more to be inferred than seen. Further investigations were necessary to impress upon his mind the full importance of democratical institutions. His democratic principles were not an evanescent sentiment caught from the perusal of classical authors; they were the mature conviction of his mind. After ranging through all possible forms of government, he reposed on the democratic representative at last as the only one that suited

his purpose. It is not, however, in the Fragment upon Government that we must look for this: there he contents himself with exposing the nonsense written by others about the four recognised types of government, and showing its practical inutility.

Bentham's mind, we have repeatedly observed, was essentially constructive: it could not rest satisfied with negative results. Between 1776 and 1782, his views had become so matured, that he had chalked out for himself a series of publications, which, when complete, would exhaust all that he felt necessary for the accomplishment of his purposes. As the enumeration of these furnishes a chart or outline, within some department or other of which all the labours of his future life may find a place, we give it a place here.

"Part the 1st. — Principles of Legislation in matters of *civil*, more distinctively termed *private distributive*, or for shortness sake, *distributive law*.

"Part the 2d. — Principles of legislation in matters of *penal law*.

"Part the 3d. — Principles of legislation in matters of *procedure:* uniting in one view the *criminal* and *civil* branches, between which no line can be drawn but a very indistinct one, and that continually liable to variation.

"Part the 4th. — Principles of legislation in matters of *reward*.

"Part the 5th. — Principles of legislation in matters of *public distributive*, more concisely, as well as familiarly, termed *constitutional* law.

"Part the 6th. — Principles of legislation in matters of *political tactics:* or the art of maintaining order in the proceedings of public assemblies, so as to direct them to the end of their institution; viz. by a system of rules, which are to the constitutional branch, in some respects, what the law of procedure is to the civil and the penal.

"Part the 7th. — Principles of legislation in matters betwixt nation and nation, or, to use a new, though not inexpressive appellation, in matters of *international law*.

"Part the 8th. — Principles of legislation in matters of *finance*.

"Part the 9th. — Principles of legislation in matters of *political economy*.

"Part the 10th. — Plan of a body of law, complete in all its branches, considered in respect of its *form;* in other words, in respect of its method and terminology; including a view of the origination and connexion of the ideas expressed by the short list of terms, the exposition of which contains all that can be said with propriety to belong to the head of general jurisprudence. [Such," he adds in a note, "as obligation, right, power, possession, title, exemption, immunity, franchise, privilege, nullity, validity, and the like."]

A little reflection will suffice to show that these heads may be made to embrace every topic with which the legislator can have anything to do. In filling up a map of the territory, the outline of which is here sketched, he spent the whole of the rest of his life. As he himself foresaw, the order in which the "parts" are arranged, although the "best fitted for apprehension," was not that in which such of them as were published during his life ultimately made their appearance, — the succession of his works having been influenced in a great measure by "collateral and temporary considerations." In the mass of writers, the faculty of language overmasters every other: they are never quite aware of the coherence or incoherence of their dim notions, until they see them staring them in the face from the paper. They work up a book rapidly: and can always show in tangible manuscripts the fruits of their hours of literary labour. With Bentham it was otherwise: language was with him a very subordinate concern — the mere vehicle for conveying his ideas. With the class of writers we have adverted to, arrangement and distribution is a mere matter of external form: it exists only in the visible signs of books, chapters, and volumes. With Bentham, on the other hand, arrangement was essentially a part of his subject: with him the outward symbols of arrangement flowed necessarily from his mode of thought. The whole field of his exertions lay distinctly before him: when he seemed to expend himself upon the minutest details of one corner of it, this was not because he overlooked the rest, or attributed an undue prominence to the subject of the moment, but because a man can only do one thing at a time. He laboured incessantly — seeking to give the last finish to every part of his work: conscious that when the whole was finished, each part would stand in its due relation to the rest, and thus create harmony of proportions. When he found the stone of a right size and texture, he did not waste time

in having it cut, if the building was not far enough advanced to admit of its being laid. He knew where it was, and that he could fit it for use when he required it. The great architect, with his plans of the building as distinct in his mind's eye as if it were finished, collected his materials, and arranged them so that each should be at hand when wanted. The details were executed by his assistants, under his superintendence, he lending at times a finishing touch. To the uninstructed, the works published during his life may seem fragmentary—his collections may seem a chaos; but he who, taking the above enumeration of projected works for a guide, reads himself into Bentham's way of thinking, will soon come to see, that in the works published during his life, and his MS. remains now about to appear for the first time, the task of his life has been sufficiently accomplished.

It is impossible, in the limits we have prescribed to ourselves, to recapitulate every work: we must be contented to indicate them by classes. The books which Bentham prepared for the press himself, or allowed to be prepared from his MSS. by others, are of three kinds. All of them were published under the impression that something in the temper of the public mind at the moment, or in the tendency of public events, was favourable to the design of attracting attention to that particular part of his system. This is their common feature: the varieties are:—*first*, Complete treatises on one or other of the heads indicated in his outline; *second*, Preliminary investigations of a metaphysical character, intended to elucidate and defend the doctrines of his practical or constructive works; *third*, Polemical tracts on subjects attracting public attention, extracted by friends from his MSS., or hastily dictated by himself.

To the first class belong the volume of his "Constitutional Code" published in 1830; his Principles of Civil and Penal Law; his "Panopticon;" a little tract entitled "Plan for a General Register;" "Political Tactics;" and some others. In these works, the incessant aim of the Author is to suggest such institutions and modes of procedure as shall conduce to utility, *i. e.* to insuring "the greatest possible happiness of the greatest number." His main instrument for obtaining this end, is the establishment of responsibility, on the part of those to whom the power of acting for society is intrusted, to the whole of that society. This instrument is framed of:—The attribution of the elective power to every individual (Universal Suffrage;) the renewal of the tenure of delegated power, at brief and regularly recurring intervals (Annual Parliaments;) and the removal of every external controul of the voter's individual opinion (secret voting, or vote by Ballot.) His subordinate means are various. The most important are his precautions for insuring the utmost possible publicity to legislative enactments, and the utmost possible precision and explicitness in their expression. Next in order comes his plan for securing cheap government, in insisting upon which, he draws a most important distinction between what is cheap and what is merely low-priced. For further particulars, his works themselves must be consulted: in them will be found the most extraordinary manifestations of intellectual clear-sightedness, and fertility of invention, combined with an unsurpassed power of lucid exposition.

The most important works of the second class are the "Introduction to the Principles of Morals and Legislation;" the "Rationale of Judicial Evidence;" and the "Rationales of Reward and Punishment." The manner in which the first-mentioned of these was first suggested to its Author's mind, as stated in the preface, explains the nature of the whole. It had at first, he tells us, "no other destination than that of serving as an introduction to a plan of a penal code, *in terminis*, designed to follow in the same volume. The body of the work had received completion according to the then present extent of the Author's views, when, in the investigation of some flaws he had discovered, he found himself unexpectedly entangled in an unsuspected corner of the metaphysical maze." He was therefore obliged to dig into the subsoil of metaphysics, in order to lay his foundation secure; but upon this task, not the most congenial to a mind less speculative than constructive, he never spent more time than was absolutely unavoidable. He never ventured into the dim chaos of metaphysics, out of sight of the illuminated world of practice; and the moment his object was accomplished, he winged his glad way back. His constant subordination of speculative inquiry to the practical end he had in view in undertaking it, gave occasion at times to his pre-

senting general truths in a shape which has led sciolists, who found it easier to cavil at forms than to investigate the reason why they were adopted, to misapprehend or misinterpret his doctrines. To avoid misapprehension of Bentham's metaphysical tenets, it is necessary to keep in view, that they are never advanced except for the purpose of establishing or throwing light upon the doctrines of practical legislation. Viewed in this manner, no safer guides can be found to moral speculation than his "Introduction," and the "Rationales of Reward and Punishment;" as we will seek in vain elsewhere for a substitute to his "Rationale of Judicial Evidence," as a treatise on the art of expiscating truth.

The third class embraces an almost countless and miscellaneous collection of treatises. The earliest of these is his "Defence of Usury." In the preface to his "Fragment," he had hinted at the utility of a natural classification of offences, in the character of a test for distinguishing spurious from genuine ones. He had experienced insuperable difficulty in the attempt to find a place in such a system for the imaginary offence of usury. About the time that he was thus perplexed, the usury laws became a subject of discussion, and, by publishing his treatise on them, he at once did good service in a controversy immediately at issue, and enabled himself at a later period to point to that tract as a specimen of the fruits of systematic research into the principles of legislation. At a period long subsequent, he allowed to be published in the same way a work of more varied interest, — the selection from his MSS. entitled "The Book of Fallacies." This manual of political logic is at once an enduring proof of the valuable results of his sincere and systematic habit of thought, and a practical exercise to all who study it in honest and healthy thinking. In the same spirit of seeking occasion to demonstrate the value of his abstract researches, by applications of them to the practical questions of the day, he addressed in 1799 to the National Assembly, a "Draught of a Code for the organization of the Judicial Establishment in France;" and in 1831, his "Letter to his Fellow-citizens of France on Senates and Second Legislative Assemblies." To the same intention we owe his "Petitions for Justice and Codification;" his "Radical Reform Bill;" his "Plan of Parliamentary Reform, in the form of a Catechism, with Reasons for each article;" his Defences of Economy against Burke and Rose; his "Boa-Constrictor, or Helluo Curiarum;" his "Chrestomathia — explanatory of a proposed school for the extension of the new system of instruction (Lancaster's) to the higher branches of education;" his "Observations on Mr. Secretary Peel's Speech;" his "Indications respecting Lord Eldon;" and many others. To this class also belong his various tabular works, — "Springs of Action," "Delay and Complication Tables," &c. These are valuable, as bringing under the eye at one glance the results of his inquiries, and impressing them upon the memory. None but the man who had so completely exhausted his subject, could have furnished materials for these: but who would *à priori* expect that such a mind would stoop to the drudgery of compiling them? In this, as much as in any act of Bentham's life, we recognise the intensity of his benevolence. He thought no labour unworthy of him, which could produce practical benefit. His soul, which, as Wordsworth has beautifully said of another great reformer, "was like a star, and dwelt apart," like him too, "the lowliest duties on itself did lay." These formal works are eminently useful; but the others enumerated under the present head are also interesting and amusing. In these minor works, the reader unacquainted with Bentham cannot fail to recognise a buoyancy and vigour of intellect, a closeness of ratiocination, a play of humorous imagination, such as must lead him to wish to know more about the author. The student of Bentham's systematic works will find his principles placed in new and startling lights, their practical utility corroborated by illustration; and will find what was at first a mere languid assent of the intellect, shaken into a healthy and pervading spring of action.

Here seems the appropriate place for offering a few remarks on Bentham's style, regarding which the most absurd misrepresentations have been propagated. The staple of his composition is the purest and most nervous English. The occasional peculiarities which have been represented as pervading it are referable to two different sources. First, in his systematic writings he has found it necessary to use technical terms, or terms of art. In the language of ordinary conversation, or of writings the principal object of which is to amuse, there is unavoidably a considerable degree of vagueness. One man conceives, and conse-

quently employs a word or phrase in a more restricted, another in a more extensive sense. The word or phrase passing into common use, is employed sometimes in the one and sometimes in the other. This is one of the most fertile sources of fallacious or false reasoning: an assertion is made, using the word or phrase in the restricted sense; an inference is drawn, using it in the more extensive. All writers on scientific subjects find it necessary in consequence (for a man may unconsciously play off this sleight of hand upon himself,) to use the words of conversational language with a precise and predetermined meaning, or in extreme cases to substitute others for them. The superior accuracy of Bentham's mind may have made him do this more frequently than lesser reasoners: but he never introduces a term of art without careful and repeated explanations. The most unlearned reader will find a dictionary of all these unusual terms (and after all, they form a small part of his vocabulary) in Bentham's own writings; and when he has mastered them, he will find that the exercise has been an invaluable practical lesson in accurate habits of thinking. The other source of some occasional peculiarities in Bentham's style relates more to the phraseology, as the preceding referred more to the words. Many — and these not the least valuable — of his occasional publications, are, properly speaking, nothing more than notes or heads of discourse hastily jotted down or dictated. In these he was accustomed to give himself a greater latitude in abrupt and startling transitions, or in the introduction of unwonted terms of expression — in heightening the grotesque representations in which he sometimes delighted to indulge, by corresponding language.

There is a raciness about the rough smack of these off-hand sketches, which some prefer to the most elaborate finish. Who, with any taste, could wish to see Bentham's letter to his fellow-citizens of France on senates, &c. assume a smoother or more conventional form than that which it at present bears? We repeat, however, that both classes of peculiarities are of comparatively rare occurrence in Bentham's writings. His works are not flimsy novels, but substantial hard-headed pieces of reasoning — some of them of the lengthiest. In order to understand them, men must pay attention to what they read: and this is all. There is nothing in them that places them beyond the apprehension of average understanding and average industry. After all, the information acquired by reading is not the most beneficial result of the employment: it is the strengthening of the intellectual powers by the exercise.

III. Of the effect which Bentham's writings have already produced, and the farther effect they are in the act of producing.

In tracing the history of the reception which Bentham's works have met with, we may pass over with a brief allusion, the cavils of what a German would call the *belle-lettristen*. Of this class, the Edinburgh Reviewers may be considered as the most favourable specimen. These cavils proceeded from men who had begun to write before they began to think — who brought to their task vivacity, sentiment, wit, taste (of a certain quality)— everything, in short, but clear and comprehensive views, and competent knowledge. They would not take the trouble to understand Bentham, and consequently could not appreciate him. Their articles were amusing at the time; but, like all old jokes, have already become insipid. Their praise could not have hastened the day of Bentham's acceptation; their blame has not been able to retard it. They are already of the things that have been and are forgotten: to estimate their character, or scrutinize their motives, would be mere waste of time.

It is interesting to trace the coldness with which original views (and Bentham's in their totality were eminently such) are at first received, and the channels by which they insensibly find their way into general acceptation.

The power and superiority of the new writer was acknowledged at once upon the appearance of his then anonymous "Fragment on Government." Lord Mansfield perused it with eagerness, warmly praising all those passages in which the verbose superficiality of Blackstone was crushed and dissipated. The Fragment became a topic of discussion at Dr. Johnson's club, and the Dictator himself attributed it to Dunning, then at the height of his reputation. Other attributions of paternity, equally flattering to the young author, were made by others. The Edinburgh Review *condescended* long after to praise the eloquence and logic of the "Defence of Usury." But with praise of the Author's talents there was an end. The subject-

many knew not what to think of the new doctrines; and the ruling few knew too well what to think of them. The Fragment and the Defence of Usury were short, and in some measure rhetorical: they were read. But the larger systematic treatises were "*caviare* to the multitude." The Solicitor-General Wedderburne shook his head at the mention of the principle of utility, and said it was "a dangerous one." It was indeed, for him and his tribe.

Amid this general coldness, Bentham persevered: he knew what he had undertaken to perform, and the work itself was to him a source of happiness. Nor was he at any time entirely devoid of some who acknowledged the justice of his views. John Lind adopted a short paper, in which Bentham had stated his views of the colonial question, as the nucleus of his "Remarks on the Acts of the Thirteenth Parliament;" and wrote in defence of the "Fragment" when it was assailed in the Morning Chronicle. Through Lind, who was agent for King Stanislaus of Poland, in London, Bentham's connexion with the Polish patriots seems to have commenced. To this we are indebted for his correspondence with Prince Adam Czartoriski in 1815, relative to the code expected at the hands of the Emperor Alexander; as also for the orders given by Alexander himself to consult Bentham, relative to a Russian code then in the course of preparation.

Not long after the conversion of John Lind, Bentham obtained in Romilly a convert of higher qualities, both intellectual and moral. Romilly regarded Bentham "with the almost filial reverence of a pupil for his tutor:" he followed out his principles to a practical application, in his labours for the reform of the criminal law, and in his collection of the forms of proceeding in the House of Commons.

Dumont was introduced to Bentham by Romilly. Even in the first fever heat of the revolution, Dumont endeavoured to familiarize the French legislators with the principles of Bentham, with which at that time he was acquainted chiefly through the medium of Romilly's mind. Several times he interested Mirabeau in some of them, but that was too restless a period for preaching order. It seems to have been Dumont who induced Bentham to offer his plan of a penal code to the National Assembly. But in 1802, Dumont adopted a more efficient method of disseminating the principles of his teacher. He published in that year a French redaction of the Principles of Legislation, which he followed up from time to time, by the publication of such compilations from the MSS. of Bentham, as amounted in time to a pretty complete body of our author's systematic writings, — the only one that, previous to the present publication, has been issued from the press. It is almost exclusively through this work that Europe has obtained a knowledge of the principles of Bentham. Even the English public have hitherto possessed some of his most important treatises in the form of translations from the French of Dumont. In 1818, this model of redacteurs engaged the legislative committee of his parent state of Geneva in a correspondence with Bentham on the subject of a penal code. So early as 1805, he superintended the publication of a translation of such works of Bentham as he had at that time published into Russian.

By means of the publications of Dumont, and also of the personal exertions of many others of Bentham's disciples, his principles were made known to the most illustrious jurists and legislators of Europe and America. A few facts will suffice to show how deeply his principles have struck root. In the Code Napoleon, we can trace somewhat of his arrangement, in the division into general and special codes. In the Constitutions of Spain and Portugal, and of most of the Spanish States of South America, we find still more unequivocal traces of them. Applications for advice and assistance were made to him in the formation of constitutional and judicial codes, from the leading patriots of Spain, Portugal, Greece, and, as we have seen, from the authorities of Poland and Russia. The Liberals of Italy have repeatedly expressed their admiration of his works.

"A prophet hath no honour in his own land." So it seemed for a time likely to prove with Bentham. But better days were at hand. Sir Francis Burdett, in 1818, when at the zenith of his patriotism, applied to Bentham for assistance in framing a series of resolutions, embracing the principles of radical reform, to be submitted to the House of Commons. This was the first time that the principles of Bentham were avowedly and in any detail promulgated in that House. Little was gained in the way of votes: but the principles themselves were from that time inquired after by

many in whose eyes the circumstance of their having been mentioned in parliament was necessary to render them worthy of notice. On several other occasions, both in parliament and out of it, Sir Francis was honoured by being made the speaking-trumpet through which Bentham's voice found its way to the public. Previous to the commencement of Sir Francis's acquaintance with Bentham, Lord (then Mr.) Brougham had been a frequent visiter. That energetic, indefatigable, and mercurial genius — incapable of working without *éclat*, and too often satisfied to rest contented with *éclat* — was incapable by nature of adopting Bentham's views as a whole. But he was useful by frequently taking up an isolated point which suited his temporary purpose, and impressing it on the public, with his intense and glowing energy of language, and variety of felicitous illustration. Many germs of Benthamism had in like manner been quickly carried off by less prominent characters, and deposited unnoticed in the public mind, there to strike root. He co-operated with the enemies of slavery in every land, with the humanizers of the penal code, with the advocates of universal education. In his intellectual armoury were stored up implements fitted for the purposes of them all, and every man was welcome to take and use. Any person who reflects will be astonished, not only at the immense number of Bentham's opinions which have insensibly obtained hold of the public mind, although, wanting the great principle which binds them together, they continue fragmentary and unproductive — but also at the certainty with which we can in so many cases trace them, though by a circuitous route, to him as their author. This mass of latent Benthamism, floating in the social atmosphere, has been increased and rendered positive by the exertions of the Westminster Review, a work set on foot by the immediate exertions of the philosopher himself, and little else than a medium for extending and popularizing his tenets. It is wonderful how, by means of these combined influences, so many people now-a-days write and talk Benthamism without seeming to be aware of it.

More efficient agents in the realization of his principles, are a number of young men, just growing up into active employment, who have been trained in his school. The ostensible honours of legislation and government are worn by others, but the real working men in many public offices, and in almost all commissions of any consequence, have been trained in the school of Bentham. Not only is the public mind rapidly ripening to a conviction of the advantage of throwing off the old hull of our effete institutions: we possess a body of men trained to public business, who sympathise entirely with the growing public opinion. Poets are said to be prophets. Shelley at least was one, when, referring to the popular disturbances of his own day, and the gradual loosening of the hold of old forms of government upon society, he employed the bold figure of speech: — "The cloud of mind is discharging its collected lightnings, and the equilibrium of institutions and opinions is restoring, or about to be restored." And how much of this has been demonstrably accomplished by the single-handed exertions of one individual, who, little more than half a century ago, published a book, the style of which was praised by a few, and the reasoning disregarded by all but one lawyer, who declared that it contained a dangerous principle!

Need more be said, to recommend the writings of Bentham to a candid and attentive perusal?

The reader will entertain a natural curiosity to know something of the personal habits and domestic life of this great and good man. The materials for his biography — both abundant and interesting — are in the hands of a faithful biographer, Dr. Bowring, whose affectionate veneration for, and intimate acquaintance with Bentham, as well as his eminent accomplishments and extensive literary correspondence, furnish a guarantee that the work will be well executed, and in a right spirit. The Doctor's Life of Bentham will either be printed uniformly with the present edition, or an abridgment of it, executed by himself, will be prefixed to the first volume. No long time can now elapse before the public shall be put in a condition to form an accurate personal judgment of Bentham.

W. W.

Glasgow, December 1837.

INTRODUCTION TO THE STUDY

OF THE

WORKS OF JEREMY BENTHAM;

BY

JOHN HILL BURTON,

ADVOCATE,

ONE OF THE EDITORS.

ADVERTISEMENT.

The writer of the following pages, believing that he possesses a more intimate knowledge than belongs to the majority of general readers, of the nature of Bentham's Works, and of the subjects discussed in them, is desirous of presenting the reader with such a cursory view of their more prominent features as may afford a general idea of their scope and character. In the performance of such a task, he will not be expected to support those opinions which coincide with his own, or to controvert those with which he may differ. In wishing his remarks, however, to be considered as of a purely expository nature, he cannot but expect that the very manner of his exposition will, in many cases, betray the partisan. He professes no claim to an impartiality which, in matters coming so closely in contact with the most important interests of the human race, would be justly ranked as an attempt to conceal thoughtlessness and indifference under the mask of candour. The subjects which will have to be mentioned are those on which almost every man has formed an opinion, and on which few can speak without exhibiting a bias. Many opinions will have to be described which, though but coldly received on their first appearance, gained gradual ground in the minds of thinking men, and are now received with so near an approach to unanimity, that it would be affectation to allude to them otherwise than as doctrines which have received the verdict of society in their favour. Even those who may dispute Bentham's first principles and general theory cannot deny to him the supremacy of the practically operating minds of his age; and in speaking of projects which have passed through the stringent ordeal of being practically adopted by those who were at first opposed to them,* the same

* Among the various practical reforms suggested by Bentham, the following are instances in which his views have been partially, or wholly adopted by the Legislature :—Reform in the Representative system. Municipal Reform in the abolition of Exclusive privileges. Mitigation of the Criminal Code. The abolition of Transportation, and the adoption of a system of Prison discipline adapted to reformation, example, and economy. Removal of defects in the Jury system. Abolition of Arrest in Mesne process. Substitution of an effectual means of appropriating and realizing a Debtor's property, to the practice of Imprisonment. Abolition of the Usury Laws. Abolition of Oaths. Abolition of Law Taxes, and Fees in Courts of Justice. Removal of the exclusionary Rules in Evidence. Repeal of the Test and Corporation Acts, the Catholic Disabilities Acts, and other laws creating religious inequalities. Abolition or reduction of the Taxes on knowledge. A uniform system of Poor Laws under central administration, with machinery for the eradication of mendicancy and idleness. A system of training Pauper children, calculated to raise them from dependent to productive members of society. Savings Banks and Friendly Societies on a uniform and secure system. Postage cheap, and without a view to revenue. Post-office Money Orders. A complete and uniform Register of Births, Marriages, and Deaths. A Register of Merchant seamen, and a Code of Laws for their protection. Population Returns, periodical, and on a uniform system, with the names, professions, &c., of individuals. The circulation of Parliamentary Papers as a means of diffusing the information contained in them. Protection to Inventions without the cumbrous machinery of the Patent Laws.

The following are among those of his proposed Reforms, which have received only a very partial, or no legislative sanction, but which have, each, a considerable and respectable class of supporters :—Free Trade. Na-

sceptical tone of exposition cannot be expected to be employed, which would be applicable to new and untried suggestions. The writer has no intention of attempting to reduce the various subjects treated of by Bentham into a scientific logical arrangement. Part of the space will be occupied with an explanation of the manner in which he treated his subjects—part with a general view of the conclusions which he arrived at. There will be no specific separation of these two departments; and the writer will have succeeded in his object, if it be admitted that he has afforded his readers a few useful, though loose hints, of the nature of the subjects which chiefly occupied Bentham's attention, and of the manner in which he treated them.

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tional Education. The Ballot. Equal Election Districts. Local Courts. A uniform and scientific method of drawing Acts of Parliament. Public Prosecutors. A general Register of Real Property, and of Deeds and Transactions. Sanatory Regulations for the protection of the public health, under the administration of competent and responsible officers. The circulation of Laws referring to particular classes of society among the persons who are specially subject to their operation.

INTRODUCTION

TO THE

STUDY OF BENTHAM'S WORKS.

SECTION I.

BENTHAM'S STYLE AND METHOD OF THINKING.

The general reader is so accustomed to find subjects connected with politics and legislation, treated as the mere topics of passing criticism, that he is not prepared to see them dealt with as matter of elaborate reasoning and accurate analysis. Whoever reads the Works of Bentham should, however, take the task on hand with the condition, not of bestowing on them a mere casual perusal, but of *studying* them: and it is only in some of his lighter works, or in occasional passages of his more important ones, that those who adopt the former alternative, will find either instruction or amusement. He addressed himself to those who were prepared to bestow on the sciences of Government and Legislation the same rigid intellectual labour, without which no man ever expects to become a proficient in Mathematics or Natural Philosophy. It was his ambition to lay the foundation and to build the superstructure of a new system, by which the departments of thought, which had too long been the playthings of party spirit, passion, and prejudice, should be subjected to the rules of rigid philosophical inquiry; and those who do not come to the perusal of his Works, with minds prepared to follow him through a rigid and systematic train of reasoning, cannot be said to receive him in the capacity in which he presents himself to their notice. Mistaking the method in which the author professes to teach his doctrines, cursory readers have complained of his reiteration of truisms; and they would find the same character in the axioms of Euclid, if they perused them with the same spirit. They have complained that passages are obscure, intricate, and aimless; and they would find the same defect in the Demonstrations of Geometry, if they were hurriedly to read isolated portions of them. The Author's aim was not to plead the cause of opinions unadmitted, or to render received doctrines more pleasing by ornament and illustration, but to *demonstrate*. It is only as a demonstrator that he can fairly be appreciated. And those who would judge of the legitimacy of his conclu-

sions, must follow his chain of reasoning link by link. In performing such a task, impatient intellects will perhaps find a precision and minuteness of reasoning, which they would have been content to dispense with, and will see conclusions which they may think might have been leaped to, arrived at by systematic demonstration. But in submitting to this precision of intellectual exertion, they only subject themselves to the mental discipline, without which none of the more abstruse sciences can be mastered. Bentham found the whole field of morals and legislation crowded with fallacies which lurked behind slovenly expressions or incomplete arguments. He worked in perpetual fear of any fallacy finding a hiding-place in his own system; and he examined every word and every idea with scrupulous accuracy. It mattered not how unimportant might be the ground of deception: like a scrupulous merchant's book-keeper, who hunts out an error about a farthing, he would not allow the most trifling defect in argument to escape correction, because the principle of overlooking any defect is a dangerous one.

It must be admitted that this characteristic,—the keeping in view demonstration in preference to elucidation, is chiefly to be found in his later works. In those which he published early in life, there is more ornament and less of the character of severe logic. His mind was at all times rich in the produce of logical inquiry; but, in his earlier years, it was his practice to give the results of his reasonings, with the arguments generally and popularly stated, illustrated, and adorned by similes and examples; while in his more advanced years, he omitted no portion of the process by which he arrived at his conclusions, and indulged but slightly in rhetorical ornament. Of the habits of thinking, and of composition, which accompanied these distinct methods, some elucidation will be attempted farther on; but in the meantime it may be serviceable to give a few remarks on the peculiarities of the two very distinct styles which Bentham wrote at different periods of his life.

The characteristics of Bentham's early style were, power, simplicity, and clearness. There was no writer of his age whose style had less of mannerism; and the absence of all peculiarity in that of his earliest work—the Fragment on Government, led those who naturally sought for the author of a work so bold and original among the names known to fame, to attribute it to various great men whose respective styles were strikingly dissimilar. It was not the least pleasing feature in these early works, that while the matter was wonderfully original, there was nothing in the manner of communicating it to startle the most fastidious taste. The Author's great skill, acquired by untiring study, is exhibited in the facility with which he adapts the common language of our literature to philosophical purposes, for which it had never at any previous time been used. There is never any vagueness in the expression of the most abstruse propositions; and yet they are framed out of a nomenclature which had not been intended for the elucidation of distinctions so subtle. Indeed, it would not be possible to find in the English language a style better adapted, in every respect, to describe in clear terms that which is, of all things with which language has to deal, the least easily made clear—The operations of the mind. The reader who is acquainted with his Introduction to the Principles of Morals and Legislation, his Panopticon, his Defence of Usury, and his other works written in the 18th century, will require no confirmation of this opinion. As an illustration may be acceptable to some readers, the following is taken at random—it is from the Defence of Usury:—

> The business of a money-lender, though only among Christians and in Christian times a proscribed profession, has nowhere, nor at any time, been a popular one. Those who have the resolution to sacrifice the present to the future, are natural objects of envy to those who have sacrificed the future to the present. The children who have eaten their cake, are the natural enemies of the children who have theirs. While the money is hoped for, and for a short time after it has been received, he who lends it is a friend and benefactor: by the time the money is spent, and the evil hour of reckoning is come, the benefactor is

found to have changed his nature, and to have put on the tyrant and the oppressor. It is an oppression for a man to reclaim his own money; it is none to keep it from him. Among the inconsiderate, that is, among the great mass of mankind, selfish affections conspire with the social in treasuring up all favour for the man of dissipation, and in refusing justice to the man of thrift who has supplied him. In some shape or other, that favour attends the chosen object of it through every stage of his career. But in no stage of *his* career can the man of thrift come in for any share of it. It is the general interest of those with whom a man lives, that his expense should be at least as great as his circumstances will bear; because there are few expenses which a man can launch into, but what the benefit of them is shared, in some proportion or other, by those with whom he lives. In that circle originates a standing law, forbidding every man, on pain of infamy, to confine his expenses within what is adjudged to be the measure of his means, saving always the power of exceeding that limit as much as he thinks proper; and the means assigned him by that law may be ever so much beyond his real means, but are sure never to fall short of them. So close is the combination thus formed between the idea of merit and the idea of expenditure, that a disposition to spend finds favour in the eyes even of those who know that a man's circumstances do not entitle him to the means: and an upstart, whose chief recommendation is this disposition, shall find himself to have purchased a permanent fund of respect, to the prejudice of the very persons at whose expense he has been gratifying his appetites and his pride. The lustre which the display of borrowed wealth has diffused over his character, awes men during the season of his prosperity into a submission to his insolence, and when the hand of adversity has overtaken him at last, the recollection of the height from which he has fallen, throws the veil of compassion over his injustice.

The condition of the man of thrift is the reverse. His lasting opulence procures him a share, at least, of the same envy that attends the prodigal's transient display: but the use he makes of it procures him no part of the favour which attends the prodigal. In the satisfactions he derives from that use—the pleasure of possession, and the idea of enjoying at some distant period, which may never arrive—nobody comes in for any share. In the midst of his opulence he is regarded as a kind of insolvent, who refuses to honour the bills which their rapacity would draw upon him, and who is by so much the more criminal than other insolvents, as not having the plea of inability for an excuse.

Could there be any doubt of the disfavour which attends the cause of the money-lender in his competition with the borrower, and of the disposition of the public judgment to sacrifice the interest of the former to that of the latter, the stage would afford a compendious, but a pretty conclusive proof of it. It is the business of the dramatist to study, and to conform to, the humours and passions of those on the pleasing of whom he depends for his success; it is the course which reflection must suggest to every man, and which a man would naturally fall into, though he were not to think about it. He may, and very frequently does, make magnificent pretences of giving the law to them: but woe be to him that attempts to give them any other law than what they are disposed already to receive! If he would attempt to lead them one inch, it must be with great caution, and not without suffering himself to be led by them at least a dozen. Now I question whether, among all the instances in which a borrower and a lender of money have been brought together upon the stage, from the days of Thespis to the present, there ever was one, in which the former was not recommended to favour in some shape or other—either to admiration, or to love, or to pity, or to all three;—and the other, the man of thrift, consigned to infamy. *

His later works,—those written from the year 1810 downwards, exhibit a marked change in style; whether an improvement or a deterioration, the present writer, while endeavouring to explain the nature of the alteration, will not venture to decide. The symptoms of the change will be found in his works and correspondence of the early part of the 19th century, and the Letters to Lord Grenville, on the proposed Reform in the Court of Session in Scotland,† printed in 1808, may be taken as a specimen of his style in its transition state. The prominent feature in the change arose out of a dissatisfaction with the ordinary terms of language, and their accepted arrangement, as a means of conveying, with that certainty and precision which the author aimed at, his new opinions, with their subtle subdivisions and distinctions. One of the means which he had recourse to, was the formation of a new technical nomenclature for his own purposes; this was a design which he had in view from the commencement of his career, but it was in after life that he gave his most ex-

* Defence of Usury, Works, vol. iii. p. 17.
† Works, vol. v. p. 1 *et seq.*

tensive exemplifications of it. Its nature, and the uses to which he employed it, will be noticed farther on. But, independently of neology, the style, as developed in the construction of the sentences, was novel, and avowedly so. In his minute divisions, he had perpetual occasion to compare, balance, or contrast one proposition with another; and, looking upon language as the only means through which this could be accomplished, he judged that uniformity, in the structure of sentences, would make that very structure subservient to his purposes. His arrangement was such, that the predicate, the copula, and the subject—that distributive, limitative, or exceptional terms, if there were any,—were all to be found in precisely the same parts of every sentence; and by this uniformity he was enabled, to a certain extent, to manipulate his sentences, as if they were Algebraic signs; a service to which he never could have applied the freedom and variety of locution, sanctioned by the ordinary rules of rhetoric. As an illustration of what is here attempted to be described, the following extracts, from a few notanda, explanatory of the leading principles of his opinions, may be adduced. If there be a certain degree of monotony, and even of repetition, in the sentences, it will be admitted, that they are admirably constructed for comparison with each other, and for enabling the eye to assist the mind in perceiving the principle of their connexion.

1. *June* 29, 1827.

1. Constantly actual end of action on the part of every individual at the moment of action, his greatest happiness, according to his view of it at that moment.

2.

2. Constantly proper end of action on the part of every individual at the moment of action, his real greatest happiness from that moment to the end of life. See Deontology private.

3.

3. Constantly proper end of action on the part of every individual considered as trustee for the community, of which he is considered as a member, the greatest happiness of that same community, in so far as depends upon the interest which forms the bond of union between its members.

4.

4. Constantly proper end of action on the part of an individual, having a share in the power of legislation in and for an independent community, termed a political state, the greatest happiness of the greatest number of its members.*

One of his favourite, and most serviceable arrangements, was the employment of a verbal substantive with an auxiliary, instead of a verb. "I use a substantive," he says, "where others use a verb. A verb slips through your fingers like an eel,—it is evanescent: it cannot be made the subject of predication—for example, I say to give motion instead of to move. The word motion can thus be the subject of consideration and predication: so, the subject-matters are not crowded into the same sentence,—when so crowded they are lost,—they escape the attention as if they were not there."†

Much outcry has been made about the intricacy and obscurity of Bentham's sentences. Those who bring the charge often forget that he demands severe thought as due to his subject, and that no form of phraseology would make a golden path to that which, in its very nature, requires a continuous process of abstraction. That Bentham's sentences are complex, is, however, in many instances, true; but that they are obscure or dubious, is so much the reverse of the fact, that their complexity arises, in a great measure, from the anxiety with which he has guarded them against the possibility of their meaning being mistaken. So anxious is he that the mind should not, even for a passing moment, adopt a different understanding from that which he wishes to impress on it, that he introduces into the body of his sentence all the limitations, restrictions, and exceptions which he thinks may apply to the proposition broadly stated. He limits his meaning, in the most precise manner, by a circumvallation of well-weighed words. It is difficult for the mind sometimes to trace all the intricate windings of the sentence; still more difficult to have it,

* Works, vol. x. p. 560. † Ibid. 569.

in all its proportions, clearly viewed at once; but, when this *has* been accomplished, it is at once clear that all the apparent perplexity arises from the skill with which the author has made provision that no man shall have a doubt of what he means to say. Take the following specimen from the Rationale of Evidence: the point under consideration is the extent to which a transcript may serve in evidence, in place of the original deed. Almost every sentence is complex; but when the reader has been at the trouble of abstracting his mind to the extent necessary for embracing its full meaning, he will allow that there can be no dubiety whatever as to what that meaning is—that it is clear and indubitable. The author is most careful, that, when he speaks of a possessor, it is understood that he does not mean also a proprietor; that the circumstance of his detention of the document being intentional, or unintentional, does not influence the question: that the extent of danger to which the original may be exposed by inspection, is limited, &c. &c.

When the original of a deed or other written document is so situated that the production of it cannot be effected without a more than ordinary degree of vexation, expense, and delay—lodged in some place between this and the antipodes, in the hands of some possessor, who, proprietor or not, does or does not choose to part with it or to bring it;—where such is the situation, or supposed situation, of a supposed or alleged original, at the time that an alleged transcript, or sufficient extract or abstract, is ready to be produced;—a question may arise as between the two documents, the alleged original and alleged transcript, (both certainly not being necessary, one perhaps sufficient,) which, if either of them, shall be admitted. Were both present, the admission of the transcript (unless it were for momentary provisional consultation, for the purpose or in the course of argument) would evidently be attended with some (howsoever little) danger, and with no use. A transcript, how little soever inferior in point of trustworthiness to the original, can never, so long as man is fallible, be considered as exactly upon a par with it. But the original is so circumstanced, that, rather than load the cause with the vexation, expense, and delay, attached to the production of it, it would be better to exclude it: nay, even although, to the prejudice of the side by which it should have been produced, misdecision were sure to follow. It ought therefore to stand excluded: and thereby the whole of the evidence from that source, were there no other remedy.

But the transcript,—although, in preference to or indiscriminately with the original, it ought not to be produced,—yet, rather than the evidence from that source should be altogether lost, and misdecision take place in consequence, might (if ordinarily well authenticated)—might, with much less danger than what is frequently incurred in practice, be (under the conditions above proposed) received instead of it. Nevertheless, mischief from misdecision ought at the same time (so far as is consistent with the regard due to the avoidance of preponderant collateral inconvenience in the shape of vexation, expense, and delay) to be obviated as effectually as possible. Accordingly, previously to execution, obligation (or at least liberty) ought to be in the hands of the judge, for taking from the party thus to be instated, sufficient security for the eventual reinstatement of the other party; in case that, within a time to be limited, the propriety of the opposite decision should have been made appear,—the authenticity of the transcript, or its correctness or completeness with relation to the point in question, having been disproved.*

The following passages on the subject of unpromulgated laws, are given as an illustration of the difference between Bentham's early and his later manner. The difference in the style will probably not be more remarkable than the similarity of the opinions:—

Written in the Year 1790.

Of the condition of him whose curse, I had almost said whose crime, it is to live under such laws, what is to be said? It is neither more nor less than slavery. Such it is in the very strictest language, and according to the exactest definition. Law, the only power that gives security to others, is the very thing that takes it away from him. His destiny is to live his life long with a halter about his neck; and his safety depends upon his never meeting with that man whom wantonness or malice can have induced to pull at it. Be-

Written about the Year 1825.

Whatsoever good effects the portion of law in question may, in virtue of its matter, be intended or calculated to produce, the production of those effects will depend, in the instance of each individual on whom the law calls for his obedience, on the hold which it has happened to it to take upon his mind: viz. in the first place, upon the circumstance of the fact of his being apprized of the existence of the law; of the general matter of fact—viz., that on

* Works, vol. vii. p. 379.

tween the tyranny of sleeping laws, and the tyranny of lawless monarchy, there is this difference: the latter is the tyranny of one, the other is the tyranny of millions. In the one case, the slave has but one master; in the other, he has as many masters as there are individuals in the party by whom the tyranny has been set up.

Tyranny and anarchy are never far asunder. Dearly indeed must the laws pay for the mischief of which they are thus made the instruments. The weakness they are thus struck with does not confine itself to the peccant spot; it spreads over their whole frame. The tainted parts throw suspicion upon those that are yet sound. Who can say which of them the disease has gained, which of them it has spared? You open the statute-book, and look into a clause: does it belong to the sound part, or to the rotten? How can you say? by what token are you to know? A man is not safe in trusting to his own eyes. You may have the whole statute-book by heart, and all the while not know what ground you stand upon under the law. It pretends to fix your destiny: and after all, if you want to know your destiny, you must learn it, not from the law, but from the temper of the times. The temper of the times, did I say? You must know the temper of every individual in the nation; you must know, not only what it is at the present instant, but what it will be at every future one: all this you must know, before you can lay your hand upon your bosom, and say to yourself, *I am safe*. What, all this while, is the character and condition of the law? Sometimes a bugbear, at other times a snare: her threats inspire no efficient terror; her promises, no confidence. The canker-worm of uncertainty, naturally the peculiar growth and plague of the unwritten law, insinuates itself thus into the body, and preys upon the vitals of the written.

All this mischief shows as nothing in the eyes of the tyrant by whom this policy is upheld and pursued, and whose blind and malignant passions it has for its cause. His appetites receive that gratification which the times allow of: and in comparison with that, what are laws, or those for whose sake laws were made? His enemies, that is, those whom it is his delight to treat as such, those whose enemy he has thought fit to make himself, are his footstool: their insecurity is his comfort; their sufferings are his enjoyments; their abasement is his triumph.

Whence comes this pernicious and unfeeling policy? It is tyranny's last shift, among a people who begin to open their eyes in the calm which has succeeded the storms of civil war. It is her last stronghold, retained by a sort of capitulation made with good government and good sense. Common humanity would not endure such laws, were they to give signs of life: negligence, and the fear of the subject in question there exists such a thing as a portion of law: in the next place, upon the degree of correctness and completeness with which, as often as any occasion comes for acting in obedience to, or in any other way in pursuance or consequence of, such portion of law, the matter of it is present to his mind.

To the production of any bad effects, no such notoriety is, in the instance of any portion of law, in any degree necessary.

For a man to be put to death in due course of law, for non-compliance with this or that portion of law, it is not by any means, in any case necessary, that either the matter of it, or the fact of its existence, should ever have reached his mind. On the contrary, whosoever they be to whom it is matter of satisfaction that men should be put to death in due course of law (and these, more especially among English judges and other English lawyers, are many,) the greater the extent to which they can keep from each man's mind the knowledge of such portions of law to which, on pain of being put to death for disobedience, they are called upon to pay obedience, the greater the extent to which they can administer this satisfaction to their minds; and if the portions of legal matter to which this result is attached, had for their object the administering of this satisfaction to those from whose pens they issued, they could scarcely have been rendered in a more effectual degree subservient and conducive to that end, than they have been rendered by the form into which the matter of that, and all other parts of the English law have been cast.

True it is, that before any man can be put to death, or otherwise vexed for non-obedience to any portion of law, what is necessary is, that some person—nay, that divers and sundry persons, should be apprized, not only of its existence, but its contents; forasmuch as a man of ordinary prudence, such as are all those who are in the habit of taking each of them a part in an operation of this sort, will not engage in any such operation except in the persuasion, well or ill-grounded, of his being warranted in so doing, if not by the tenor of any real law, at any rate by the feigned tenor or purport of some imaginary law or rule of law, which for his justification and protection will be attended with this same effect.

But when the bearing a part in the putting of men thus to death, is of the number of those acts by the performance of which men are called upon to manifest their obedience, the production of an effect of this sort is not among those results which generally, openly, and avowedly, at least by the legislator, are held up to view in the character of the objects or ends in view ultimately aimed at: ultimately and absolutely good a result of this sort is not generally (for even here there are some exceptions) declared to be; relative, and that alone, is the term employed in giving expression to the point of view in which any such

change, suffer them to exist so long as they promise not to exist to any purpose. Sensible images govern the bulk of men. What the eye does not see, the heart does not rue. Fellow-citizens dragged in crowds, for conscience' sake, to prison, or to the gallows, though seen but for the moment, might move compassion. Silent anxiety and inward humiliation do not meet the eye, and draw little attention, though they fill up the measure of a whole life.*

But, independently of all reference to his style, there are certain peculiarities in the method of Bentham's literary labour, which must be kept in view in relation to the appearance which his later works present. He who writes a book for the purpose of influencing the public mind, by, in the first place, securing the public attention, will in general be careful to use the accepted methods of making it attractive. If the matter he has to expound should be original, and perhaps repulsive, he will take care that the form in which it is presented shall have as little as possible of the latter qualification. There are arts, in drawing the public attention to books, acquired and handed down by long experience; and these, so far as he can, he will adopt. Above all, he will see that a great deal of what is passing through his mind in the course of composition, is matter which it will do more harm than good to his work to insert in it; and he will select, prune, and arrange, till the whole has a passable appearance. Above all, he will present a work which is *ex facie* finished, and containing all that, at the beginning, the author has announced that he is to give.

It will be at once understood that Bentham did not adopt these appliances, and the cause will be perceived, when it is stated, that in later life he prepared none of his works for the press. It was his opinion, that he would be occupied more profitably for mankind in keeping his mind constantly employed in that occupation to which it was supereminently fitted, and in which it seemed to find its chief enjoyment—ratiocination. He thought that while he lived in the possession of this faculty, he should give as much of the results of it to the world, as he could accomplish by a life of constant labour, temperance, and regularity; and he left it to others to shape and adapt to use the fabric of thought which thus came out continuously from the manufactory of his brain. Laying his subject before him for the day, he thought on, and set down his thoughts in page after page of MS. To the sheets so filled, he gave titles, marginal rubrics, and other facilities for reference, and then he set them aside in his repositories, never touching or seeing them again. It was his method to divide and subdivide his subject at the outset; and after having carried this subdivision to the utmost extent which he thought necessary, he would begin his examination of one of the branches of the lowest subdivision. Having exhausted the two branches ‡ of this ultimate division, he would then go back to one of the higher branches of division, which would lead him to a subdivision in another quarter; and thus, like the anatomist who first explains to his pupils the general component parts of the human frame, and begins his dissection at one of the extremities with the design of taking them *seriatim* and working towards the heart, he took care that, so far as he went, his analysis should be completely exhaustive. It happened, however, very frequently, that his psychological dissection went no farther than the extremities of the subject he had laid out for anatomizing. This is remarkable in the Department of Logic and Metaphysics. Under the general head of Logic, a complete analysis of all the powers and operations of

appellative as *good* is spoken of as applicable to such a subject:—that A should be put to death is good, is maintained, Why? That B and C may, without being put to death, abstain from the commission of acts of the sort of that, for the performance of which A is thus ordered to be dealt with.†

* Works, vol. iv. p. 397-398.

† Works, vol. iii. p. 237.

‡ His system, according to the principle of Bifurcate division to be afterwards noticed, was always to divide by two.

the human mind had been intended; but the subject obtaining but a portion of his time in conjunction with the other vast projects which he contemplated, he was enabled only to leave behind him some fragments, of which a selection has been given under the titles Logic, Ontology, Language, and Grammar, in vol. viii. of the Works. They are specimens of the most finished workmanship, but still they are merely *fragments*. Perhaps the only extensive subject which the author completely investigated, according to the rigid method latterly adopted by him, was Evidence; and his work on this subject fills two of the closely-printed volumes in the collected edition. It is a larger work than Blackstone's Commentary on the Laws of England. But there is another work—and, perhaps, the most boldly conceived of all his projects, which Bentham lived to complete—his Constitutional Code. The plan on which he is described as proceeding in his analysis is not here applicable, for the work is synthetic, not analytic. It is neither an examination of the principles on which laws are made, nor of those on which they ought to be made, but a substantive code of laws. It may be safely pronounced, that in no language does any other such monument of the legislatorial labour of one mind exist. Independently altogether of any question as to the principles of government developed, or the sagacity of the general plan; the completeness of the fabric—the accuracy of the proportion of all parts to each other—the total absence of any sort of incongruity in the relations to one another of such a quantity of things, great and small, which have to be fitted to each other to form a homogeneous whole,—astonish the mind of the reader with the evidence that they convey of the comprehensiveness and clearness of the Author's intellect.

The above remarks, bearing chiefly on the precision with which Bentham pursued his inquiries, would give an imperfect notion of his later writings without an allusion to one signal characteristic—the bursts of fiery eloquence with which he sometimes soars from the rigid logic of his usual system. It is when his subject brings him in contact with illustrations of suffering and oppression that the man thus breaks from the philosopher. Among some pamphlets which he wrote towards the termination of the reign of George III., when he believed the remaining liberties of the country to be in imminent danger, there are many such passages as the following:—

> Yes!—you pillage them: you oppress them: you leave them nothing that you can help leaving them: you grant them nothing, not even the semblance of sympathy: you scorn them: you insult them: for the transgression of scores, or dozens, or units, you punish them by millions; you trample on them, you defame them, you libel them: having, by all you can do or say, wound up to its highest pitch of tension the springs of provocation and irritation, you make out of that imputed, and where in any degree real, always exaggerated irritation, a ground, and the only ground you can make, for the assumption, that, supposing them treated with kindness—all their grievances redressed—relief substituted to oppression, they would find, in the very relief so experienced, an incitement—an incitement to insurrection, to outrage, to anarchy, to the destruction of the supposed new and never-yet-experienced blessing, together with every other which they ever possessed or fancied.
>
> Levelling!—destruction of all property! Whence is it they are to learn it?—what is there they can get by it?—who is there that ever taught it them?—whose interest is it—whose ever can it be—to teach it them? How many of them are there, who would, each of them, be so eager to lose his all? The all of a peasant—to the proprietor how much less is it, than the all of a prince—the all of him whose means of livelihood are in his labour, than the all of him whose means of livelihood are in his land? Who again is it, that, in your notion at least, they are at this moment so abundantly looking to for instruction? Is it not Cobbett? With all his eccentricities, his variations, and his inconsistencies, did he ever attempt to teach them any such lesson as that of equal division of property—in other words, annihilation of it? In the whole mass of the now existing and suffering multitude, think ye that one in a score, or in a hundred, not to say a thousand, could be found, so stupid, so foolish, as either of himself or from others, to fancy that, if without other means of living, he had his equal share in the whole of the land to-day, he would not, twenty to one, be starved upon it before the month were out? Oh! if the men, in whom—truly or erroneously—they behold their friends, were not better instructors as well as better friends to

them than you are, or than it is in your nature to be, long ere this would the imputation you are thus so eager to cast on them, have been as substantially grounded as it now is frivolous.*

Bentham was singularly happy in the employment of lively, humorous illustrations. He took care that in their use fancy should never be allowed to take the precedence of reason; the logical proposition was formed before the ornament was added, and the purpose of the latter was merely to make it more distinct to the eye. He made war against a system which is too common—that of using a simile not as a means of making clear and palpable the meaning of an argument, but as a substitute for the argument itself. His own similes never divert the mind from the original reasoning—they only serve to make it more vivid. Thus, the sense of hardship experienced by rapacious judicial officers, on being deprived of an illicit source of gain to which they never should have been allowed access, is compared to the sense of hardship experienced by the shark who, having bit off one of Sir Brooke Watson's legs, was compelled to leave the other in its place. "Under English law," he says, "not to speak of other systems, the sort of commodity called *justice*, is not only sold, but, being like gunpowder and spirits made of different degrees of strength, is sold at different prices, suited to the pockets of so many different classes of customers."† Talking of the English system of pleading, and its anticipated adoption in Scotland, he says —"I have no more apprehension of seeing the Scotch nation submit to defile itself with any such abomination, than I have of seeing the port of Leith opened for the importation of a pack of mad dogs, or for a cargo of cotton impregnated, *secundum artem*, with the plague."‡ Again—

If a man comes and pleads his clergy, whatever goods he had, the king has got them. This being the case, having had your clergy, you are innocent, or, what comes to the same thing, you are forgiven. All this is very true; but as to your money, the king, you hear, has got it; and when the king has got hold of a man's money, with title or without title, such is his royal nature, he cannot bear to part with it; for the king can do no man wrong, and the law is the quintessence of reason. To make all this clear, let it be observed there is a kind of electrical virtue in royal fingers, which attracts to it light substances, such as the moveables and reputed moveables of other men; there is, moreover, a certain glutinous or viscous quality, which detains them when they have got there.

Such are the grounds upon which the forfeiture of personal estate, in cases of clergyable felony, still continues to subsist.§

In relation to official men talking of appointments they have used every effort to obtain, as if they were innocent of all design in the matter, he says—"These are of the number of those gracious designs, which, till the very moment of their taking effect, are never known of. While the eyes of the right honourable person are, as usual, fixed on heaven, the grant is slipped into his pocket; and when, putting in his hand by accident, he feels it there, his astonishment is not inferior to his gratitude."‖

The neology of Bentham—his construction of new words to serve his purposes—has been the subject of much attack and ridicule. This is not the place for discussing the question whether he has done any service to the language by this system of innovation, or whether the words he has coined ought or ought not to have received a more general admission into the current language of the age, than they have received; but it may be of service to the reader to explain the principles on which he proceeded in his fabrication of words, and the extent to which he has served the ends he had in view. It must be remembered that Bentham took up the position of a scientific inventor and discoverer in a new field of human knowledge—a field which, he maintained, had been left to the dominion of empirical discussion, and which thus displayed, both in the substance of all the reasoning that it produced, and in the nomenclature employed

* Works, vol. iii. p. 475-476. † Ibid., vi. 134. ‡ Ibid., v. 42.

§ Works, vol. i. p. 503. ‖ Ibid., v. 286.

by the reasoners, the obscurity and confusion of mere popular and unscientific handling. He entered on the field of Morals and Legislation, as Linnæus did on the Animal and Vegetable kingdoms, and as Lavoisier did on the science of Chemistry—to analyze, and to introduce order and method; and, like these great men, he found that the popular nomenclature which had accompanied the vague notions of his predecessors, was insufficient in precision, and the other scientific requisites, to represent his own accurate and distinct classification. But he had difficulties to contend with which were not encountered by the pioneers of natural science. In their case, none trod the same path of investigation but such as were, like themselves, philosophers, who were prepared to view every improvement with scientific appreciation, and to take advantage of, instead of censuring, whatever tended to facilitate farther investigation, by the classification and arrangement of the knowledge already acquired. The difficulty which Bentham had to contend with was, that his subjects of inquiry were not monopolised by philosophical investigators, but related to matters of which all classes of the people—the learned and the unlearned—the scientifically precise, and the vaguely declamatory—are almost always thinking. The classification of plants is left to the undisputed control of the botanist: but every man is a classifier of offences, and duties, and legal obligations; nay, it generally happens, that, however little labour or thought he may have bestowed on the subject, every man deems his own classification the very best that can be made. Moreover, in the case of the operations of nature, the sinister interests which, being at war with the whole of Bentham's system, are inimical to every branch of it, do not operate; and whoever has sufficient skill to accomplish the end, and will undertake the labour of making a serviceable nomenclature, in any new department of Nature's works, is left the undisputed despot of his own system.

Whatever view may be taken of the abstract merits of Bentham's nomenclature, to the accomplishment of his own ends it was indispensable; and the student will not have dipped very deeply into his works before he discovers how impossible it would have been to accomplish that precision of analysis, and that uniformity in all the proposed legislational reforms, of which the instances are so many and conspicuous, without the construction of a nomenclature specially adapted to the Author's own use. A few examples will illustrate this statement. To *maximise* is a word of frequent occurrence. To *maximise official aptitude*, for instance, means—to raise that quality to the highest attainable pitch,—and the author would have required to use all these words, whenever he wished to express such an idea, if he had not coined a word for his own use. To "raise" would not have done, for it expresses no *terminus ad quem*. "Increase," "improve," and "enlarge," are subject to the same objection—they express increment, but not to the greatest practicable point. To "make perfect" would not express the meaning, which bears *in gremio* the understanding, that perfection is not attainable.—He found the rule of action, in matters where one nation was concerned with another, called the "Law of nations," a term which intimated, not the purpose or use of the law, but its mere possession, as if it were the only sort of law which nations possessed. He called it *International Law*.—He found no word in the language suited to express a universal body of Law; for the word Code, which is generally employed, has nothing in it to express universality, and is, indeed, applied to particular departments of the Law—*e. g.* the Civil Code, the Criminal Code, &c. He therefore coined the word *Pannomion* from the Greek.—The adjective "civil," as applied to law, he found possessed of various meanings, sometimes applying to all those portions of the law which are not ecclesiastical, sometimes to all those which are not penal, and sometimes to all those which are not military; and he found it necessary to discard it, and frame the distinctive term *Non-penal*.—The word "criminal" he found to be equivocally

used. A criminal lawyer might mean a lawyer versed in the penal department of the law, or a lawyer guilty of crimes; a word so tainted with dubiety was useless for the Author's purposes, and had to be discharged. — The substantive "right" he found employed, and mischievously employed, with an ambiguous meaning. Originally it signified that which the law sanctions, — my rights are those privileges of action and possession, which are fixed in my favour by the existing law. If I dispose of goods by bargain and sale, I have a right to the stipulated price, and no other man has any rival right. If I am a member of the corporation of London, I have a right to vote for a Lord Mayor of London, but not for a Chief Justice of the Common Pleas, or a Mayor of Manchester. So, if I be registered on a qualification, in terms of the Reform act, I have a right to vote for a member of Parliament, but I have no such right if I be unqualified. But, by a confusion between this substantive, and the adjective *right*, which is the opposite of *wrong*, people applied the term their *rights*, not only to those privileges of which they were in possession, but to those which they thought they *ought* to possess—to those which it was *right* they should have. Hence came declamation about "imprescriptable rights," "sacred and inalienable rights," &c.; and the effect of the confusion was, that when people demanded new privileges, they spoke of them as their rights—as privileges to which they were entitled by law, but which were denied them. The confusion ended not in mere words; for men, acting as if their legal rights were denied to them, became filled with the violence, invective, and turbulence, with which an open refusal to enforce the fixed law is apt to fill every man's breast.* It was a singular illustration of the equivoque of the word, that Blackstone should have divided his Commentaries into Rights and Wrongs, as if the substantives right and wrong were, like the adjectives of the same words, the precise opposites of each other. The word "rights" was employed in Bentham's earlier works in its precise meaning as a counterpart to fixed obligations, when he examined the objects of the civil law; but in his later works, when he had established his own distinct nomenclature, it was discarded, and the whole body of the law was scientifically divided, as we find it in the introductory Book of the Constitutional Code.†—The verb *codify*, and the substantive *codification*, have encountered much ridicule; but the subject to which they refer is as legitimate a source of laughter as the terms thus applied to it; for, except by means of such words, it would have been impossible for the Author, without much dubious circumlocution, to have urged the utility of codes of law, and to have pointed out the best means of constructing them. A code is a collective body of laws complete so far as it goes, and sanctioned, as covering the whole of its particular field, by the legislative authority. To perceive the difficulty of investigating the subject with Bentham's scientific scrutiny, without a verb corresponding to the action of creating or making a code, let the reader imagine how incomplete would be any inquiry into the operation of making laws in detail, without a verb corresponding to that operation—viz., the verb to legislate, with its substantive Legislation.

There were two distinct classes of cases, in which Bentham found subjects of discussion to which no one had ever given names, and which, therefore, had he not himself come forward as godfather to them, would have remained undenominated. In the one he scattered his nomenclature here and there, whenever, in the course of his researches, he found operations and phenomena, which, though already known to be at work, had received no denominations. In the other he applied new names to the new machinery which, in his own constructional projects of legislation, he proposed to erect. The following may be adduced

* See Works, vol. ii. p. 500 *et seq.*

† Works, vol. ix. p. 8.

as instances of the former division of his nomenclature—In all operations connected with courts of law, the quality of being accessible or inaccessible to the purpose of fulfilling the decrees of the court, is sometimes a most important quality both in men and things. The Author perceived, that though the importance of the quality was admitted by every one whose attention was attracted to it, no one had given it a name; and as he had often to speak of it himself, he found it necessary to designate it, and he called it *Forthcomingness*. He found no term characterizing the use in one litigation of evidence which had been elicited for service in another, so as to distinguish it from evidence collected solely for the litigation in which it is applied—and he called the former *Adscititious evidence*. In evidence as furnished by writings, he found that the nomenclature of the law did not distinguish those writs which were prepared with the express end of serving as evidence, from those which, not being prepared with any such view, came, incidentally, and from the course of events, to be articles of real evidence —The one he called *Preappointed written evidence*, the other *Casually written*.

The other species of Nomenclature applies to the new offices and new functions, required for bringing the Author's system of government into full operation. Such are the Functionaries: *Judiciary Registrar*, *Government Advocate*, *Eleemosynary Advocate*, *and Local Headman;* and the functions—*Judiciary-power controlling*, *Communication-aiding*, and *Beneficent-mediation*.* Here it was absolutely necessary that the Author should choose his own names; and the only question can be, whether he is successful in his choice.

To a complete scientific Nomenclature the Author found two qualities—the one necessary, the other expedient. The former is distinctiveness, and is exemplified in the use of words, which are restricted to the meaning assigned to them, and have no other meaning attached to them which can occasion a dubiety in their use. The other qualification is, that they should have, as distinct as possible, an etymological reference to the thing they are intended to express. There are two advantages in a good etymological nomenclature—it not only assists the memory and aids the judgment by the connexion between the word and the thing signified, but it forms a medium through which the various branches of a science or art may be seen in their connexion with each other. A very remarkable illustration of the power to create such a nomenclature is afforded by the Author's Encyclopedical Table, and the accompanying treatise.† It begins with Wellbeing, or Eudæmonics, and by subdivision, embraces most of the subjects of human knowledge in collected groups, giving to each a new and apt name. Thus, Natural History and Natural Philosophy are respectively represented by Physiurgic Somatology, and Anthropurgic Somatology: the one signifying the science of bodies, in so far as operated upon in the course of nature without the intervention of man —the other the science of bodies, so far as man, by his knowledge of the convertible powers of nature, is able to operate upon them. Of the unaptness of the previous nomenclature the Author says:—

> Of the two words,—the first an adjective, the other a substantive,—of which the compound appellation *Natural History* is formed, —it found, at the time of its formation, the substantive *History* already appropriated to the designation of a branch of learning, having for its subject those *states of persons and things* of all sorts, and those *events* of all sorts, that have been known or supposed to have had place in times *past:* present time either being altogether excluded, or its history being but as it were a point, in comparison with the time of history which it closes. Adding the word *natural*, say *Natural History*, the result is, that, for the import, designated by this appellative, antecedently to the establishment of that usage from which it has received an import so widely different, *we have this*, viz., the *natural* account of those *states of persons and things*, and so forth, and of those *events*, and so forth, which had place in times past.
>
> Now, with what propriety, to any one of the above-mentioned so aptly denominated

* See the Constitutional Code, Works, vol. ix.

† Works, vol. viii. p. 63 *et seq.*

divisions, of the branch of art and science itself thus unaptly denominated,—with what propriety, to Mineralogy, to Botany, to Zoology,—can the term *Natural History*, consideration had of its original and proper import as thus developed, be applied?

* * * * *

The branch of art and science, for the designation of which the compound appellation *Natural Philosophy* is in use, is that which has, for its *subject*, *matter* in general, considered in respect of such modifications as it has been made, or may be expected to be made, to undergo, by human *art*, under the guidance of human *science:* with the addition, perhaps, of such properties, as, by means of changes made in it by the application of that same mental instrument, have been discovered to have been already belonging to it.

Taken by itself, *Philosophy* is *the love of wisdom.* Adding the word *natural*, say *Natural Philosophy*, and, for the import designated by this appellation, antecedently to the arbitrary usage, established in this case as in that other,—we have *this*, viz. *the natural love of wisdom.**

But the Author, while showing an illustration of what may be accomplished towards a pure and apt nomenclature, admits, that in the majority of cases, the task of driving out the old empirical system of names would be, in many cases, impossible, and that the advantage would, in others, fail to compensate for the labour of the operation.† It was, therefore, only where the absence of any nomenclature, or the palpable defects of that in existence, made it necessary for him to resort to his own mint, that he coined his words on the above principles. Thus, finding no word which indicated a professional assistant in the conduct of a law-suit, and which was confined to that meaning, he constructed the term *Litigational Proxy*, for employment in the Principles of Procedure. Instead of using such terms as "Action on the case," "Assumpsit," "Qui tam," "Detinue," &c., which, though use has made their meanings determinate, are not adapted to express the Author's scientific division of Law-suits, he adopted such divisions as "Non-Penal and Penal," "Simple and Complex," "Original and Excretitious," "Plurilateral and Unilateral," "Summary and Chronical," &c.

SECTION II.

THE GREATEST-HAPPINESS PRINCIPLE AND ITS APPLICATION TO MORALS AND LEGISLATION.

It appeared to Bentham, at an early period of his life, that the Philosophy of human action was incomplete, until some general principle should be discovered, to which the actions of mankind ought all to tend. The way had been so far cleared by the Inductive system of Philosophy. Bacon laid down the grand and general law, that experiment is the means of obtaining a knowledge of what is true; but a question was left to be answered—to what end men, after having achieved the knowledge of what is true, should use that knowledge? It was clear that though experiment might teach us how to achieve that end when it had once been pointed out, it could not be the means of discovering it; for the very supposal of an end predicates something, not sought after, but predetermined. It was after much thought that he decided that the end in view ought to be the creation of the greatest possible amount of happiness to the human race. The word "utility," was the first shape in which the end presented itself; ‡ but this term left the question "what constitutes utility" an open one. The answer to—what constitutes utility? and the more abstract principle afterwards adopted, were one and the same. That is useful which, taking all times and all persons into consideration, leaves a balance of happi-

* Works, vol. viii. p. 69.

† Ibid., p. 107.

‡ See the Fragment on Government, Works, vol. i. p. 260 *et seq.*

ness; and,—the creation of the largest possible balance of happiness—became the Author's description of the right end of human actions. The manner in which he stated his axiom was at first in the words, "The greatest happiness of the greatest number," or "The greatest possible happiness of the greatest possible number;" but as there were here two conflicting elements of extent—the intensity of the happiness and the number of persons among whom it is dispersed * the respective limits of which could not be fixed, the simple expression THE GREATEST HAPPINESS was determined on.

The Author was quite aware that this principle was liable to the imperfection of all axioms. It was simply like others of its kind, the closest approach to the abstract that could be made by reasoning. Logic could tender it no support; it must itself be the base on which reasoning should rest; and unless in so far as he could obtain admission for it, it must remain unproductive of good. He

* For instance, if the question were put, whether a measure which gives twelve people happiness to the extent of 4 each, or eight people happiness to the extent of 8 each is the preferable measure, the former statement of the principle would leave it doubtful which of the two should be adopted, for, though the extent of four be but half of that of eight, twelve is a greater number than eight. By the latter principle the process is simply arithmetic. 8 times 8 being 64, and 4 times 12 only 48, the happiness to the extent of 8 each, distributed among eight people is to be preferred.

Like everything else in Bentham's Philosophy, it is by its reference to practice, and an observation of the extent to which it is acted on, that the direction of the argument thus abstractly stated, will be observed. In cases of distribution, the greatest quantity of happiness is produced where the number among which it takes place is the largest; and almost all human laws have a tendency, more or less strong, to prevent individuals from absorbing in their own persons an exorbitant proportion of the elements of happiness at the disposal of the community. Again, on arithmetical principles, property in the ordinary case removed from one person and given to another, adds a smaller element of happiness to the person who receives it, than that which the person deprived of it loses; hence the laws for the protection of property and vested rights. But the following quotation from a Pupil of Bentham, equally clear in his explanations and happy in his illustrations, will make the matter more distinct: "The latest improvement, therefore, of the philosopher whose long life has been dedicated to the diffusion of the principle,—and of which the present Article has to boast of being the announcement and the organ,—is to dismiss the superfluous 'greatest number,' and declare that the just object of politics and morals, is simply 'THE GREATEST HAPPINESS.' In this manner the magnificent proposition emerges clearly, and disentangled from its accessory. And the accessory proposition is, that the greatest aggregate of happiness must always include the happiness of the greatest number. For the greatest number must always be composed of those who individually possess a comparatively small portion of the good things of life; and if anything is taken from one of these to give to the others, it is plain that what he loses in happiness, is greater than what the others gain. It is the mathematical assertion, that a quantity x is greater in comparison of a small quantity it is taken from, than of a large one it is added to. It is the avowal that half-a-crown is of more consequence to the porter who loses it, than to the Duke of Bedford who should chance to find it;—that a chief portion of the baseness of the rich man who seized the poor's ewe lamb, consisted in taking what caused so much greater pain to the sufferer, than happiness to the receiver."—*Colonel Thompson's Works*, vol. i. p. 136.

In the Deontology there is the following statement on the subject of the Author's abbreviation of his axiom:—

"In the later years of Mr Bentham's life the phrase 'Greatest happiness of the greatest number' appeared, on a closer scrutiny, to be wanting in that clearness and correctness which had originally recommended it to his notice and adoption. And these are the reasons for his change of opinion, given in his own words:—

"'Be the community in question what it may, divide it into two unequal parts; call one of them the majority, the other the minority; lay out of the account the feelings of the minority; include in the account no feelings but those of the majority,—you will find, that to the aggregate stock of the happiness of the community, loss, not profit, is the result of the operation. Of this proposition the truth will be the more palpable, the greater the ratio of the number of the minority to that of the majority; in other words, the less the difference between the two unequal parts; and suppose the undivided parts equal, the quantity of the error will then be at its maximum.

"'Number of the majority suppose 2001, number of the minority, 2000. Suppose, in the first place, the stock of happiness in such sort divided, that by every one of the 4001 an equal portion of happiness shall be possessed. Take now from every one of the 2000 his share of happiness, and divide it any how

says, in the Introduction to the Constitutional Code.

When I say, the greatest happiness of the whole community ought to be the end or object of pursuit, in every branch of the law —of the political rule of action, and of the constitutional branch in particular, what is it that I express ?—this and no more, namely, that it is my wish, my desire, to see it taken for such, by those who, in the community in question, are actually in possession of the powers of government; taken for such, on the occasion of every arrangement made by them in the exercise of such their powers, so that their endeavours shall be, to render such their cause of action contributory to the obtainment of that same end. Such then is the state of that faculty in me which is termed the will; such is the state of those particular acts or modifications of that faculty, which are termed wishes or desires, and which have their immediate efficient causes in corresponding feelings, in corresponding pleasures and pains, such as, on the occasion in question, the imagination brings to view.

In making this assertion, I make a statement relative to a matter of fact, namely that which, at the time in question, is passing in the interior of my own mind;—how far this statement is correct, is a matter on which it belongs to the reader, if it be worth his while, to form his judgment.*

But it was not to the announcement of his first principle that Bentham trusted for its adoption, but to the influence it would have on the minds of his readers when they studied the forms in which he brought it out in detail. And this brings us to examine the extent to which the author lays claim to the merit of originality. It was not the principle itself, that constituted his discovery, but his rigid adherence to it in all his expositions—his never losing sight of it, in what he did himself or called upon others to do. He did not say that the world had hitherto been ignorant of such a principle; he found the theory of utility to a certain extent promulgated by Hume, and references to the "greatest happiness" in the works of Beccaria and of Priestley; while something like the Utilitarian Principle is announced at the commencement of the Nicomachean Ethics. He found indeed that it was at the root of all systems of religion and morality; that all codes of law were more or less founded upon it; and that it was, in all places and at all times,

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among the 2001: instead of augmentation, vast is the diminution you will find to be the result. The feelings of the minority being, by the supposition, laid entirely out of the account, (for such, in its enlarged form, is the import of the proposition,) the vacuum thus left may, instead of remaining a vacuum, be filled with unhappiness, positive suffering, in magnitude, intensity, and duration taken together, the greatest which it is in the power of human nature to endure.

" ' Take from your 2000, and give to your 2001 all the happiness you find your 2000 in possession of: insert, in the room of the happiness you have taken out, unhappiness in as large a quantity as the receptacle will contain: to the aggregate amount of the happiness possessed by the 4001 taken together, will the result be net profit ? on the contrary, the whole profit will have given place to loss. How so ? because so it is, that such is the nature of the receptacle, the quantity of unhappiness it is capable of containing, during any given portion of time, is greater than the quantity of happiness.

" ' At the outset, place your 4001 in a state of perfect equality, in respect of the means, or say, instruments of happiness, and in particular, power and opulence: every one of them in a state of equal liberty: every one independent of every other: every one of them possessing an equal portion of money and money's worth: in this state it is that you find them. Taking in hand now your 2000, reduce them to a state of slavery, and, no matter in what proportions of the slaves thus constituted, divide the whole number with such, their property, among your 2001; the operation performed, of the happiness of what number will an augmentation be the result ? The question answers itself.

" ' Were it otherwise, note now the practical application that would be to be made of it in the British Isles. In Great Britain, take the whole body of the Roman Catholics, make slaves of them, and divide them in any proportion, them and their progeny, among the whole body of the Protestants. In Ireland, take the whole body of the Protestants, and divide them, in like manner, among the whole body of the Roman Catholics.' "—*Deontology*, vol. i. p. 328-330.

In connexion with this, the first reference made to the Deontology, it may be well to state the reason why this work was not published in the collected edition of Bentham's works. It was collected and published by Dr Bowring, so lately as the year 1834, in two volumes; and as the impression is not nearly exhausted, it was supposed that a reprint in the collected edition would be a waste of funds, which would be better employed in the publication of works from the author's MSS.

* Works, vol. ix. p 4.

an unseen and unacknowledged guide to human action. But he was the first to bring forth this guide, to prove to the world that it should be followed implicitly, and to show that hitherto, from not keeping their guide in view, men had often wandered from the right path. "The good of the community," "the interests of the public," "the welfare of mankind," all expressions to be found in the mouths of those who talk of the proper ends of action, were so many ackowledgments of the Greatest-happiness Principle, and vague attempts to embody it. There is here an apt parallel with the philosophy of Bacon. Long before his day experiments were made, and thinkers, even in their emptiest theories, in some shape or other looked to experience. Fact was then, as now, the source of knowledge; but for want of an acquaintance with what their source of knowledge really was, men wandered about among vague theories, and Bacon was the first to discover, that wherever experience and the induction from it are lost sight of, there is no check to the errors of thought. In like manner does Bentham show, that, when the greatest happiness of mankind is lost sight of, in the pursuit of more immediate ends, there is no check to the aberration of human action.

There is, perhaps, no better illustration of the operation of the utilitarian principle in minds which are ignorant of, or do not acknowledge its existence, than in the appreciation which Bentham's works have met with by the majority of his readers. His general principle has received few adherents, in comparison with the number who have adopted his detailed applications of it. There is no project of change, or plan of legislative reform, in which he has not kept the greatest-happiness principle in his eye as the end to which it has been adapted; yet there are many who accede to his practical measures, while they repudiate his general principle. Thus, that jurymen should not make oath, each to vote according to his conscience, and then be coerced till they are unanimous; that there ought to be a general register of real property, in which all sales, burdens, and pledges may be entered; that the price paid for the use of money ought no more to be fixed by law than the consideration given for any other contract—are all opinions admitted by a large portion of practical men, who, when their attention is directed to the end to which all these proposals are but means, intimate a distaste of vague theory, and turn their backs upon it. There can be no doubt, then, that had Bentham contented himself with an exposition of his leading principle, instead of giving the world, on so wide a scale, the details of its operation, he would have had far fewer followers than he has: and that, indeed, it has generally been through the influence of his practical adaptation of it, that he has brought his pupils to the adoption of his central principle.

It is a circumstance worthy of remark, that the philosophy of Bentham met with an opponent even in the extent to which its leading principle was practically admitted. The quantity of utilitarianism that was in mankind, had rooted certain opinions so firmly in their breasts, that they took a suspicion of that sceptical philosophy which took them up and examined them, though the examination ended in approval. People lost patience with the system, when they heard its author ask whether theft and falsehood were hurtful to mankind, before he condemned such acts. When it was said that murder, if beneficial to society, would be a virtue instead of a vice, it was indignantly maintained, that under no presumable circumstances could it be anything but what it is—the most atrocious of crimes. That fact was, indeed, one of the most broad and clear cases in which the utilitarianism of the world had made up its mind from the beginning. Almost, in all ages and in all nations, men had leaped at the conclusion without a perceptible interval of ratiocination. It was a startling thing to see so long decided a question called up for trial, and to hear the evidence against it investigated and weighed, before judgment was pronounced, as if there were really room for any dubiety. The feeling was somewhat akin to the popular

cry which, in the case of a public and notorious criminal, tries to bear down the calm deliberation of the judicial tribunal, and is scarcely content when the proceedings end in punishment, because the very weighing of evidence, in such a case, seems to be a trifling with truth which frightens people into the belief that it is possible justice may be got the better of. Viewing them with reference to the question of their popularity, the prudence of some of these illustrations of the utilitarian principle might be questioned. Putting the case that murder would be justifiable if it were for the benefit of the community, was like putting the case, that if that which was bad were good, then it would not be bad. The conclusion was so clearly leaped to, both by the public and the philosopher, that the mere suppositious questioning of it by the latter, looked like a play on words. Yet, all who have followed tissues of abstract reasoning, know how very necessary it is to have clear views of the simpler propositions of a series, as a preparation for the proof of the more complex. That the opposite sides and angles of a parallelogram are equal to each other, seems too simple a statement to require any proof: but, if it were not demonstrated, a link would be lost in the chain of reasoning which shows that the square of the hypothenuse of a right-angled triangle is equal to the squares of the other two sides. Though men admitted the evil effect of murder, they had not followed the utilitarian principle so closely as to see much mischief in condemning a man to death according to law, when a smaller punishment is sufficient: and while theft encountered condemnation almost universal, the number of those who carried out the principle to the condemnation of the wilful accumulation of debts, which the debtor knows he has no chance of paying, was small. In both cases, however, the proof of the simpler proposition was an introductory step to the proof of the more complex.

Having established the pursuit of the greatest happiness as the leading object which all men should hold in view, the next step was, to find what principles there were in human action to be made conducive to this end. In examining the real state of the actions and impulses of mankind, and going back from particulars to the most general principle of action, the philosopher came to the conclusion, that every human being, in every action which he performs, follows his own pleasure. He had to deal with a multitude of prejudices, in his use of this term, but he would perhaps have hardly propitiated his opponents if he had chosen a new one. The very universality of its individual action was against it as a general term; for every man felt so strongly that what was pleasure to his neighbour was not pleasure to himself, that he revolted against the application of the same word to qualify motives which appeared so distinct. Among a large class of persons, the expression, "the pursuit of pleasure," had inherited the bad reputation which has popularly attended the doctrines of Epicurus. It was connected in some way with sensuality and mere corporeal enjoyment, and stood in opposition to those objects and pursuits which the better part of mankind hold in esteem. In the popular discussions on this subject, there is generally a want of observance of the distinction between pleasure as attained, or, in one word, happiness, and pleasure as an object sought after. The latter is an unknown quantity—the former presents us with the arithmetical results of the experienced pains deducted from the experienced pleasures. Many a man makes himself unhappy; but no man pursues unhappiness, though one may be very unsuccessful in his pursuit of happiness. One man is seen industrious, prosperous, surrounded by a well-educated moral family; his contemporary and class-fellow has been bringing himself gradually to the grave by profligacy—has impoverished himself, and has lost the respect of his fellow-men by the desperate alternatives to which misery has driven him. It is not easy to believe that both these men are in their actions directed by the same motive—the pursuit of pleasure. One man is seen cautiously laying up for himself a depository of future enjoyment,

at the price of present privation; another, yielding to all immediate influences, scatters at once the whole of the material of enjoyment which nature has put at his disposal; while a third is systematically depriving himself of the ordinary appurtenances of human gratification, that he may dedicate them to heaven, or to the relief of those portions of his race who have been less gifted than himself. It requires that one should have a very abstract and unconventional notion of the term happiness, to believe that it is the moving force in each one of these cases.

Perhaps it may serve the purpose of farther explaining the sense in which Bentham used the terms happiness and pleasure, to compare them with those words which more nearly approach to them. In the first place, it is necessary to keep in view an essential difference in the acceptation of the two words. Happiness is applied to the state in which the mind is placed when enjoying a continuity of pleasure: pleasure is applied to each of the individual sensations which, when aggregated, produce happiness. It is generally, therefore, more convenient to use the word, pleasure, when the immediate results of actions are talked of, and the word, happiness, when ultimate and permanent effects are the subject. In popular language, the distinction is sometimes drawn to the extent of contrast, and a man is said to pursue pleasure to the destruction of his happiness. When speaking, therefore, as we are now doing, of the immediate impulse of acts, it is convenient to use the word, pleasure: when we come to the discussion of acts in their general results, the term, happiness, will be more applicable.

The term nearest to being synonymous with pleasure, is *volition:* what it pleases a man to do, is simply what he *wills* to do. By considering it for a moment in the light of mere volition, we separate it from the notion of actual enjoyment—that popular acceptation which is most likely to lead us astray. What a man wills to do, or what he pleases to do, may be far from giving him enjoyment; yet, shall we say that in doing it, he is not following his own pleasure? A man drinks himself into a state of intoxication: here, whatever may be the ultimate balance of happiness, people can at least imagine present enjoyment, and will admit that the individual is pursuing what he calls his pleasure. A native of Japan, when he is offended, stabs himself to prove the intensity of his feelings. It is difficult to see enjoyment in this case, or what is popularly called pleasure; yet the man obeyed his impulses—he has followed the dictate of his will—he has done that which it pleased him to do, or that which, as the balance appeared to him at the moment, was, in the question between stabbing and not stabbing, the alternative which gave him the more pleasure.

Those hasty acts, the result of sudden impulse, which one afterwards repents of having done because they militate against ultimate happiness, are the operations which people can with least facility ally to the pursuit of pleasure. They cannot imagine a balance struck in the mind in favour of pleasure, in cases which, by their results, and the feeling which the actor afterwards expresses regarding them, have evidently been so much the result of want of consideration. But, unless it be denied altogether that will has any influence in such cases, it cannot be denied, that what the man wills to do is that which gives him, at the moment, greater pleasure than abstaining from it. A man, in a fit of fury, stabs his best friend. The deed followed the impulse as quick as lightning; but was not the will brought into play? if it was not, ask legislators why they make laws for punishing those who give way to their passions—ask them if the fear of punishment has not often been the actual sanction which restrained the assassin's blow, even when the deed he would have committed is one which he would afterwards have repented of? The rapidity of the operation of the will—of the action of choice—is exemplified in every day life. It transcends, in its quickness, the power of self-discernment; and thus, working undetected, its existence is forgotten. A rapid penman,

quickly writing a letter to his friend, has his volition exercised on the choice of subjects, on the manner in which he is to treat them, on the words he is to use, and on the letters which he is consecutively to set down as the method of spelling these words. On the choice of subjects, and the manner of treating them, the operation of the will may, perhaps, be distinctly perceptible. It is not so distinctly traceable in the choice of words; and in the collocation of letters, succeeding each other at the rate of several hundreds in a minute, it will be quite imperceptible. The acts which are called rash—those which are the effects of sudden volition, are notorious for their malign influence on happiness. The imperfection generally attributable to hasty operations is perceptible in them. By too rapidly making up his mind on the question what is for his pleasure, the hasty man makes a wrong decision, and does that which, in the end, brings him a heavy balance of misery. Sudden acts may be fortunate, but they are not to be calculated upon as the most conducive to happiness, and the suppression of the habit of doing them will be found to be one of the ends of morality. A gambler may make himself rich by a lucky turn of the dice; but the best chance of permanent opulence is in favour of the man who practises a rigid system of industry, honesty, and self-restraint.

The terms, *choice* and *preference*, are useful in explaining the meaning of the word *pleasure*, as used by Bentham, though they are not so completely equivalent as *will*, being only employable where more than one thing is presented to the will, each with its own inducements. Between two courses, which a man has before him, he adopts, from pique or disgust, that which is foolish, wicked, detrimental to his own happiness, and he repents of it afterwards; still, at the moment, it was not less the object of his choice, his preference, his will, his pleasure.

It is in the cases where the instruments of palpable enjoyment are given up by one human being for the sake of the happiness of others, that its common popular acceptation renders the use of the word pleasure in its philosophical sense least commodious. He who sacrifices self for the good of others will be said to yield to the dictates of duty, of generosity, of humanity, of benevolence, of patriotism, as the case may be; but generosity revolts against attributing to him the selfish motive of the pursuit of pleasure. There is no harm—indeed there is much good—in the terms of eulogy which are applied to the motives of such actions. Bentham was not less conscious of their excellence than other moralists; but in looking at their direct and immediate motive, he found it the same one ruling principle—the pursuit of pleasure—the doing that which it pleases a man to do—the doing that which volition suggests. The misunderstanding of his opinions arose from the defect already stated—the inability of men to see sources of pleasure to others, in things which were not sources of pleasure to themselves. The sources of pleasure, both corporeal and mental, are almost innumerable; and he made them the subject of a most laborious and minute classification, under the title of "A Table of the Springs of Action." *

It is probable that this list may not be quite complete; and from the nature of such a task, if the accomplishment of a completely exhaustive list were demanded as a condition of the admission of the Utilitarian doctrines, the condition would probably not be fulfilled. It is the less difficult process, and is certainly not an unfair one, to ask the objector to point out any other motive but his own pleasure as actuating any man when he does that which he chooses to do. When Howard found himself possessed of an unappropriated sum of money, the first use for it that suggested itself was a pleasure trip on the continent; but on second thoughts he devoted it to the accomplishment of his benevolent schemes. In popular language, he was said in this instance to have made a sacrifice of his pleasure, or of his enjoyment; and in the case of an ordinary man, had Howard possessed over him the power of appro-

* Works, vol. i. p. 195 *et seq.*

priating to the improvement of prison discipline, the money which the owner of it had intended to spend on travelling, and had he so exercised his power, that owner would probably feel that Howard had deprived him of a pleasure. But the source of enjoyment and the will to choose it were fitted to each other, and placed in one mind; and who shall say that the choice he adopted was not that which gave Howard pleasure? Of a kindred spirit were the whole of the events of Bentham's life: they were a rejection of the more gross and tangible objects of human enjoyment: a recourse to elements of pleasure and satisfaction, for which vulgar and truly selfish minds have no appreciation. Seclusion, temperance, and hard labour were preferred, as the outward and visible signs of enjoyment, to popularity, indulgence, or luxurious ease; and the inward source of satisfaction was the consciousness of doing permanent good to the human race. Of his capacity for appreciating a character like his own, let his opinion of Howard stand as an illustration. "My venerable friend," he says, "was much better employed than in arranging words and sentences. Instead of doing what so many could do if they would, what he did for the service of mankind was what scarce any man could have done, and no man would do but himself. In the scale of moral desert, the labours of the legislator and the writer are as far below his, as Earth is below Heaven. His was the truly Christian choice: the lot in which is to be found the least of that which selfish nature covets, and the most of what it shrinks from. His kingdom was of a better world! He died a martyr after living an apostle."*

It will not increase our appreciation of such men to endeavour to prove that self-gratification was not their rule of action, and that *their* minds were not better suited to derive pleasure from such acts, than those of the more ignoble section of mankind whose elements of enjoyment lie on the surface of the earth they tread. As hopeful a task would it be to prove that the father has no satisfaction in denying himself the luxuries of life that he may increase his son's fortune, or that a wife cannot in reality suffer pain from seeing her husband pursuing a career of vice, if she be assured of a sufficiency of food and clothing to herself so long as she lives. The self-sacrifices made in domestic life are the cause of wonder to those who, not having like ties, have not the same sources of enjoyment: but it is useless to question, that between the doing and the not doing these acts of self-devotion, the balance of pleasure is felt to be on the side of doing them. There is almost an *experimentum crucis* in some cases where mischief is done by yielding to the pleasures of self-sacrifice. Children spoilt by an over-indulgence, purchased by privation on the part of their parents, are a frequent illustration. To avoid the pain of sympathy, a charitable person parts with money to give it to a mendicant, suspecting probably that he is an impostor and will make a bad use of it, or knowing that indiscriminate almsgiving has a deleterious and degenerating influence on society. Thus, too, will a jury allow a dangerous malefactor to escape and continue his ravages among the community, of which they form a part, because they have not firmness enough to do their duty at the expense of what is called their humanity.

Having found the psychological fact, that each man in all his actions pursues his own pleasure, and laid down the rule that the right end of action is the increase of the sum-total of the pleasure or happiness of mankind, the next question came to be—how the pursuit could be brought to bear upon the end? and he decided that, as a general rule, the happiness of the community would have the greatest chance of enlargement, by each individual member doing the utmost to increase his own. The conclusion, that the pursuit of pleasure should thus be deliberately set down as the proper end of life—the great duty of man—seemed startling to those whose notions of felicity were drawn from its most palpable, but least potent department, sensual gratification. But here again, as in the other departments of his

* Works, vol. iv. p. 121.

system, he appealed to the conduct of all men—to the views of all moralists —as illustrations that he was founding no new system of morality, but merely clearing up that which had, with more or less of deviation, been acted upon and taught in all ages. The first great point to be kept in view is, to distinguish between the pursuit of immediate pleasure, and the doing that which, probably at an expenditure of present pain, will have the effect of securing a balance of pleasure when the whole transactions of a life are wound up. People call the former the pursuit of pleasure—the latter they call the practice of morality. The gambler, the spendthrift, the drunkard, adopt the former course. Heedless of consequences, they snatch at present enjoyment; but before the end of their days the balance of pleasure has turned fearfully against them. The upright, industrious, abstemious man, has braced himself to resist these allurements. *He* has struck the balance accurately at the beginning, and at each passing moment of temptation he keeps it steadily in view. When the opportunities of fleeting enjoyment start up before him, he says, "No; I will pay dearly for it hereafter:" it will conduce to his pleasure afterwards that he has avoided it; and, reflexly, to avoid it is pleasure to him at the moment. When his days are ended, the book of life shows a balance of pleasure—an increase to the stock of the happiness of society, to which he has been an ornament and a benefactor by the acts which have conferred felicity on himself. Moralists and divines may disguise it as they will, but the balance of happiness is always the reward which they hold out for good actions. Be temperate—you will secure health and respect. Make your expenditure meet your income—you will avoid shame and embarrassment. Be liberal—you will have the good-will of mankind, their praise, and their kind offices. When the teacher looks beyond the world and opens up motives on which it is not necessary here to dwell, (for Bentham did not discuss religion in itself, but merely spoke of it as one of the influencing engines of society,) the appeal is still the same, and happiness in a future state is held out as the reward of virtue here.

If people did not follow their own pleasure, it might be a puzzling question —what morality ought to teach them? but since so it is, that every action they do is done in the pursuit of their own pleasure, the moralist's task is simplified. He teaches them how to avoid mistakes and miscalculations. He shows them how they are to obtain in its greatest quantity that which they are in search of.

It will scarcely be denied that every man acts with a view to his own interest—not a correct view—because that would obtain for him the greatest possible portion of felicity; and if every man, acting correctly for his own interest, obtained the maximum of obtainable happiness, mankind would reach the millennium of accessible bliss; and the end of morality—the general happiness—be accomplished. To prove that the immoral action is a miscalculation of self-interest—to show how erroneous an estimate the vicious man makes of pains and pleasures, is the purpose of the intelligent moralist. Unless he can do this he does nothing:—for, as has been stated above, for a man not to pursue what he deems likely to produce to him the greatest sum of enjoyment, is in the very nature of things impossible.*

In having discovered that it is a search after the greatest attainable amount of happiness, the rule of morality is far from being developed. The difficult problem, What line of conduct will be most conducive to happiness? has to be worked out. The Author, however, believed that he had done much to facilitate this operation by laying before people the ultimate, in place of the secondary objects of morality. He admitted that all the world—both the moral and the immoral part of it—were searching for the same desideratum, but he maintained that they would be more likely to find it, if they did not forget the object of their search by having their attention distracted by the various matters they encountered on their way. He found, that in the search two distinct classes of mistakes were made. Some acted hastily, following the dictates of present enjoyment without weighing the consequences; these were the immoral men. Others, after a laborious investigation,

* Deontology, vol. i. p. 12-13.

divulged schemes, which being acted on, left a balance of pain greater than the pleasure; these were the propounders of false moral doctrines. The object of morality and moral discussions is to show the former the folly of their ways, and to assist the latter in their attempts to discover the right path.

It would be a very palpable mistake to presume that it was the Author's meaning that immoral practices always bring their punishment with them in this world. The problem he works out is one of chances; not of direct cause and effect. He maintains only the possibility of discovering a moral rule, the pursuit of which will give the individual the best chance of leading a happy life. The principle has been thus propounded by an eloquent disciple—

It may not be accordant with experience that in every individual case the man who lives in the breach of moral rules shall, in exteriors at least, be less happy than some other; —any more than it is accordant with experience that every man of eighty will die before every man of twenty-five. On the contrary it may be allowed to be certain, that in some instances the contrary will happen. But what is urged is, that in the same way as it is proveable by experience that a man would be a simpleton, who with all the chances before him, should choose an annuity on the life of an average man of eighty in preference to one of twenty-five,—so it is proveable that a man commits an error and a folly, who, with all the chances to encounter, chooses the quantity of happiness which shall be consequent on a course of immorality, in preference to the quantity he might have obtained by another course. The way in which each of these propositions must be established, is by individual attention to the evidence, that though now and then a man of eighty sees the funeral of a man of twenty-five, or a man of immoral conduct is (in outward appearance at least) more fortunate and happy than some one of opposite character, this does not destroy the general inference that nine times out of ten the event is of a contrary description, and that the man is a blockhead who makes his election the wrong way. If indeed anybody says he sees reason to believe, that men of eighty are on the whole better lives than those of twenty-five, or that immoral men do upon the whole lead happier lives than moral ones, he is at perfect liberty to support his own opinion. All that is insisted on is, that there are reasons sufficient to induce the greatest part of mankind to come to a contrary conclusion. *

* Colonel Thompson's Works, vol. i. p. 231-232.

It is one of the evils of the imperfection of language as an accurate vehicle of thought, that the full meaning of what is involved in Bentham's views regarding the pursuit of happiness cannot be comprehended by any species of simple exposition: the student will know them best by examining them, inductively as it were, in the various works in which they are practically applied. Among the elements of the greatest-happiness principle, or of the utilitarian principle, he will find characteristics very different from that pursuit of sensual pleasure which popular prejudice attributes to the one, or that hard limitation to what are called the immediately useful and rejection of the ornamental objects of life, attributed to the other. There was no one more fully endowed with the feeling, that everything which lifts the soul of man above the clod he treads, and purifies its elements of enjoyment, tends to the fulfilment of that end which he had set before himself as the right one. The progress of a system of intellectual instruction, the most refined and elevated in its nature which the position of the individual could admit of, was one of his favourite schemes—one towards the practical adoption of which he laboured with a zeal worthy of better success. The gradual removal of the pupil's mind from contact with those objects and practices in which man shows the greatest amount of his animal, and the least of his intellectual nature, was the peculiar moral benefit he anticipated for his system. He was a zealous admirer of what may be called intellectual discipline. He conceived that the minds of youth, in almost all grades, and under all systems of education, were allowed too much relaxation from the bracing influence of severe thought. If it had been in his power, he would have made every man a thinker; he would have taught all men to meditate on the ends of their actions; to check their propensity towards immediate enjoyment, to govern their passions, and to look into the future.† It is a common error

† See the plan of a Chrestomathic System of Education, in the Works, vol. viii. p. 1 *et seq.* See also the Rationale of Reward, in vol. ii. p. 192 *et seq.*: where the different beneficial

to proclaim Bentham an opponent of the Fine Arts. The charge was artfully founded on his protest against taxing the poor for national institutions accessible only to the rich:* he was friendly to the devotion of such national funds as were not required for purposes more urgent, to the support of institutions for improving the taste of the people. He was in his own person an accomplished musician, and passionately attached to the pursuit. Towards poetry and painting the bent of his mind did not lead him; but, while he felt that his own intellectual exertions were to be in a different sphere, he denied not the respect due to these arts in the persons of their more eminent professors; and he saw in them great sources of intellectual enjoyment to those whose tastes and habits led them in the direction of such pursuits.†

Those petty sacrifices of selfish inclination, for the pleasure of others, which constitute the rules of good-breeding, politeness, and courtesy, formed part of his system of morality. These are not important acts, taken individually; but collectively they are the materials of which much of the happiness of social man is created.‡ He was not deaf to the greater calls for admiration made by that species of disinterestedness, which makes large sacrifices of what is called personal enjoyment, for the good of others. He looked on the disinterested benefactors of their species—men rarely occurring, and highly gifted, as those whose greatest happiness was centred in the consciousness of doing good to mankind; and he conceived it right and just that the acknowledgment of their services should be amply given. But these were not the men for whom he could cast his scheme of morality. Greatly as they raise themselves, in the unapproached grandeur of their minds, above the people of the every-day world, it is for these latter that codes of morality must be constructed; it is to the size of such minds that they must be fitted. It is useless to ask whether it would be better that men should find their chief enjoyment in something higher than the usual objects of ambition; suffice it that experience shows these to be the ruling motives, and therefore the instruments with which the moralist must act. He who addresses himself only to Howards and Washingtons, leaves several millions of well-intentioned men, with narrower minds and lower objects of ambition, unguided. The economy of the world would be different from its present constitution were it otherwise. "The virtue of beneficence, though its objects embrace all mankind, can be exercised to a very limited extent, and, as applied to any single individual, yet narrower is its sphere of action. And this is well;

objects of encouragement are discussed. See also vol. i. p. 569 *et seq.*: vol. viii. p. 395 *et seq.*

* See Works, vol. ix. p. 451.

† See Works, vol. i. p. 317; vol. ii. p. 253 *et seq.*; vol. iv. p. 18; vol. x. p. 32.

‡ The rules of politeness are discussed in "The Deontology," vol. ii. p. 132 *et seq.* The subject is commenced with the following remarks: —"The dependence of man upon his fellow men is the sole source of the extra-regarding, as it is of the benevolent principle; for, if a man were wholly sufficient to himself, to himself he *would* be sufficient; and as the opinions and conduct of others towards him would, by the supposition, be indifferent to him, no sacrifice would he make to obtain their friendly affections. In fact, such sacrifice would be but a waste, and such waste would be a folly.

"Happily for each, happily for all of us, the human being is differently constituted. Of man's pleasures, a great proportion is dependent on the will of others, and can only be possessed by him with their concurrence and co-operation. There is no possibility of disregarding the happiness of others, without, at the same time, risking happiness of our own. There is no possibility of avoiding those inflictions of pain with which it is in the power of others to visit us, except by conciliating their good will. Each individual is linked to his race by a tie, of all ties the strongest, the tie of self-regard.

"Dream not that men will move their little finger to serve you, unless their advantage in so doing be obvious to them. Men never did so, and never will, while human nature is made of its present materials. But they will desire to serve you, when, by so doing, they can serve themselves; and the occasions on which they can serve themselves by serving you are multitudinous. The intelligent will catch at opportunities which escape the eyes of the vulgar; and in these mutual services there is virtue, and there is little virtue beyond them; and happily of such virtue, there is more than those who do not possess it are willing to acknowledge or able to believe."

for, if every man were disposed to sacrifice his own enjoyments to the enjoyments of others, it is obvious the whole sum of enjoyment would be diminished, nay, destroyed. The result would not be the general happiness, but the general misery."* Again—"Take any two persons, A and B, and suppose them the only persons in existence: call them, for example, *Adam* and *Eve*. *Adam* has no regard for himself: the whole of his regard has for its object *Eve*. *Eve*, in like manner, has no regard for herself: the whole of her regard has for its object *Adam*. Follow this supposition up: introduce the occurrences which, sooner or later, are sure to happen, and you will see that, at the end of an assignable length of time, greater or less, according to accident, but in no case so much as a twelvemonth, both will unavoidably have perished."†

It is not inconsistent with an appreciation of disinterestedness, to hold that mankind would not be advanced but deteriorated, if all the shopkeepers deserted their counters to revolve schemes for the public good. The produce of the selfish industry of commonplace moral men and good citizens, is the fund with which philanthropy deals on an extensive scale. Aggrandizing, money-getting Britain, gave twenty millions for the emancipation of slaves: how could such an act be accomplished by a nation of Aristideses and Epictetuses?

Bentham's appeal to the practice of mankind was unsuccessful in this respect, that, in the separate course of action of the virtuous and the vicious man, there were so many apparent contrasts, that it was very difficult to find any common element in their motives. But even when it was explained that the former made a sacrifice of the present to the future, it did not appear that he encountered and overcame difficulties which the vicious man failed to defeat, in anything like the proportion in which the two differed from each other in the quality of goodness. "The one man," it would be said, "is wicked, and the other is virtuous; but if wickedness be a yielding to the temptations of immediate appetite, and virtue be the resistance of them, the virtuous man's life must be a continual up-hill struggle. Now we see none of this: he goes on easily and naturally; he makes no great effort to be virtuous—not even so great an effort as that which his vicious neighbour makes, and makes in vain—to reclaim himself: it must just be the natural tendency of the one to be a good man, and of the other to be a bad man." It is undoubtedly the case, that there are physiological and psychological differences, which will make the avoidance of a given act a matter of greater effort on the part of one man than on that of another; but it does not the less follow, that there is a measure of self-restraint at the command of both, and that the individual will be better and happier if it be exercised. The circumstance which misleads the world, is the ease with which self-restraint is accomplished after it becomes a habit. The drunkard must tear himself from his stimulant, with a violent effort; but the man who has overcome the first temptation to indulgence meets the recurrence with quiet ease.

In proportion as a man has acquired a command over his desires, resistance to their impulse becomes less and less difficult, till, at length, in some constitutions, all difficulty vanishes. In early life, for example, a man may have acquired a taste for wine, or for a particular species of food. Finding it disagree with his constitution, little by little, the uneasinesses attendant on the gratification of his appetite become so frequent, so constantly present to his recollection, that the anticipation of the future certain pain gains strength enough to overpower the impression of the present pleasure. The idea of the greater distant suffering has extinguished that of the lesser contemporaneous enjoyment. And it is thus that, by the power of association, things, which had been originally objects of desire, become objects of aversion; and, on the other hand, things which had been originally objects of aversion, such as medicines, for instance, become objects of desire. In the case above referred to, the pleasure not being in possession, could not, of course, be *sacrificed*—it was non-existent; nor was there self-denial in the case, for as the desire which had originally been calling for its gratification was no longer in existence, there remained no demand to which denial could be opposed. When things

* Deontology, vol. i. p. 208.
† Works, vol. ix. p. 192.

are in this situation, the virtue, so far from being annihilated, has arrived at the pinnacle of its highest excellence, and shines forth in its brightest lustre. Defective, indeed, would that definition of virtue be, which excluded from its pale the very perfection of virtue.*

But the main difficulty which has been raised against the Greatest-happiness principle, is in the allegation, that each man, in pursuing his own greatest happiness, will sacrifice that of others; and that to call upon a man to pursue his own greatest happiness in this world is simply inviting him to pillage his neighbours of their proper fund of felicity. The answer to this is the same plea on which the captain of a ship, which has run short of provisions, would recommend all the crew, both weak and strong, to submit to an arrangement for short allowance. To A and B alone it would be their greatest happiness, perhaps, to have the run of the ship's store, but there are C, and D, and E, and F, with the same inclinations counteracting them; and though A and B might resist all the calls of humanity and sympathy, and might be even able, at the moment, to carry their point of preference by force, they would run the risk of a final accounting with the law. All, therefore, see that it will be their greatest happiness to make an average division; and good ship-economy will show how this is to be accomplished on such a system as to make an equal distribution, keeping in view the number of the crew and the time they are likely to be at sea. Just so is it in the world at large. Each man feels that the best security for himself getting a share of happiness, is to give way to a certain extent to his neighbour. Such is the habit more or less in every portion of the globe; and it is in the countries where practice has settled the proportion, of how much should be kept and how much given away, with the greatest accuracy, that the end of morality has been best accomplished. The strongest counter-illustration which an opponent could find, is, perhaps, that of a despotism; but even here the principle is followed, though, according to our Author's opinion, very barbarously and unsatisfactorily. If the despot presides over a docile people who will not rebel, it is a sign that they prefer the ease of submission to the exertion of independence, and they are following their happiness in their own way. Among such a people, the temptation to play the pranks to which despotism is liable, is greatest, and, to say the truth, does least harm. But if an autocrat were calculating what course would produce him, on the whole, the greatest happiness, it is believed that he would not find it to be in roasting his subjects before slow fires, or skinning them alive, or hunting them with blood-hounds; and that the despot who has taken the best estimate of a happy reign, is he who has resolved to make his sway wise and beneficent; to do justice and to love mercy. But it is seldom that the embers of the spirit of resistance have been so completely extinguished that no gust will waken them into a blaze; and more or less, the fear of resistance holds the despot in awe, providing in his person an illustration, though certainly but a rudely developed one, of the counteraction which is supplied by the universality of the pursuit of self-enjoyment.

There can be no better illustration of the wide embracing influence of what has been denounced as "the selfish system," than its extension not only to all classes of mankind, of whatever colour or persuasion, but to every living thing to which the Deity has given, along with animal life, the capacity of physical pain and pleasure. Bentham was a strenuous supporter of the legislative protection of the brute creation from cruelty. † Perhaps in his own case he needed no train of philosophical deduction to teach him the duty and pleasure of treating them with humanity; but he thought their claims not the less worthy of attention when he could place them on the ground of self-interest. He believed that it was the interest of mankind at large to suppress all indulgence in cruelty, because the habit of being cal-

* Deontology, vol. i. p. 144-5.

† See the Works, vol. i. p. 142-143, 562; vol. x. p. 549-550.

lous to animal suffering propagates itself in crimes of violence and brutality—a phenomenon which will have to be farther noticed in its relation to the subject of Punishment. In another form he inculcated the cause of humanity on grounds of self-interest, by displaying the high intellectual nature of the enjoyment derived from its exercise.

Bentham made a rigid analysis of the various forms in which the fear of consequences check a man in the pursuit of what may be his own individual pleasure; and having ranged and grouped them, he divided them into four classes and called them sanctions—the chains, as it were, which bind a man from following his own wild will. These are, 1st, The Physical Sanction, viz., the bodily phenomena, which, in the course of human conduct, arise from certain classes of acts, and punish the individual by the painful sensation created, or reward him by the pleasurable. Disease produced by dissipation—health nourished by temperance and exercise, are the most common and the broadest developments of this sanction. 2d, The Political Sanction, which is in other words the law of the land, created for the punishment of offences and the protection of the virtuous. 3d, The Moral Sanction, which is the operation of the moral habits of the state of society he is in, so far as it affects the individual—the difference between this and the legal sanction will be afterwards particularly explained, because the two together occupy the greater part of Bentham's labours. The fourth is the Religious Sanction, acting through the Anticipative operation of future rewards and punishments. * The proper direction of these sanctions constitutes the field of labour of a man who would do good to his species. The medical man—not he who merely cures diseases individually as they are presented to him—but he who investigates them in the direction of cause and effect, and gives the world the benefit of his discoveries, is a labourer in the cause of the proper end of the Physical Sanction. He discovers the sources of disease, leaving probably to others the task of observing how much happiness a man sacrifices by encountering it, and how much happiness he will save by avoiding it. The moral philosopher is the man who deals with the moral sanction. As to the legal sanction, there are few men, from the emperor down to the non-elector wearing a party badge, who has not some influence in its operation; and a right influence is developed in the making of good laws, a wrong in the making of bad. The influence of the religious sanction is also, more or less, in all men's hands, but chiefly in that of the clergy. It is, under some circumstances, the most potent, either for good or evil. Of its operation in the former shape, no illustration will be needed in a Christian land. For the latter, we can look at all the crimes which have been produced by religious influences,—the great tragedy from which Christianity dates, the Massacre of St Bartholomew, the Inquisition, the murder of Archbishop Sharp, the persecution of the Irish Catholics.† Of the operation of the sanctions, the following is an illustration from the Deontology—it is a sort of narrative adaptation of Hogarth's Industry and Idleness. It will be observed that it admits of a fifth sanction—the social—which the author seemed to consider might either be viewed separately, or as a branch of the moral.

Timothy Thoughtless and Walter Wise are fellow apprentices. Thoughtless gave in to the vice of drunkenness; Wise abstained from it. Mark the consequence.

1. Physical sanction. For every debauch, Thoughtless was rewarded by sickness in the head; to recruit himself he lay in bed the next morning, and his whole frame became enervated by relaxation; and when he returned to his work, his work ceased to be a source of satisfaction to him.

* For the Exposition of the Sanctions, *see* Deontology, vol. i.; Works, vol. i. p. 14 *et seq.*; iii. 290; vi. 18 *et seq.*, 260 *et seq.*

† "Fanaticism never sleeps: it is never glutted. It is never stopped by philanthropy, for it makes a merit of trampling on philanthropy. It is never stopped by conscience, for it has pressed conscience into its service. Avarice, lust, and vengeance, have piety, benevolence, honour—fanaticism has nothing to oppose it."—*Works*, vol. i. p. 75, note.

Walter Wise refused to accompany him to the drinking table. His health had not been originally strong, but it was invigorated by temperance. Increasing strength of body gave increasing zest to every satisfaction he enjoyed: his rest at night was tranquil, his risings in the morning cheerful, his labour pleasurable.

2. Social sanction. Timothy had a sister, deeply interested in his happiness. She reproved him at first, then neglected, then abandoned him. She had been to him a source of great pleasure—it was all swept away.

Walter had a brother, who had shown indifference to him. That brother had watched over his conduct, and began to show an interest in his wellbeing—the interest increased from day to day. At last he became a constant visiter, and a more than common friend, and did a thousand services for his brother, which no other man in the world would have done.

3. Popular sanction. Timothy was member of a club, which had money and reputation. He went thither one day in a state of inebriety; he abused the secretary, and was expelled by an unanimous vote.

The regular habits of Walter had excited the attention of his master. He said one day to his banker—The young man is fitted for a higher station. The banker bore it in mind, and on the first opportunity, took him into his service. He rose from one distinction to another, and was frequently consulted on business of the highest importance by men of wealth and influence.

4. Legal sanction. Timothy rushed out from the club whence he had been so ignominiously expelled. He insulted a man in the streets, and walked pennyless into the open country. Reckless of everything, he robbed the first traveller he met; he was apprehended, prosecuted, and sentenced to transportation.

Walter had been an object of approbation to his fellow-citizens. He was called, by their good opinion to the magistracy. He reached its highest honours, and even sat in judgment on his fellow apprentice, whom time and misery had so changed, that he was not recognised by him.

5. Religious sanction. In prison, and in the ship which conveyed Timothy to Botany Bay, his mind was alarmed and afflicted with the apprehension of future punishment—an angry and avenging Deity was constantly present to his thoughts, and every day of his existence was embittered by the dread of the Divine Being.

To Walter the contemplation of futurity was peaceful and pleasureable. He dwelt with constant delight on the benign attributes of the Deity, and the conviction was ever present to him that it must be well, that all ultimately must be well, to the virtuous. Great, indeed, was the balance of pleasure which he drew from his existence, and great was the sum of happiness to which he gave birth.*

There are two main objects in view, in those of Bentham's works which are intended to influence human action—the direction of the Moral, and the direction of the Legal Sanction. The one is to instruct the individual as to what he ought to do—the other is to instruct the legislator what he ought to enforce and restrict. Where the former has been the end in view, the science has been denominated Morals or Ethics—by Bentham it was called Deontology, from the Greek το δέον, That which should be, or which is right. Where the latter end is held in view, the science is called Politics or Political Philosophy, and embraces within it the art and science of Legislation. To this department of his general system for the regulation of human actions, by far the greater part of Bentham's works have been devoted. Although the Greatest-happiness principle be the end in view of all the author's writings, whether they instruct men how to direct their own individual actions, or teach them how to make rules for the action of others, yet there is a broad demarcation between these two subjects, beginning at the very root of both of them. That which it may be each man's duty to do, it may not be right for each legislator to enforce upon his subjects, because the very act of enforcement may have in it elements of mischief to the community, preponderant over the good accomplished by the enforcement. In other words, it may tend to the greatest happiness of society, that a man should voluntarily follow a certain rule of action; but it may be injurious to the happiness of the community in general, to compel him to follow such a rule if his inclination be against it. For instance, in the Defence of Usury, the lending and borrowing of money at high interest, for the purpose of improvidently ministering to extravagance, is condemned; but, on the other hand, it is found that the laws for suppressing usurious transactions are so mischiev-

* Deontology, vol. i. p. 118-121.

ous in their effect, that they too are condemned for precisely the same reason—their malign influence on human happiness. Thus it is, that the rule of action for the individual, and that for the legislator, are kept distinct from each other; and it is shown by Bentham, that much of the mischievous legislation which he attacks has its origin in this distinction being overlooked. Legislators forget that they have to strike two balances, and not one only, before they act. The first arises out of the question, whether a given course of action is beneficial to the human race; and when this is answered in the affirmative, there comes the second, and frequently overlooked question, whether the enforcement of it, by any laws within the power of the governing authority to put in practice, will likewise show a balance of benefit. Moreover, as legislators often forget to strike the second balance, they also often come to a general conclusion without taking the two seriatim, and, either omit altogether, or fail in taking a due estimate of the first. But it is clear that the law which is made without the first balance being struck, as well as the second, must be unapt. Unless it be first settled that the thing proposed to be done would be good if done voluntarily, there is no room for propounding the question, whether it can be advantageously enforced. It thus occurs, that the field of Deontology embraces within it the field of legislation, and that the two are not co-extensive, the latter being smaller than the former. From this want of co-extensiveness there arise mistakes in arguing from the latter to the former. The Law is a choice of evils, because coercion is itself an evil. This element of evil is not inherent in a man's voluntary acts, and, therefore, in them, no allowance can be made for it. If, therefore, a man square his voluntary morals by the law, he may act on a totally erroneous estimate of what they should be. This he is liable to do, even in the case of the law being deduced from a moral system abstractly accurate; and the circumstance, that legislators are liable to make mistakes and erroneous deductions, increases the chances against his being right.*

In pointing legislation towards the distribution of the greatest possible amount of happiness among mankind, the chief difficulty was found to consist in the adjustment of the proper proportions in which certain objects of the law, to some extent conflicting, should be respectively aimed at. These objects Bentham classified as,

Security,
Subsistence,
Abundance,
Equality.

These have all to make, to a certain extent, sacrifices to each other, and the source of difficulty is in the adjustment of these sacrifices. There can be little happiness in a state where there is no security for property; but, on the other hand, if the right of property were so absolute, that one portion of the population should be permitted to starve to death ere the property of those who happen to be richer can be touched, it is clear that there will be much misery in such a country, and that a feeling of unhappiness, most vividly experienced by those who are subjected to actual want, will spread upwards, in the form of apprehension, among those who have more or less chance of being involved by the revolutions of the wheel of fortune in such a calamity. Hence comes the necessity for a provision for the poor, that the unfortunate may be preserved from death by starvation. But the principle of security to property and industry, on the other hand, demands that this provision be so regulated, that it shall never become an inducement to able-bodied men to live upon the property of others instead of resorting to honest industry. As the Author happily says, "The treasure of the comparatively rich is an insurance office to the comparatively indigent;" but care must be taken that the Insurer be not bound

* The best exposition of the Greatest-happiness principle is, perhaps, in the Introduction to the Constitutional Code, in vol. ix. of the Works. See also vol. iv. p. 537 *et seq.*, and see the Index to the Works, *voce* Happiness.

to pay till the calamity he insures against has occurred. The law supplies this insurance office to the public by favouring abundance—allowing means for the accumulation of capital, and protecting it when it is accumulated. The various advantages accruing from the existence of capital are for consideration under the head of Political Economy.

The principle of equality has a rivalship, to a certain extent, with that of abundance. The more extensively property is distributed, the more happiness does it produce; for the amount of felicity which each person enjoys is not increased with the relative proportion of his riches. A may have nine times the riches of B without having twice as many sources of enjoyment. It would thus conduce to general happiness if there were many small fortunes and few large; but here security and abundance come in for their claims. Unless men be assured in the enjoyment of their wealth, they will not exert themselves to increase it; and that abundance, so beneficial to the community, will fail to be created. But, on the other hand, the law produces distinct mischief by favouring or compelling the accumulation of property in the person of individuals. The former it does in the hereditary system—the latter in the law of Entail. The law, besides its direct effect, has its bearing on the habits and opinions of society, and the malign influence of the hereditary principle has spread itself beyond the sphere of its mere legal enforcement. Legislation, instead of favouring the accumulation of a family property in favour of one member, should have directed an equal distribution within certain bounds; and thus, both in law and in national habits, equality would have been the rule, and the hereditary principle the exception.*

The Greatest-happiness principle may perhaps receive elucidation from some account of the most important of the subsidiary principles which its Author deduced from it,—viz., The Non-disappointment or Disappointment-preventing principle, developed in measures tending to obviate disappointment, and the pain with which it is always accompanied.

Among the cases in which he found that legislation, in its hasty and empirical course, had neglected to strike the balance between good and evil with sufficient minuteness, was that in which small clusters of individuals came to be affected by general legislative measures. He kept in view, that individual interests are the units by the aggregation of which the collective term, "the public interest," is created, and that there is no living being whose certain or probable welfare, in relation to any proposed measure, should not be thrown into the scale when its disadvantages are weighed against its advantages.† The principle, that private interests should yield to the public good, he thus so far modified, that from the amount of any public good done, he deducted whatever private interest might be injured. In estimating the evils done to individuals, he examined minutely the pain caused by disappointment, and found it to be, on arithmetical principles, greater in the average case than the pleasure of acquisition, and than the pain (if it can be so called) of non-acquisition. The income of A is taken from him and given to B—A loses his all, but B gets merely an addition to what he had before. The whole pleasure in the possession of a source of livelihood is removed from the one; the other only receives the secondary pleasure of an increase. Let A's income be dispersed among the public—he loses all, and is eminently unhappy; while that which constituted the source of his former content is distributed in portions so minute, that the amount of happiness produced by it may be scarcely perceptible. On the other hand, so long as A is left in the enjoyment of his income, according to the prospects held out to himself and to society at large, from the first,—as no man expected to obtain any of it, no one is disappointed by its not being distributed, and he himself is content. The non-disappointment principle is the great foundation of the

* See Works, vol. i. p. 301 *et seq.*; ix. 11 *et seq.*

† Works, vol. ii. p. 252.

sacredness of property. More injury than good is done, by allowing either individuals, or the public at large, to interfere with that which a man has, under the sanction of the laws, been allowed to call his own. The pain of disappointment to the proprietor is the primary evil of attacks on property. The secondary evil is the alarm to society at large,—the dread which each individual has, that he too may be the victim of spoliation.

Like the other great principles expounded by our Author, the non-disappointment principle pervades society in all its acts; but it was his task, by a minute analysis of its principle and operation, to discover cases in which its application had been neglected and misunderstood. He applied it to the principle of compensation for offices abolished, or for any other injury caused to individuals by the march of improvement. He was in favour of allowances to those whose official emoluments were affected by law reforms,* and to the owners of slaves on emancipation;† and he even hints at such a concession to the owners of proprietary seats in parliament, in the case of their disfranchisement by parliamentary reform.‡ In the estimate of the incidence of good and evil on society at large, he saw that there was a clear gain in a government following out the principle, that when a man steadily and honestly follows his calling, and makes his livelihood by it, he should feel the assurance, that no act of the government of his country shall remove it from him. But he found a secondary advantage in the principle of compensation: it has a tendency to remove the opposition perpetually operating against improvement, in the sinister interests of those who benefit by abuses. Pay off the incumbents, is thus a liberal policy, by which those who are most conversant with the operation of any institution, are relieved of a temptation to overlook or defend its defects.§ The system is capable of abuse. Offices might be created for the compensation which will accrue on their speedy abolition. But this is an evil as much to be guarded against on true utilitarian principles, as the other; and it has to be remembered, that a people who take upon themselves the burden of compensation, are the more likely to criticise the propriety of the institution created. The countries most liable to government abuses of every description —despotic and disorganized states—are, at the same time, those where the interest of individuals is most ruthlessly overwhelmed in national changes.

Bentham extended this principle to Finance, holding that, apart from other elements of good or evil, it made indirect preferable to direct taxation. It is better that a deduction should accrue to a sum of money before it reaches the possession of him for whom it is destined, than that, after being in his hands, a portion of it should be withdrawn. The operation of the principle in this department he found to be limited. There were but few cases, such as that of the legacy duties, in which the deduction could be truly said to be practicable before the money was in possession—in the case of an annual salary, the mere knowledge of the amount is nearly equivalent to possession, and a deduction before payment differs little from a charge after payment. A tax on consumption is another method in which the principle may be brought to bear. The tax is paid, in the first place, by the dealer, to whom it is, in reality, not a tax, but a portion of capital expended in the form of duty which otherwise he would have to expend on commodities. The purchaser pays dearer for the commodity; but it is maintained that, in doing so, he does not experience the same feeling of hardship which would arise if the sum charged as duty were separately taken from him after his purchase has been made. In the general case, a direct tax is a thing obligatory; a tax on consumption, unless it be on the absolute necessaries of life, calculates on its voluntary adoption by the purchaser.‖ This species of tax has, it is true, its defects, in as far as it may impede or disturb commerce and

* See Works, vol. iii. p. 325; v. 505.
† Ibid. vol. i. p. 346. ‡ Ibid. vol. iii. p. 533.
§ Ibid. vol. v. p. 277.
‖ See Works, vol. ii. p. 573, 580.

manufactures; but these are objections belonging to Political Economy.

A plan was proposed by Bentham for raising a revenue by the application of this principle to the law of succession, and in arranging his plan he inquired into the principles of succession, and the extent to which the existing systems in Britain are founded on reason. Whatever theorists may promulgate on the anomaly of a man dictating for his property after death, or on the principle that when the man is done with the use of his goods they should go to the state, the practice of mankind in all places and times has supported a law of succession; and an examination, on the principles of the utilitarian philosophy, vindicates the practice as a right one. He who has brought children into the world is the person against whom there is the strongest claim to support them, and the law justifies this claim by giving them his property on his death. If children have been brought up in the gratification of certain tastes and luxuries; in short, in a particular rank of life and with a certain expenditure—it is better, so long as no one is injured by it, that they should continue in the same course. The most simple and the least injurious method of giving them the means of doing so, is by continuing in their possession the wealth by which the luxury and rank are purchased, on the death of its previous holder.* Let the daughter of a labourer be left without any pecuniary provision—it is nothing but what she expected, she suffers no hardship or disappointment, and goes forth to her labour with a glad heart. Let the daughter of a wealthy landowner or merchant be left in the same position—a fearful calamity has fallen upon her—a calamity undeserved, and heavier than the punishment of many a formidable crime. So much for the case of the individuals; but the benefit of succession operates also on the public at large. The providing for a family, or, even if a man have no family, the faculty of destining his money to what purposes he pleases, is one of the greatest inducements which he can have to make and to save property—the one an increase of the general capital of the community, the other a preservation of the increased capital from dispersal. Were it not for the wife and children he will leave behind him, there are many men taxing their heads and hands to great efforts who would be idle and worthless; there are many founders of great manufacturing and commercial projects who, but for such a motive, would never have thus distributed the means of industrial wealth around them.

But it comes to be a question whether the law has not carried the operation of succession beyond the bounds within which it is useful. Between the children who have shared in their parents' fortune, and the distant relation who never heard of the wealth thrown at his feet, till some scrutinising lawyer made the discovery of his relationship, there is the greatest possible difference: there are strong reasons for the law of succession operating in the one case—none for it in the other. On this principle Bentham founded his plan that succession should open only to near relations, and not to distant. If the law were once so established and known, there could be no disappointment among distant relations, (excepting those to whom the law was *ex post facto;*) but even independently of a knowledge of the law, there are multitudes of cases where the distance of the relationship precludes expectation. It is true that a man may adopt a distant relation—the same who, in the present course of succession, would be his heir—as a member of his family, partaking in his luxuries, and acquiring habits, a sudden check on which would be a hardship. This is true; but in the same manner may a man adopt a stranger; and in either case there is proposed to be open to him the right of bequest. The line which Bentham proposed to draw, is that of the forbidden degrees. He suggested that, where the nearest relation to the deceased is beyond those degrees, there should be no succession, except through bequest. He found in this plan two secondary advantages; it would cut off a great source of expen-

* See Works, vol. ix. pp. 16, 17.

sive litigation, (of which the country, in providing judicial establishments, bears part of the expense,) in the enforcement of distant claims to relationship through obscure and conflicting evidence; and it would afford an inducement to men having property to leave behind them, to marry. The plan is developed in the tract called Escheat *vice* Taxation.*

SECTION III.

THE PURSUIT OF TRUTH.—FALLACIES.—PRINCIPLES OF EVIDENCE.

Believing that falsehood was one of the main instruments of evil to mankind —that a regard for perfect truth was one of the greatest safeguards against the various means by which sinister interest could operate to the evil of society, Bentham made war against mendacity in every form in which it could raise its head. He found that the ingenuity of sinister interest had here covered society with a net-work of evil, through the meshes of which it required the most vigorous efforts of the understanding to clear a way. He found a popular notion, that it was in certain words used, and not in the act of deceiving, that the offence of falsehood consisted. The shepherd in the fable, who promised to the stag not to give information of his hiding-place, did not tell the hunters where it was, but pointed with his finger to the spot. It was the interest of persons who had done such deeds to remove the odium from the act of betrayal to that employment of false words called a lie; but in Bentham's view, men might stumble among the ingenious intricacies of words, and he found no criterion of criminality but in the thing done through their means. Words, the simple purport of which would convey a falsehood, may be uttered in a manner and with a purpose to put the party right, and keep him from deception. On the other hand, words signifying the truth are often made a mere effectual cover to the falsehood they are intended to convey. A newspaper, the other day, wishing to show that certain operations abroad had been carried on in consequence of instructions from home, stated that such instructions had been sent out, but did not state that they had not arrived. Almost every species of commercial deception is carried on in words that are in themselves true. When emigrants are enticed to embark with their little property for a colony where they are ruined, the inducement is, in general, some perfectly correct description of luxuriant vegetation and salubrious climate, which is all deceptious, because it is not stated that there is no means of making the natural profusion available—that there is no commerce with the place—no system of inland conveyance, and no harbour. An auctioneer lately advertised an estate for sale in Canada, "containing a quantity of fine old timber," in the hope that some one who did not know that timber in Canada is worth less than nothing, might act on the advertisement. A common method of deceiving without words is, for a man to act with a political party, in its arrangements preparatory to some great conflict, for the purpose of being counted too good a friend to be questioned, and then desert it, on the plea that he never promised to support it. All these acts have in them whatever there is of evil in a lie. It has become the practice to refer to them as the "speaking the truth, but not the whole truth," an unsatisfactory expression, which seems to intimate that they have in them at least a portion of the virtue of truth. Let them be looked at simply in the result intended to be accomplished, and so judged, and then they will be seen clearly to be in every respect equivalent to lies.

As the effects of falsehood are of the most varied character, ranging from the highest crimes to the most paltry and unpunishable social frauds, there cannot

* Works, vol. ii. p. 585.

be any measure of punishment for it, (of punishment whether as administered by the Law, or by the opinion of society,) but in taking the measure of the offence which it is made the instrument of perpetrating.* A lie producing death is the offence of murder; a lie giving an undeserved character of excellence to an article of commerce for the purpose of making it saleable, is but a petty fraud. Can it be said that these offences are equal in magnitude? Yet if the offence be in the lie, and not in the effect produced by it, the criminality of the two cases is precisely co-extensive, for the verbal falsehood is as distinct in the one as it is in the other. On this point Bentham found the laws for the punishment of judicial perjury defective. The criminality was thrown on the ceremony, with which the falsehood is decked, and not on the effect produced by it. To tell a falsehood in a court of justice cannot be, under any circumstances, other than a crime of high magnitude; but between the case of a man swearing away the life of another, and that of a man swearing five pounds away from its right owner, there is surely a greater difference than between the saying the lie with, and saying it without certain formalities. Bentham made an accurate analysis of judicial falsehoods, for the purpose of measuring the extent of their criminality by that of their respective evil effects, and he introduced the new distinction between temerarious and mendacious falsehood. Among those who looked merely at the words spoken as the offence, when it turned out that the speaker did not anticipate the meaning that would be attached to them, or would not have uttered them if he had known them to be false, he was considered innocent. But Bentham, on the principles on which he who fires a pistol into a church, or drives furiously through a crowded street, is held responsible for the mischief he may occasion, did not see any reason why the individual who maims or slaughters the person or reputation of another by rash words, should not be equally responsible.†

On an examination of the various processes through which the truth, in regard to the merits of human actions, is obscured, the common practice of giving a good or bad character to motives, according to the feelings of the person who is speaking of them, presented itself as one of the most common devices of falsehood. Results are open and susceptible of examination—motives are hidden in the bosom of the actor; hence those who love darkness rather than light will more readily exercise their ingenuity in giving a character where its truth or falsehood cannot be detected, than in examining that which is spread before the world.

"It is the act, and not the motive, with which we have to do; and when the act is before us, and the motive concealed from us, it is the idlest of idling to be inquiring into that which has no influence, and forgetting that which has all the real influence upon our condition. What acts, however outrageously and extensively mischievous, but may be excused and justified, if the motives of the actor, instead of the consequences of the act, become the test of right and wrong? Perhaps there never was a group of more conscientious and well-intending men than the early inquisitors; they verily believed they were doing God service; they were under the influence of motives most religious and pious, while they were pouring out blood in rivers, and sacrificing, amidst horrid tortures, the wisest and best of their race. Motive, indeed! as if all motives were not the same,—to obtain for the actor some recompense for his act, in the shape of pain averted, or pleasure secured. The motive, as far as that goes, of the vilest, is the same as the motive of the noblest,—to increase his stock of happiness. The man who murders, the man who robs another, believes that the murder and the robbery will be advantageous to him,—will leave to him more happiness than if he had not committed the crime. In the field of *motive*, however, he may make out a case as recommendatory of his conduct, as if he were the most accomplished of moralists. To say that his motives were ill-directed to his object, is to reason wisely with him; to say that his motives had not the object of obtaining for himself some advantage, is to deny the operation of cause on effect. There is,—and the existence of the disposition is a striking evidence of the tendency of men towards despotic assertion,—there is by far too great a willingness to turn away from the consequences of conduct in order to inquire into its sources. The inquiry is a fruitless one, and were it not

* See "Swear not at all," in Works, vol. v. p. 187 *et seq.*; vol. vi. p. 297.

† See Works, vol. vi. pp. 280, 292 *et seq.*

fruitless it would be useless. For were motives other than they are,—were they fit and proper evidence of the vice or virtue of any given action,—it would not be the less true, that opinion could ultimately have no other test for judgment than the consequences of that action. A man's motives affect nobody until they give birth to action ; and it is with the action and not with the motive, that individuals or societies have any concern. Hence, in discourse, let all indications of motives be avoided. This will remove one spring of error and false judgment from the mind of the speaker, and from the minds of the hearers one source of misunderstanding.*

In a minute analysis of the subject of motives, in another part of his works,† he showed that the system of appreciating motives as good or bad, even if their goodness or badness could be discovered, proceeded on a false idea of what motives really are. It is to *intention* with relation to acts, that merit and demerit are applicable; for motives in themselves are neither good nor bad. There is no motive that may not lead to the best or to the worst of actions. A desire to preserve his family from starving is called a praiseworthy motive, so long as it prompts a man to work honestly for his bread; but who shall say that it is a praiseworthy motive, when it directs him to the highway with a pistol? The mischievousness of his act we can clearly calculate —the mischievousness of his *intention* we may estimate, even if he has been unsuccessful in his attempt to put it in practice; but we shall in vain search for a just attribute to his motive.

The petty insincerities evolved in the course of casual disputes, for the purpose generally of obtaining a temporary intellectual victory, were occasionally the subject of Bentham's reprehension. He did not consider that this habit could be compared in point of evil with many of the other sources of untruth to be found in the practice of society: but it had its sphere of mischief, and was, consequently, worthy of exposure. He says:—

Avoid all arguments that you know to be sophistical. Think not, by shutting your own eyes against the weakness of your statements, that you have thereby shut the eyes of your hearer. Your sophistry will but irritate, for sophistry is not only uncandid, but dishonest. It is an attempt to cheat, not the purse of another, but his senses and his judgment. His aversion to you will be awakened by your effort to shine at his expense; and his contempt will be roused for the folly that supposed it was able so to shine. In all argument be candid, for the sake of your comrade and for your own sake. The triumph of an argument which is known and felt to be unfair and unfounded, is a wretched exhibition of perversity. If successful, it can serve no interests but those of fraud : if unsuccessful, it brings with it the consequences of blundering and detected dishonesty. Constituted as society is, with its errors and prejudices, its narrow interests and interested passions, the pursuit of truth makes demands enough upon courageous virtue; for he who goes one step beyond the line which the world's poor conventions have drawn around moral and political questions, must expect to meet with the thundering anathemas and obloquies of all who wish to stand well with the arbiters of opinion. Let no searcher after truth be led into the labyrinths of sophistry. He will have enough to do in order to make good his ground one step beyond that trodden by those who dogmatize about decorum, and propriety, and right and wrong.‡

In many established institutions Bentham found principles tending to the commission of falsehood, and to the designed obliteration of the distinction between the truth and a lie. Of these the most prominent were Oaths, in their two classes, Promissory and Assertory. A Promissory oath, such as an oath of allegiance, is an obligation taken not to know the truth; or, if it should be known, not to act upon it. It is generally imposed under the influence of bribery and intimidation—at the time when a man has the inducement of some benefit, such as the appointment to office—to harden his conscience against the iniquity. It binds the individual down to a certain line of conduct, however clearly his conscience, aided by experience and reflection, should afterwards be opened to the evil of the course. To some it is a drag, preventing them from doing what is right; for they feel that they have already registered a vow in heaven to do what is wrong. To others it is a ready excuse for the wrong they are inclined to : they have sworn to do it, and it is useless to tell them it is not

* Deontology, vol. ii. p. 155-156.

† Principles of Morals and Legislation, in vol. i.

‡ Deontology, vol. ii. p. 145-146.

right. George III. laid the responsibility of the American war, and of his resistance to the Catholic claims, on his Coronation oath: he had sworn to preserve his dominions entire: he had sworn to preserve the Church. He was the interpreter of the meaning of these oaths, and the two questions were removed from the operation of the inquiry—what is right and what wrong? The claims of mercy and justice might cry aloud,—hundreds of thousands of his own subjects might suffer the frightful death that is caused by the hardships of unsuccessful war, in the vain attempt to inflict the same calamity on hundreds of thousands of unoffending foreigners —it mattered not: the cause was prejudged, a vow had been registered in heaven, and it must be fulfilled.*

But the most pernicious of all promissory oaths are subscriptions to declarations of faith—to religious tests. They are a direct bribe to perjury—perjury which is daily committed. Whether, having serious differences of opinion on the subject, the candidate for office deliberately sets his hand to that which he disbelieves, or, purposely closing his eyes to the genuine meaning of the words, he, at the same time, shuts his ears to the voice of conscience, by carelessly signing as a "matter of course," the effect is equally pernicious in poisoning the stream of public morality—poisoning it at its very fountain, the institutions where learning, and morality, and religion are promulgated —poisoning it through the very hands of those who are under the most sacred of *real* obligations to keep it pure and uncontaminated. Bentham could never refer, without the most lively indignation, to that most flagitious of shapes in which this vice is practised, when the adherence to a certain array of complex doctrines is extracted from youth, purposely and avowedly before they are capable of comprehending them; the thing which is done when they are required, before they know the doctrines of the Church of England, to declare what side they will take after they do know them. With the same unconsciousness with which other youths have acted, and will act, he signed his adherence to the Thirty-nine Articles on entering himself at Oxford; and the act was one to which he could not refer down to the last days of his life without a feeling of bitter remorse.†

The evil effects of assertory or judicial oaths he did not find so flagrant. He held that some formality was necessary as a sanction for truth—necessary to this extent, that the witness might, by its use, be put upon his guard that he shall be made judicially responsible if he tell a falsehood. But the effect of making this ceremony a sacred invocation he maintained to be, that the criminality of falsehood was removed to the wrong place. Instead of being centered in the mischief occasioned by the lie, it was attached to the profanation of the ceremony. Thus, judicial falsehood, instead of being like theft or forgery, a crime between man and man, was converted into an offence against God. Hence it resulted, that the real ingredient in the offence was lost sight of, and that men believed that if they could stand right on the subject of the profanation, the injury committed was no wrong. Multitudinous are the devices that were fallen upon to evade the oath; for wherever a man could persuade himself that he was not pledged to the Deity, (and in many a case the conclusion has been easily come to) he was free; for neither law nor morality said it was a crime to accomplish any object by a testimonial fraud, if it were not accompanied by a false oath.‡ The danger of the fallacy is in this, that, as the sanction for truth is hidden with his other religious opinions in the breast of the witness, no one can tell whether it is in operation or not. It is a simple doctrine, the practical application of which can be easily calculated on, that if a witness, by the nature of his evidence,

* See Works, vol. ii. p. 403 *et seq.*; v. 207, 514 *et seq.*

† See Works, vol. x. p. 37.

‡ In the trial of an election petition some years ago, it came out in evidence, that young lads put pieces of paper, with the number 21 marked on them, in their shoes, that they might be able to swear they were "above twenty-one."

leads twelve men to convict another of murder unjustly, he is himself guilty of murder: but you must have found your way to the bottom of his soul, and must know his whole system of religion, before you are assured that he holds any given ceremony a sacred obligation made between the Deity and himself.*

The oath applied to jurymen in England, was one which Bentham held as *sui generis* in its absurdity and self-contradiction. Twelve men are compelled solemnly to swear that they will come to a decision according to their conscience, and they are then starved till they declare themselves all of one mind.†

Since the earlier works of Bentham against oaths were published, Legislation has made rapid strides in the abolition both of the promissory and assertory class.‡

Bentham considered the support and perpetuation of Foundations, or Institutions for the inculcation of particular doctrines, to be most dangerous to the cause of truth;§ and he likened them to funds for paying judges to decide, not according to justice, but in favour of a specified class of clients. So long as the system shall continue, of keeping foundations "sacred," as it is called, from the interference of the legislature acting upon them for the common good, they become so many centres of absolutism in the midst of free institutions—of absolutism, where there is not even that chance of improvement which may be afforded in the probability of occasional good men appearing in a succession of despots; for the despots who have thus transmitted their will to future ages, are gone, and neither hope nor fear—neither reason, nor the treasures of experience, can operate upon them to make them revoke their laws. Thus, every man who is possessed of wealth, by judiciously founding with it some institution properly calculated to the end in view, may place a perpetual barrier in the way of free inquiry, and tie down a portion of posterity to the amount of knowledge and the class of opinions possessed by the men of his own generation.‖ In public national matters, legislation in some measure adapts the increased facilities to the enlarged wants of the age; systems of management make some approach to the improved habits of the time; official salaries are brought to something like a proportion, according to the state of the labour-market, with the work performed for them. But centuries pass, with their train of changes and improvements, and leave the foundation unaltered and unalterable. The legislature dare not pry into its operations, or ask what its officials are paid, or what they do; while the daily routine of the establishment, and the very costume of its inmates, proclaim it at war with improvement—a cluster of human beings, at whose gate the march of civilisation and enlightenment is arrested. The whole principle of the sacredness of foundations proceeds on a false analogy with the stability of property. Because it is good for all members of society, that a man should keep, and use for all lawful purposes while he lives, and should give to whom he pleases at his death, that which he has made, or which he is otherwise allowed to call his own,—it does not follow that it is good for the

* See "Swear not at all." Also, Works, vol. v. p. 454 *et seq.*; vi. 318 *et seq.*

† See Works, vol. v. p. 84 *et seq.*

‡ See Editor's note to Works, vol. v. p. 188.

§ Establishments for the support and influence of a dominant sect in a civilized country, are not to be confounded with funds for appointing propagandist missions to barbarous countries, or to the destitute or uncivilized portion of a community. The former have a tendency to stop inquiry, and keep back the community in the pursuit of truth; the latter have for their object the raising less intelligent classes to the standard which has been already reached by the more civilized. Apart from questions as to the superiority of one sect of Christians over another, the religious opinions of civilized Europe cannot well be propagated in barbarous Africa, without conveying some portions of whatever, in the character of the people of Europe, is superior to that of the people of Africa. But it by no means follows, that, in the same civilized society, good will be done by giving one sect power and money to bear down another. The subject of Christian missions was not investigated in any of Bentham's published works.

‖ See Works, vol. ix. pp. 35, 303.

community that he should be allowed to employ it in building a barrier to stop the stream of civilisation and improvement, and to keep a certain class of his fellow-men just as enlightened on a certain set of doctrines as he is himself, and no more so. The sinister interests which support the permanence and inviolability of such institutions, are founded in the wealth they give to individuals and the power of domination they confer on classes of thinkers. When they are overwhelmed by any great revolution of opinion—such as the Reformation—those portions of them which escape individual rapacity are seized upon by the strongest sect, appropriated by them to the promulgation of doctrines the reverse of those for which the property was originally destined, and are then surrounded by the same impregnable walls of sacredness and immutability, as if they were still held in terms of the original founder's destination, and had never been wrenched from the hands of those for whom he intended them.

The "Fictions of Law," of which the English practice is so full, were repeatedly and earnestly attacked by Bentham, both collectively and in detail. The example shown to the world, of falsehoods deliberately, and on a fixed system, told in the very workshops of justice, and by those who are employed to support truth and honesty, he looked upon as holding out a pernicious example to the public. Without any sarcastic or reprehensory qualification, a fiction of law may be defined in general as the saying something exists which does not exist, and acting as if it existed; or *vice versâ*. Thus, by the system of pleading anterior to the late Uniformity Act, the defendant over whom the Court of King's Bench extended its jurisdiction, was said in the writ to have been in the custody of the Marshal of the King's Bench Prison for an offence, though no such circumstance had taken place. The court had originally no jurisdiction over any one who was not so in custody; the lie was told that the court might have an excuse for interfering; the court would not allow the lie to be contradicted, and it assumed jurisdiction accordingly. The origin of this class of fictions was of the most sordid character—the judges and other officers of court being paid by fees, a trade competition for jurisdictions took place; each court trying to offer better terms to litigants, than the others, and adopting the fictions as a means of accomplishing this object. Of another class are the Fictions as to Common Bail, Fines and Recoveries, Docking Entails, &c. Where the object to be accomplished by the fiction is a right one, it should have been accomplished directly, and without falsehood or ambiguity, by the Legislature; where the end is a wrong one, it should not have been accomplished at all. But whether used to a good or a bad purpose, it is an assumption of arbitrary power. "A fiction of law may be defined a wilful falsehood, having for its object the stealing legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the delusion thus produced, could not exercise it."*

It is true that new fictions are not now invented—at least on any considerable scale; and that those formerly created have become a fixed part of the law, and are uniform in their operation. It is still the case, however, that from the nominal repetition of the fraud under which they were originally perpetrated, they are a cumbrous and costly method of transacting judicial business. But they have a much worse influence than this. By the obscurity and complexity with which they surround operations which might be simple and open, they afford concealment to fraud and professional chicanery; they exclude the unprofessional man from the means of knowing what the lawyer is doing among the windings of the professional labyrinth, and they show him that the law countenances palpable falsehoods. "When an action, for example, is brought against a man, how do you think they contrive to give him notice to defend himself? Sometimes he is told that he is in jail; sometimes that he is lurking up and down the country, in company with a

* Works, vol. i. p. 243.

vagabond of the name of Doe; though all the while he is sitting quietly by his own fireside: and this my Lord Chief Justice sets his hand to. At other times, they write to a man who lives in Cumberland or Cornwall, and tell him that if he does not appear in Westminster Hall on a certain day he forfeits an hundred pounds. When he comes, so far from having anything to say to him, they won't hear him: for all they want him for, is to grease their fingers."*

A class of chronic falsehoods had found their way into the minds of political thinkers, which Bentham, in imitation of the logicians, termed Fallacies.† Of these he undertook a laborious and minute investigation and exposure; and there were none of his extensive labours to which he looked with more satisfaction than this rooting out, from the field of political thought, of the tares which the enemies of truth had sown in it. He found that they consisted, to a great extent, in an ingenious perversion of the language of praise or blame, to make it comprehend that which did not properly come within the quality expressed: and the permanent evil to truth he found to consist in the circumstance, that by habitual use and reiteration, men came to associate the good or bad quality with the thing so spoken of, without examining it. Thus the term "old," which, as applied to men, implies the probability of superior experience and sedateness, he found used in characterizing early times, or those states of society which had not the benefit of so long a lesson of experience as later times have had.

It is singular that the persons who are most loud in magnifying the pretended advantage in point of wisdom of ancient over modern times, are the very same who are the most loud in proclaiming the superiority in the same respect of old men above young ones. What has governed them in both cases seems to have been the prejudice of names: it is certain that, if there be some reasons why the old should have advantage over the young, there are at least the same reasons for times that are called modern having it over times that are called ancient. There are more: for decrepitude as applied to persons is real: as applied to times it is imaginary. Men, as they acquire experience, lose the faculties that might enable them to turn it to account: it is not so with times: the stock of wisdom acquired by ages is a stock transmitted through a vast number of generations, from men in the perfection of their faculties to others also in the perfection of their faculties: the stock of knowledge transmitted from one period of a man's life to another period of the same man's life, is a stock from which, after a certain period, large defalcations are every minute making by the scythe of Time.‡

That the end justifies the means, is another of these fallacies. He held that both the end and the means should be weighed in the balance of good and evil. When, taken together, they afford a balance of good, then are both transactions justified; but, if more mischief be done by the means than the good produced by the end, no abstract amount of goodness can justify that end being followed.§ As a familiar example: if a man is drowning, the rescuing him is a good end in itself; but, if the method of rescuing him should involve the sacrifice of two other lives, the balance of the whole act is evil, and the end does not justify the means. "Argue not from the abuse of a thing against its use," is another fallacy. The liability to be abused is a quality which must detract from the value of anything that can be made use of. Between two institutions, equal in value in other respects, that which has preservatives against the means of turning it to abuse, is better than that which has none. Indeed, it is in the preservatives against abuse, that whatever is valuable in political institutions has its value. The sacrifices to this principle are enormous in a constitutional country. When the business could be transacted in the Government office at a hundredth part of the expense, and in, perhaps, a fiftieth part of the time, who would have it managed in Parliament, were it not for the protection afforded by the representative system against abuse? If we

* Works, vol. v. p. 234. See generally on Fictions of Law, vol. i. p. 243; v. 13; vi. 100; vii. 283 *et seq.*; 415 *et seq.*; ix. 77 *et seq.*

† See the Book of Fallacies, vol. ii. p. 375 *et seq.*

‡ Works, vol. x. p. 69.

§ Ibid. vol. ii. p. 470.

were bound to put the abuses out of view, despotism would be found to be the best form of government.

Fallacies lurk in abundance under imputations and laudatory personalities. They are to be found, also, in certain fixed party expressions: such as "Order," "Establishment," "Matchless Constitution," "Balance of Power," "Glorious Revolution." Fallacies of no small influence on society, pervade the employment of words designative of principles, as a means of indicating individuals; as where the opponents of a dominant party are called the enemies of government; and those who find fault with the doings of lawyers, are said to be in opposition to the law; terms used when there is a wish to class those they are levelled at as enemies to the preservation of property, or to the enforcement of justice. With a like object are those who attack churchmen and priestcraft called the enemies of the church, and, by inference, the enemies of religion.*

The Book of Fallacies is chiefly directed against the devices made use of on the side of corruption or arbitrary power. In a separate tract, called Anarchical Fallacies,† there is an exposition of the false logic with which demagogues, and other enemies of well-ordered society, vindicate their misdeeds. His Text-Book, on this occasion, was "the declaration of the rights of man and the citizen, decreed by the Constituent Assembly in France;" and it was while the philosopher, in his retirement, was expounding the sanguinary and anti-social reasoning of this production, that the wildest flames of the Revolution burst forth, and confirmed his prophecies ere the ink had dried on the page. In the storm of that eventful period, the small still voice of one weighing the meanings of words used, and drawing the practical inference of vague generalities, was not heeded. It is true that this was but a criticism on the meaning of words; and the time was not one for theorising but for acting. Words, however, are the expression of opinions, and opinions are the source of acts. The same opinions may again gain ground more or less, and be expressed in like words, and amenable to the same criticism; and if to the mere lover of narrative, or the partisan politician raking out from the embers of the Revolution materials for modern controversy, the philosopher's logical comment will have little interest, it will weigh much with those who have the peace and wellbeing of society really at heart. "In a play or a novel, an improper word is but a word: and the impropriety, whether noticed or not, is attended with no consequences. In a body of laws—especially of laws given as constitutional and fundamental ones—an improper word would be a national calamity: and civil war may be the consequence of it. Out of one foolish word may start a thousand daggers."‡ One of the expressions attacked in connexion with anarchical fallacies has already been noticed, in reference to Bentham's abandonment of technical terms which had been vitiated by their bad use—(see p. 14.)

Bentham considered that the Legislature, in dealing with the subject of Evidence, had in its power the means of creating and applying to practical use a store of facts, covering the whole field of human action, and forming an experimental foundation, by which every description of operation, from the proceedings of the Legislature and the judicial tribunals, to the acts of the private citizen, might be beneficially regulated. As the great means of separating what is true from what is false he thought the code of judicial evidence should proceed on the most searching examination of principles, and should be most cautiously and scientifically organized. To an examination of the principles on which that code should be based, and of the aberrations of the existing law, he de-

* See Works, vol. ii. p. 448; ix. 76. The references made above on the subject of fallacies are casual and unmethodical. A mere analytical view of the fallacies exposed by Bentham, would not be satisfactory, without embodying the exposure itself; and to accomplish that task more briefly than he has himself done it, would be a vain attempt.

† Works, vol. ii. p. 489 *et seq.*

‡ Works, vol. ii. p. 497.

voted two of the volumes now before the public;* and there is, perhaps, scarcely any other of his expositions which has been so generally adopted by all who have examined it, or which the Legislature has so decidedly (though certainly very cautiously) shown itself disposed to admit into the law of the land. The subject is divided into two great heads. The first is that which is ordinarily called Evidence—the succession of facts, from the consideration of which a belief is come to on one side or other of a statement; as in the case of a civil or criminal trial, when, from the testimony of witnesses, the conduct of persons, or the position of things, a decision is come to by those who are appointed to judge. This is called Unpreappointed evidence, because the dispute arises out of the very fact that arrangements have not been, or could not have been, made sufficient to obviate it; and the circumstances out of which the truth is finally reached were not prearranged for the purpose of exhibiting it. The other species of Evidence is called Preappointed, and consists, in general, of what are commonly called Records: authenticated statements of facts, such as are conveyed in recorded contracts, registers of births marriages and deaths, &c., reduced into a state of evidence to be applied to subsequent use, whether at the instance of the legal tribunals, or of the legislators or others, who may wish to make the facts so proved the foundation of their public or private acts.

Bringing his ruling principle to bear on the first of these great classes, he found that no species of evidence should be hidden from those who had to judge in a disputed question, unless it could be made to appear that more mischief would be done by the admission than by the exclusion. The law, instead of weighing the matter by this simple rule, has given effect to barbarous usages and prejudices, and to feelings of antipathy and vengeance. The ceremony of an oath was invented as an ordeal, at the same time with trial by battel and the ordeal of the hot ploughshares; and it so far held sway when Bentham wrote his Rationale of Evidence, that there was no exemption in criminal cases: and if a witness, from conscientious motives, or obstinacy, or evil design, refused to swear, a curtain was drawn before the light which his evidence might throw on the charge, and the accused was let loose on society, or unjustly punished, according to the side on which the deficiency might act. When large bodies of men arose with conscientious objections to oaths, the principle underwent a practical *reductio ad absurdum*, and society ran the risk of being dissolved; for there were thousands upon thousands of men with broad-brimmed hats, whose presence, when crimes were committed, exempted the perpetrators from punishment,—and so the Legislature had to give way successively in the case of the Quakers, the Moravians, and the Separatists. On a kindred ground, a witness was rejected on account of his religious creed; and justice was injured that he might be punished by the reproach thrown upon him. A man being asked in the witness box if he believes in a God, and a future state of rewards and punishments, and answering "no," is immediately rejected; his candour in admitting so very unpopular a fact, being a foundation for the inference that he cannot be depended on for speaking the truth. If he tell a falsehood, beginning his evidence by a deliberate statement of a belief in that which he does not believe, he is held an unexceptionable witness.

Another of the principles of exclusion attacked in the Rationale of Evidence is that which is founded on *interest*. It is admitted that preponderant interest in favour of falsehood may sway the testimony of a witness; but the question comes to be, who shall predicate of the extent to which it will sway him or whether it will sway him at all? Shall those be the judges in this matter who have the living and speaking man before them, with a statement of the circumstance liable to sway him, the power of cross-questioning him, and the means of punishing him for falsehood

* Works, vols. vi. and vii.

or prevarication? or shall the matter be prejudged by those who have never seen him, but who know human nature so much better than the judge and jury who *are* to see him, that they can predict precisely whether he is going to tell the truth or a lie? English practice has decided in favour of the latter alternative, and has declared that the evidence of a witness who has an interest in the question at issue must be rejected.

But the limitation of the exclusion is itself a proof of its absurdity. Interest may grow out of the whole range of human passions and feelings. Revenge, Hatred, Love, Affection, Party Spirit, may all bear strongly on the human mind, and prepare it for any description of iniquity. In vain, however, could the law attempt to measure these sources of interest, or fix a general criterion for ascertaining their existence. One species of interest only could it measure—the pecuniary; and therefore it narrowed the operation of exclusion to that ground. It thus happens that, according to the principles of English law, Damon and Pythias would not be presumed to have any such community of feeling as would endanger the strictest impartiality if one were called on to testify against the other; while, on the other hand, if Aristides could gain a farthing by swearing away an innocent man's life, he would so undoubtedly perjure himself for the sake of the farthing, that he need not be listened to.

In favour of truth there are a multitude of tutelary motives, acting independently of the operation of the law in punishing mendacity. Indolence alone is a motive in favour of truth: to support a lie through a circumstantial history, under a battery of cross-questions, is a difficult task which a man will not enter on for nothing. Religion, morality, the respect of the world, are all in favour of truth; and why should it be presumed that the slightest—the very slightest—pecuniary interest will at once break down all these barriers? In reality there are many cases in which the inferiority of the pecuniary to some other interest is exhibited in the nature of a witness's conduct, without legally disqualifying him. It is so where he pursues the ends of justice from a feeling of resentment, and incurs expense to gratify it. If he had that interest in the conviction which is expressed by the money he has spent to procure it, he would be disqualified; but the existence of an interest so incontrovertibly proved to be stronger does not affect him.

Another improper ground for excluding a witness is his being a criminal—a ground much narrowed by the later practice of all parts of the empire. It is where the crime imputed is that of perjury, that it founds the greatest doubt of the probable veracity of the witness; and on this ground Bentham meets it. A man has assuredly told one falsehood—does it necessarily follow that he will tell another? If the truth could be had without appealing to him, it might be well not to run the risk; but the case supposes the impracticability of getting at the truth without hearing him,—for that which makes a man a witness is the necessity of having his statement to make up a full view of the facts. Is, then, the certain deception arising from defective evidence, to be incurred in preference to the risk of deception from his telling a falsehood—a risk indefinitely reduced by the chance that his falsehood, if uttered, will be disbelieved, and that his character will make his evidence be scrutinizingly examined? The law in this case stultifies itself by a counter-exclusion limiting the means by which the perjury can be proved. This must be by production of the record of conviction, and no otherwise: and if this record is kept out of the way, though there may be a thousand persons (the judge included) ready to testify that the witness was convicted of perjury, his testimony is unexceptionable.

But the most mischievous of all the exclusions is that by which a man is privileged to decline giving testimony which may injure him. It is not that the injury may not in some cases be a justifiable protection: a merchant should not have the secrets of his trade dragged to light by any interested person who can ingeniously plant a petty liti-

gation in his vicinity. But to justify the privilege, the evil to be suffered by disclosure should be clearly predominant over the advantage of the evidence. It is in those cases where the right to this privilege is held most indisputable, that it is most pernicious in its effect—viz., where the harm which the witness may bring on himself, is punishment for an offence. The law says, that no man is bound to criminate himself; and thus, by unjust leniency founded upon a false analogy, the evidence of two crimes is purposely concealed; that of a crime which a witness may have himself committed, and that of another crime which he may have witnessed in the course of his own iniquities. If the laws which condemn a man be just laws, let them be enforced—if they be unjust, let them be amended. The various impediments which still stand in the way of the conviction of a criminal are the relics of a barbarous age, when might made right, —when one class of men made cruel laws, and others tried to protect themselves from their operation by frauds and fictions. When society was in such a state, that an innocent man was as likely to be hanged as a guilty, there was some reason on the side of those who thought that every legal quibble which saved a victim from the fangs of the law was a virtuous act: but in an age when nine-tenths of society are in favour of the pure administration of justice, those who encourage such impediments to their operation cast an imputation on the institutions of their country.*

It would seem, to those unaccustomed to its operation, to be an absurdity too perverse to have entered into the brain of man, to award a punishment for an offence, and then, on the plea of humanity, to take measures to prevent the criminal from betraying his guilt. It is quite true that there may be means of coming at the truth which ought to be avoided from their mischievous effects on society; but these mischievous effects can only occur in the unjust punishment of the innocent,—the just punishment of the guilty cannot be an evil. Torture is a means of coming at the truth; but the objection to it is, that the innocent as well as the guilty may suffer from the operation of the test. In the case of a man criminating himself, it is the guilty, and none other, that can be affected; and society at large gains an undoubted advantage by the proof of a crime and the consequent punishment of the delinquent. The leading principle laid down by Bentham regarding the investigation of crimes, is of the clearest and most effective character; it is simply this: adopt every measure for the exposure of the guilty, which will not involve the innocent. This principle does not admit of confidential communications by criminals to their law advisers being kept inviolate, any more than their revelations to their accomplices. Confidential communications, the object of which is to defeat the law, have no better claim to secrecy than those which have in view the commission of a crime. A change of system in this respect would probably make criminals less confidential with their agents; but it is difficult to see what harm society could suffer by an alteration which would only compromise the safety of the guilty.

The above remarks bear only on a small portion of the Rationale of Evidence. An analysis of the whole work, within the compass of the present notice, would be little more than a table of contents, and could give the reader no satisfaction. On a subject which occupies a considerable proportion of the work—that of Records, some remarks will be made further on. (See p. 72.)

* From *The Globe* of 7th December, 1842.

" Surrey Sessions, 6th December, 1842.—Charge of Stealing a Banker's Check.

" The jury, after a short deliberation, acquitted the prisoner; upon which

" The chairman, addressing him, said that he was very fortunate to have escaped conviction; for the court was in possession of a document of which there was little doubt he was the writer, and which, had it been received in evidence, would surely have led to a very different result from that which the trial had taken. The prisoner then bowed and left the dock."

The question naturally suggested by the perusal of this statement is, Whether the Surrey magistrates sit for the punishment of criminals, or for the purpose of conniving at their crimes by concealing the evidence?

SECTION IV.

SYSTEM OF GOVERNMENT.

To find out the best means by which mankind could be governed, was the chief object of all Bentham's exertions; and there is scarcely a work which he has written in which he has not some allusion to this subject. His expositions in reference to politics are divided into two distinct classes. In the one he lays down those principles and rules of action which ought to guide a people, supposed to have thrown off all trammels of prejudice and established custom, and to be in search of the very best form of government which a practical philosopher would dictate to persons ready implicitly to adopt his arrangements. In the other class of cases, in which he had immediate practical ends in view, his endeavour was to mould the existing machinery of established institutions and opinions to the production of the best practical results. The reader, therefore, must not take it for granted that the principles and institutions which are developed in the former class of works, are such as their Author would recommend a practical statesman, connected with an established government, to put into immediate operation, however much he might wish to establish in the statesman's mind a leaning to such opinions as an ultimate end of gradual change. There are projects of practical reform in the minor works of Bentham, adapted to all grades of government, from democratic republicanism in the United States.* to Mahommedan despotism in Tripoli.† It will not be expected that any development should be here attempted of the different projects of reform which he thus applied to such distinct circumstances; but some explanation of the more conspicuous features of his opinions on government will be attempted.

He held that the ruling power should be in the hands of the people, because the happiness of the people being the object of government, the means of obtaining that object would thus be in the power of those who have the chief interest in realizing it. The happiness of every individual in the community would be best secured by giving every individual the species of government he would like best. But as confliction of interests renders this impossible, the nearest approach to such universal freedom of choice is, to put the power into the hands of the majority, whose use of it will not only be that which is most conducive to their own liking, but will likewise be such as cannot be very detrimental to a minority, which, in the case of such perfect freedom, must have too many interests in common with the majority to be in any case much injured by those proceedings which may appear to the latter the most fitting. But all the people of a state large enough to enjoy a separate government profitably, cannot collectively transact the business of government; and therefore it is necessary that some artificial arrangement should be adopted, by which the closest practicable approach may be made towards acting in accordance with their opinions: hence comes the Representative system.

Bentham was of opinion that no male adult should be excluded from voting for a representative, except those who are unable to read. His criterion of a right to the franchise was therefore equivalent to that which Mr Adam has aptly called The Knowledge qualification. Bentham termed it "virtually universal suffrage," because it excluded no one who chose to take the trouble of learning to read; and it might fairly be estimated that those who refused to make this exertion were as unfit to exercise the right to advantage, as they were careless of its possession.‡ There were other persons

* See Works, vol. iv. p. 451 *et seq.*

† Ibid. vol. viii. p. 555 *et seq.*

‡ See Works, vol. iii. pp. 464, 470, 560, 565.—"Now as to the qualification by *reading*—At

besides "non-readers" who might be excluded, were it not for the complexity that would be so created—*e. g.* people of unsound intellect, and criminals. Their influence, however, would be almost imperceptible—they would not exist in any one place in sufficient numbers to be made serviceable tools of; and their votes, presuming them to be given without thought, or with a bad intention, would be likely to tell on either side of a contest with tolerably equal effect. Arrangements for excluding them would be complex and uncertain; whereas the criterion of ability to read is easily adjusted on a simple practicable arrangement, which is described in the Draft of a Reform Bill.* He was of opinion that the questions whether females should be admitted to the franchise, and how the political privileges they ought to hold should be bounded, could not be satisfactorily discussed while prejudices on the subject are so strong as they were when he wrote.†

Another of the essentials of representative government, is Secrecy in Suffrage—the system of the Ballot. The reasons will be briefly explained further on in connexion with the principle of responsibility. In the Draft of a Reform Bill, arrangements are made for conducting an election on the Ballot system, well worthy of the attention of practical reformers. The operation is to proceed on a raised platform in presence of the public and of certain officials, who all see that the elector votes for some one, without knowing for whom. In a glass-covered counter, cards are deposited bearing each the name of a candidate, a separate compartment being provided for the cards of each candidate. These cards have each a joint or hinge in the middle, admitting of their being folded double, with the name inside. At the moment of voting, no one sees these cards but the voter, who takes one of them up folded, and holding it between his finger and thumb in the presence of the public, hands it to an official, who, without seeing the name within, files it in the presence of the public.‡ It is a necessary preliminary of such a system, that all questions as to the right of voting are prejudged, and that no scrutiny can supervene.

Annual Parliaments, and equality of Election Districts, are farther arrangements of the representative system, the reasons for which are also noticed in connexion with responsibility. To obviate the inconvenience apt to be created by the annual separation of the legislature, a plan is devised for the appointment of a "Continuation committee," to keep on through a succeeding session the thread of the legislation commenced in a preceding;§ an arrangement which, in conjunction with others for keeping

first blush, it seems to involve exclusion :—it does no such thing in effect. From two to three months' social pastime, at the hours of repose from work, would give it to all adults in whose eyes the privilege were worth that price: and he, in whose eyes it were not worth that price, could not, with much justice, complain at the not having it. Qualification by householdership does involve exclusion: for it is not in every man's power to pay rent and taxes for a house. Householdership is evidence of property; it is for this cause that it is required by those who stipulate for it. Qualification by payment of taxes—*that* too involves exclusion: if by payment of taxes be meant that which is anything to the purpose. Qualification by payment to indirect taxes, if those be the taxes meant, is *universality of suffrage:* for where is the human being that pays not to taxes on consumption? to the taxes called *indirect* taxes? Payment to direct taxes—to assessed taxes for example—is householdership under another name. Qualification by reading involves no exclusion: for every man who chose could give it to himself. He could do so, before a bill such as this could go through the forms, even supposing Honourable House ever so well disposed to it."—P. 560.

* Works, vol. iii. p. 565.

† See Works, vol. ix. pp. 3, 108. Perhaps the following would be the just utilitarian method of treating this question. At the present moment there is, perhaps, not above one female in a hundred who wishes to possess the franchise. The extension of it to the sex would be a sacrifice of the peace and happiness of the ninety-nine to the ambition of the one, and even the agitation of the question would be a modified annoyance to the former. It will perhaps be time for seriously considering the question, when the majority of the sex show an inclination to have a voice in Parliamentary Politics.

‡ See Works, vol. iii. p. 571.

§ Works, vol. ix. p. 170.

projects of law once brought before the legislature from dropping out of notice, would prevent the public time from being unprofitably wasted, by being devoted, as that of the British Parliament frequently is, to the furtherance of measures which are afterwards lost sight of.

The arrangements for the strict attendance of the members of the legislature, and for economically adjusting the time at their disposal to their duties, form the subject of many stringent provisions in the Constitutional Code.* It is provided that the executive ministers of the state shall be present *ex officio*, in order that they may be questioned, may afford instruction and explanation, and may even originate measures and join in the debate—but they are not to have the privilege of voting. † That the superior experience and knowledge which the judges must possess, of the state of the law, and of the amendments from from time to time necessary to improve it, may be applied to practical use, an official communication with the legislature is kept constantly open to them; and to prevent their suggestions from being neglected, provision is made for these being incorporated in the body of the law, if the legislature, after the proper formal intimations, do not interpose a veto. ‡

In the British Parliament much of the time that should be devoted to the general legislation of the country is wasted on local and private projects. Of these there are some that should be appropriated to the Courts of Law—others should be managed by Local Legislatures. § The arrangements of such local legislatures, in subordination to the supreme body, are provided for in the Constitutional Code. ||

A hereditary legislative body is an institution utterly at variance with the first principles of that republican system, which Bentham considered to be the best form of Government in the abstract—the best form that could be adopted, if circumstances should give an unlimited variety of choice. But he was decidedly of opinion, that any second chamber, whether elective or hereditary, can operate to no good. It occasions delay. It makes rivalry and conflicts between house and house, which tend to the public detriment. It prevents decisions from coming clearly out, as between majority and minority, very often making a small minority of the collective members of the Legislature triumphant over a majority. The practical result of such a system, in the end, generally is, that the one house becomes the originating and working, and truly legislating body, while the other, finding itself incapable for good, has nothing to boast of but its capacity for mischief; the extent of which is the more palpably shown the more useful are the measures it resists. The services presumed to be performed by a second legislative body, in the shape of inquiry, and the deliberate and accurate inspection of measures before they are sanctioned, are all capable of being adapted to the legislation of a single chamber, through the instrumentality of committees. ¶

* Works, vol. ix. p. 163-170.

† Ibid. p. 316. ‡ Ibid. pp. 431, 504-508.

§ "Of cases in which, for want of due discrimination between the duties peculiar to itself, and those not peculiar to itself, the Supreme Legislature stands exposed to the danger of wasteful application of its time, examples are the following :—

"Inquiry and decision as to a case in which property belonging to an individual is required to be transferred to Government, for some supposed preponderantly beneficial national purpose : and thence as to the quality and quantity of the compensation due. In this case the appropriate authority would be, not the Supreme Legislative, but the Judicial.

"Taxation, for the expense of works, the benefit of which is confined within the limits of particular portions of territory : say of peculiar *districts*. In this case a more apt authority would be, that of the sub-legislature of the district.

"So, if for any local purpose, common to some district.

"So, a transfer for a merely private purpose : the arrangement being clearly conducive to the mutual benefit of all parties ; and the transfer capable of being made without detriment to the general sense of security and respect of property. Here the appropriate authority would be the judicial authority of the district."—Works, vol. ix. p. 118.

|| Works, vol. ix. p. 640 *et seq.*

¶ See Letter to Fellow Citizens of France

In considering the proper arrangements for the conduct of business by a supreme legislature, it was found, that very little improvement could be made on the practice of Parliament; which, in Bentham's opinion, made the nearest approach to abstract perfection, which has been exhibited by any human institution. To those who are accustomed to expect in his works nothing but censure of existing institutions, the chapter, "on the mode of proceeding in a Political Assembly in the formation of its decisions," in the Essay on Political Tactics,* will be a remarkable exception. The chief elements of this excellence were found in the perfection of the machinery for preventing anything from going forth as a vote of the body, which had not been verbatim subjected to the inspection of its members; the arrangements, which rendered it impossible that a subject of debate could drop without being disposed of in some shape or other; the accurate line of distinction between debating and voting; and that scientifically arranged system for considering propositions in conjunction with their amendments, which admits of a vote being separately taken, upon every modification of a proposition which may happen to be before the house. He was of opinion, that the preservation of the liberties of the country was, in a great measure, owing to a firm adherence to the forms of Parliamentary tactics; and he attributed the contrast which they afforded, with the tedious, complex, and perverse forms of judicial practice in England, to the circumstance, that while the legislature had the distinct and rapid despatch of business honestly at heart, the proceedings in the Courts of Law were tortured and twisted to suit the sinister ends of the various parties—the suitors, the lawyers, the witnesses, and even the judges themselves. The work on Political Tactics was written with the design of doing a service to the National Assembly of France;† but, in that mob-arena, its rational views, and the practical application of them, were alike unheeded.

This loose sketch of the leading principles of the system of government, developed by Bentham in his Constitutional Code and other works, would be incomplete without the statement, that, according to his plan, the head of the government is the Prime Minister, chosen by the Legislature.‡ Of the methods by which checks are kept upon the power of this official; of his relation to the heads of departments, and the machinery by which their duties and powers are limited and connected with each other, it would be impossible to give anything like a satisfactory view in this sketch; and reference must be made to the substance of the Code.

An important feature in all the political writings of Bentham, consists in elucidations of the means by which men intrusted with power may be prevented from abusing it to the public prejudice. Considering all the transactions of the Political authorities, including the administration of the law, as subject to two checks—the direction of superordinate political authorities, and the control of public opinion—he searched for the best means of enforcing these securities, and found it in the principle of individual responsibility. To this end, he desired that every judicial or administrative act should be so done, that it might be seen by whom it was done, and under what circumstances. With this view he preferred individual management to board management. Where there are several persons concerned in giving effect to an operation, responsibility rests with no individual, and cannot be accurately partitioned among all. The relief from responsibility releasing each individual from the anxiety to do right, renders the appropriate industry and skill unnecessary. If one head and one pair of hands can transact the business, it will not be better done if half-a-dozen heads and a dozen pair of hands of the same skill and

on Houses of Peers and Senates. Works, vol. iv. p. 419. See also, ii. 307 *et seq.*; ix. 114 *et seq.*

* Vol. ii. p. 330 *et seq.*

† See Works, vol. ii. p. 299.

‡ Works, vol. ix. p. 208.

ability join in it. If one person cannot do the whole, or if a man be found eminently skilful in respect to one part of the transaction, and unskilful as to others, let the operation be divided accordingly; keeping this in view, that whatever a man is expected to do, or does, it be known and seen whether he does it, and how. On the same principle, there are objections to the administration of justice by more than one judge at a time; and in this case there is the additional argument, that a difference of opinion known to exist among judges of equal rank, power, and means of information, unsettles the law, and encourages litigation.*

But the principle of individual action does not extend to the legislature. The object in this case is, not the transaction of the official business of the country, but the direction and the control of its transaction, for the benefit of the people by whom the legislature is constituted. It might be practicable to take the votes of the whole people for one ruler to be elected by the majority; but besides many other risks and inconveniences attending on it, such a system would leave totally unrepresented some class of political thinkers, which might be nearly as large as that by which the ruler was elected. The greater the number of representatives, the greater will be the number of persons represented, and the nearer will be the approach made to that point of abstract perfection, which would result in everybody being represented. At the amount, however, beyond which legislative business cannot be easily or advantageously transacted, the number of legislators must be limited; and thus the problem of representation cannot be worked out without a certain number remaining unrepresented. But though there is a necessitated community of action in a legislature, individuality of responsibility may be preserved—preserved in the proper quarter—between representatives and represented. It is held that the representative should, so long as he is in that position, be actually, so far as is practicable, the person which his designation announces him to be—the representative of the opinions of those who have chosen him. It is not possible that, on every question which may come before the legislature, his own opinion will be precisely that of the majority who voted for him. It is not, as a point of morality, recommended to him to adopt measures which his conscience repels, because his constituents approve of them. But it is his duty, if such a difference of opinion arise between him and his constituents, that, had it been anticipated before the election, he would not have been elected by them, to resign his seat. On the representative committing such an act of self-sacrifice, however, no dependence is placed; and a system of arrangements is expounded in the Constitutional Code, and the Election Code or Reform Bill, calculated to have the effect of removing, with the least practicable inconvenience and delay, any representative whose opinion is at variance with that of the majority of his constituents. The most important and comprehensive of these arrangements is the annual election of representatives; by which, not only is the period during which a representative can be acting at variance with his constituents reduced to a comparatively short one, but a periodical intercommunication has place between electors and elected, conducive to the interchange of information regarding each other's sentiments.†

The principle of personal responsibility, carried through all other departments of the state, ceases with the constitutive or the elective constituency—the source of all political power. The interest of the individuals constituting the greatest number of the people is, that the government should be conducted favourably to the interests of that greatest number. Thus the general interest is each man's personal interest. When any one is transacting that in which his personal interest alone is at stake, he need be responsible to no other person;

* See Works, vol. iii. p. 571 note; iv. 125; v. 17; vi. 557.

† See Works, vol. iii. pp. 512 *et seq.*, 588, 600; ix. 191.

and the interference of another will be more likely to lead him astray than to put him right. The elector, if uninfluenced, gaining nothing by his choice but his share in the results of good government to all, votes accordingly for the man who, as a legislator, will act to that end. But if his vote for a person who will *not* act, as a legislator, for the general good, be made more valuable to him than his chance of a share in the results of good government, he will, in the general case, vote in compliance with that stronger interest. Hence the operation of bribery and intimidation at elections. Secrecy of suffrage, or as it is commonly termed the ballot, is the remedy held out for this disease. As the candidate cannot know whether or not the service has been performed, it is held that he will not give the wages. It is held that, since there is no means of detecting the nonfulfilment of his bargain, the bribed elector is in the same position, as to interests, with the unbribed—*i. e.*, his interest is identical with that of the public at large, and in favour of good government; and that the candidate, knowing this to be the case, will not throw away his money.*

But it is essential to the efficacy of this arrangement, as well as to the securing the majority in the legislature to the actual majority of the voters, that the electoral districts should be equal. Where one voter, by reason of his being in a small constituency, has as great a voice in the choice of a representative as ten have in a large constituency, then there is the temptation to bring against each elector in that small body ten times the amount of corruptive influence that will be brought against each constituent in the larger, or to single the former out for a concentrated attack. Thus, even were secrecy of suffrage conceded, without equalization of election districts, so great might be the corruptive power brought to bear against the small constituencies, that all practical barriers in favour of secrecy might be broken through.†

SECTION IV.

LAW REFORM.

The promulgation of the Laws is a prominent subject in a great proportion of Bentham's works. He held that a rule of action which the person whom it was to affect could not make himself acquainted with the purport of, was worse than no rule—a despotic arrangement for enabling one man to be cruel to another—a project for catching people in traps, for the advantage, or it might be the amusement, of those who set them. Speaking of the common law of England, he says, "Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then you beat him for it."‡ The defects which the English system exhibits in this respect, have had their origin in the neglect of the utilitarian principle—the neglect, in the preparation and execution of the law, of the very object for which those who make it would admit that it should be made—the good of the community. The ultimate object, for instance, of the criminal law, is to do good to mankind by the prevention of crimes. The immediate object is the punishment of individuals committing crime. In the discharge of this latter object, the former and ultimate one has been frequently forgotten. A man commits a breach of the law—he is punished, and all concerned consider they have done their duty, and trouble themselves no further. The criminal says, that if he had been aware of the existence of such a law he would not have broken it; but he is answered by the old adage,

* See Works, vol. ii. p. 368; iii. 487, *et seq.*, 547.

† See Works, vol. iii. p. 569; ix. 109.

‡ Ibid. vol. v. p. 235.

ignoratio juris neminem excusat. Presuming him to speak the truth, is it not an immediate inference, that it would have been better had the offence never been committed at all, than that, having been committed, the perpetrator is punished?

It is a feature, too, of unknown laws, that they have to fight society by detail. When it is known to the public at large that the commission of a given act will be met by a specific punishment, they, in general, take the alarm collectively and abstain from it. They know, perhaps, that if they all break the law in a mass, they could not all be punished; but, like Fielding's mob confronting a man with a cocked pistol, no one of them is assured that he may not be the victim. But a hidden law is a poignard—none know of the presence of the deadly weapon but those who are stabbed by it, and their immediate neighbours. Such a law will often exhaust the power of its administrators before it produces any palpable effect. There are abundance of victims, but there is little proportional amendment.

There are two means by which the laws may be brought within the reach of those whom they bind. The one is by making them in themselves simple, concise, and uniform: the other by adopting adventitious means of promulgating them. In both respects there are many defects in the law of England. The common law, which is the result of the traditionary lore of ages, is in the position of the books of the Roman law before they were digested under the superintendence of Tribonian,—a mass which defies the industry of any ordinary lifetime to master its contents. Its bearing upon any given point, instead of being contained in an enunciated command by the legislature, is to be solved by the interpretation of multitudes of unauthorized comments, or conflicting decisions. It possesses the additional evil, that, even when its tenor seems to be comprehended, no man can tell whether what he has so come to the understanding of be in reality the law; for it has received no authoritative sanction from any legislative power, and is only the opinion of certain unauthorized commentators.

The other department of the law—the statute law—is indeed the command of the authorized legislature: but it is a command perplexed by unintelligible language, confused, gigantic in its proportions, and deficient in internal facilities for reference and discovery. When a law is to be altered, there is an act passed, "to amend an act," &c.; when there is another alteration, there is an act passed, "to amend an act—to amend an act," &c., &c.* There is a popular method of referring to acts of Parliament as being such a chapter of such a session (*e. g.* the act 57 Geo. III. c. 101); but when reference is made in the amending statute to that which is amended, there is no such abbreviated mode adopted,—the act is described by its title, so that it can only be found by a search among all the acts of the session. In popular language too, the acts are divided into sections, which are numbered consecutively: but this facilitation is unknown in law, and consequently the section of an act, when an alteration of it is made by any subsequent act, is only referred to by vague description. In one session of Parliament there are frequently upwards of a hundred acts passed, and many of these will be found to contain upwards of a hundred sections; yet when, in a future session, there is an alteration made on one of these sections, it is only singled out from the mass in the vague manner above described. It will generally happen, that some members of the official establishment chiefly connected with the operation of any series of statutes will have mastered their contents; while the public in general are profoundly ignorant of

* Specimen of the title of a statute,—The 57 Geo. III. c. 101:—

An act to continue an act intituled, *An act farther to extend and render more effectual certain provisions of an act passed in the twelfth year of the reign of His Majesty King George the First, intituled, An act to prevent frivolous and vexatious arrests; and of an act passed in the fifth year of the reign of His Majesty King George the Second, to explain, amend, and render more effectual the said former Act; and of two acts passed in the Nineteenth and Forty-third years of the reign of His present Majesty, extending the provisions of the said former Acts.*

the whole subject, or know it only in so far as they may have suffered by making mistakes. Yet there are collections of statutes so extensive, that it may be questioned if even those official persons whose peculiar duty it should be to enforce them are well acquainted with their contents. There are at this moment (1842) upwards of 130 statutes, more or less in force, in relation to the Stamp Laws.

The main remedy proposed by Bentham for the evils arising out of the confusion and bulkiness of the laws, is in codification,—in a general revision of the existing laws, the rejection of the antiquated and useless portions, (for there are many acts, still part of the law, which are not enforced, solely because our civilized age affords no machinery for executing them, or because public opinion would set too strongly against any man who would have the barbarity to put them in force,) and the reduction of those parts which should be preserved, to a clear order, and to precise and intelligible language. The objections to this project are not in the form of argument, but in the simply negative shape of the neglect to perform that of which the utility is so clearly proved. The good to be accomplished would be great; but the labour too would be great: and no Atlas has been found among ministers of state to put his shoulders to the task. Nor does there seem, indeed, to be any individual on whom the responsibility of the non-performance of this mighty task can be specially thrown—it is simply a great and difficult project, for the public benefit, unperformed. It is true, that Bentham did himself offer to undertake this task: that he left behind him fragments of its execution in almost every branch of the law, and that he completed the constitutional branch in a shape rendering it fit for use, whenever those who have the power shall have the inclination to adopt it. But it was, perhaps, still less to be expected, that any code of his own fabrication should have been accepted of, than that the justice of his earnest pleadings, in favour of a simplification of the law, should have been admitted, in some attempt to prepare a code under other auspices. A code, drawn up by Bentham, must have not only received the advantages of his clear arrangement and accurate legislative style, but must, in substance, have conformed with all his opinions of what the law ought to be. It would not have been the laws of England consolidated or embodied in a code, but a new code of laws, prepared on the utilitarian system. It was one thing to admit his reasoning in favour of a code, but another and a totally different thing to admit that the code ought to embody in it the principles of the utilitarian philosophy. The Constitutional Code is, for instance, a system of government arrangements adapted to a republic. Of the many who might be favourable to codification, few might be republicans, and still fewer would be ready to attempt to achieve a republic in this country. The Code Napoleon was the adoption of Bentham's opinion in favour of codification; but the great patron of that measure, while acknowledging the advantage of having the laws simplified, would have been among the last men in the world to permit Bentham to prepare the substance of the laws which were to be so reduced to order.

It is true, that Bentham would not have been deterred by restrictions and limitations from devoting his time to the service of the public as a legal draftsman. If he had been directed, by those in power, to simplify any branch of the law, reserving our feudal institutions, and reserving, likewise, any other peculiarities in the laws, which the government had come to the resolution to leave unchanged,—while regretting the barbarism which adhered to machinery, in his eyes antiquated and cumbersome, he would have been ready to devote his time and talents to the task of fitting them for such good uses as they were capable of accomplishing. He exemplified this disposition in his Project of a General Register of Real Property, communicated to the Real Property Commissioners. In his cor-

respondence with foreign countries, indeed, he showed how ready he was to turn the least promising institutions to use; and, in the case of the Tripoli papers, we find him suggesting a series of arrangements, by which the protection of personal liberty may be made consistent with an Eastern despotism, and a limited toleration with the principles of Mahommedanism.*

But the principle of codification has not been without some practical concessions to its utility by our legislature. The statute penal law of England has been brought into a state far more nearly resembling a code than it was when the author wrote the greater part of his attacks on it. Improvement and codification have here gone hand in hand; and the system, perhaps, only waits for the removal of some of its relics of barbarism, to be finally condensed into a code, as concise and intelligible as the plan on which our Acts of Parliament are drawn will admit of. A further concession to the principle is to be found in the consolidation of the Customs and Excise laws, and the laws regarding shipping, which are intimately associated with them. The plan taken, with regard to the far more complicated department—the Custom House Laws, was this. In 1825, search was made in the Statute-book for all existing acts relating to the customs, and they were repealed in the mass. It would appear that the duty of deciding what statutes did, and what did not bear on the subject of the customs, was too onerous to be undertaken even by those who had all the appliances and ends of the government in their favour; for when the Customs laws were again reviewed in 1833, it was found necessary to pass a general repealing clause as to, "All acts and parts of acts relating to the Customs," without any farther attempt to enumerate them,† (3 & 4 Will. IV. c. 50.) The ground being thus cleared, a Custom House Code was created, in ten statutes, each embracing some distinct department of the Customs and Navigation Law. The cumbrous form of our statutes, and their incapacity to provide any system of division and arrangement, prevented this code from approaching to the state of order and intelligibility which its author, Mr Hume, seems to have been anxious to achieve for it; but he endeavoured to compensate as far as possible, by marginal headings and an indicative rubric, for the necessarily unarranged substance of his acts; and these Customs acts are the only statutes which are divided into compartments bearing a resemblance to the division of a literary work into chapters. In the interval down to the year 1833, many additions had been made to the Customs laws; and, to prevent confusion, all these additional laws, along with the consolidated Statutes of 1827, were repealed, and new consoli-

* Works, vol. viii. p. 555 *et seq.*

† The number, and the heterogeneous nature, of the subjects frequently embraced in one act, render it extremely difficult to trace the whole legislation of the Statute Book on any one given subject. The following is the title of the act 23 Geo. III. c. 26: "An act to continue several Laws for the better regulating of pilots, for the conducting of ships and vessels from Dover, Deal, and Isle of Thanet, up the rivers of Thames and Medway; and for permitting rum or spirits, of the British sugar plantations, to be landed before the duties of Excise are paid thereon; and to continue and amend an act for preventing frauds in the admeasurement of coals within the city and liberty of Westminster, and several parishes near thereunto; and to continue several laws for preventing exactions of occupiers of locks and wears upon the river Thames, westward; and for ascertaining the rates of water-carriage upon the said river; and for the better regulation and government of seamen in the merchant service; and also to amend so much of an act made during the reign of King George I., as relates to the better preservation of salmon in the River Ribble; and to regulate fees in trials at assizes and *nisi prius*, upon records issuing out of the office of Pleas of the Court of Exchequer; and for the apprehending of persons in any county or place upon warrants granted by Justices of the Peace in any other county or place; and to repeal so much of an act, made in the twelfth year of the reign of King Charles II., as relates to the time during which the office of Excise is to be kept open each day, and to appoint for how long time the same shall be kept open each day for the future; and to prevent the stealing or destroying of turnips; and to amend an act made in the second year of his present Majesty, for better regulation of attorneys and solicitors."

dated statutes were constructed from their fragments; thus rendering it unnecessary for the searcher among the customs laws, to go farther back than the year 1833.*

While urging the utility of a general code, and the importance of a complete or partial reconstruction of the law, Bentham did not lose sight of the immediate practical advantages of an improvement in the system of drawing the statutes so as to make them more intelligible to the public, and consequently more serviceable as rules of action. In an examination of the vices of the existing method of drawing acts of parliament, he found that there was a departure from the common colloquial and literary language of the country, which, instead of diverging from it in the direction of precision and conciseness, led to vagueness and verbosity. The departure from the ordinary forms of expression was thus an evil, not compensated by any advantage in the shape of a more scientific style. He found that there was unsteadiness in respect of expression, occasioned by a want of fixed words having definite ideas connected with them. The draftsman, not having in his mind any distinct nomenclature, overloads his work by employing a number of words to mean the same thing, lest, if he should restrict himself to one, he might choose one which did not fully embrace the meaning intended. In this manner, that which could have been well accomplished by the use of one word with a determinate meaning, is imperfectly accomplished by the use of several words without any fixed signification. Thus, there frequently occur such pleonasms as "all the powers, authorities, methods, rules, directions, penalties, clauses, matters, and things," "use, exercise, apply and put in execution,"† &c., all referring to the same thing, but by their number rendering what they refer to more vague instead of more clear. It is an additional defect referable to this source, that when the same thing is thus mentioned more than once, the collection of words by which it is referred to does not happen to be precisely the same on each occasion, and thus dubiety is created in the mind of the reader.

It was found that clauses of acts, instead of consisting of separate enactive propositions each with its own verb, constituted each of them, a series of sentences heaped together, the same verb serving for a variety of propositions. The bad effects of this system are two—it makes the sentence too long for full and clear apprehension by ordinary intellects; and it renders it liable, from its complexity, to dubiety and ambiguity of interpretation.

In an English act of Parliament, in each section the connexion given to the matter is commonly such, that when once the mind has entered upon it, no repose is to be had till it has reached the end of it: no, nor then neither, unless such be the strength of its grasp as to give assurance of its retaining, in a full and distinct point of view, the whole mass of the matter which, parcel after parcel, it had in the course of its progress through the section been taking up.

So much worse than absolute redundancy is longwindedness, that if in any instance, under the oppression produced by longwindedness, it were deemed necessary to seek relief, —relief would in many, and indeed in most instances, scarcely be to be found on any condition other than that of adding to the number of words. . . . .

Another imperfection of the first order, to which this imperfection of the second order will, whether constantly or not, be naturally and frequently conducive, is *bulkiness*. As the entanglement runs on, the obscurity thickens —as the obscurity thickens, it attracts more and more the attention of the penman:—fearing lest the mass should grow too involved, and through much entanglement too obscure for use, he sets himself to disentangle it—to point out this or that distinction in the provision meant to be made respecting the subjects thus involved. But as by words it was that the matter was entangled, so it is only by words that the disentanglement can be effected, or so much as aimed at: and thus it is, that while increase is given to *obscurity*, so is it to bulkiness.‡

* See on the subject of Codification, vol. iii. p. 155 *et seq.*, 205 *et seq.*; iv. 451 *et seq.*, 503 *et seq.*; v. 439, 546 *et seq.*

† Quoted from the Income Tax act, 5 & 6 Vic. c. 35.

‡ Works, vol. iii. p. 248-251. See on the subject generally—Nomography, or The Art of inditing Laws, vol. iii. p. 231 *et seq.* No better examples could be given of statutes drawn on the principles recommended by Bentham, than the Illustrations of his own system given by

So much with regard to those internal qualities in the construction of the laws, which might serve to make them accessible as a rule of action. An external means of accomplishing the same end, is, in the Promulgation of the laws when they are enacted, among those whose obedience they demand. Bentham looked

Mr Symonds, in his communication on the "Drawing of Acts of Parliament," presented among the Parliamentary papers in 1838. The following is a portion of the act 4 & 5 Will. IV. c. 31, for the reduction of the 4 per cents, given along with Mr Symonds' improved draft. It has to be noticed that in his original there is a clause for explaining the abbreviated expressions used by Mr Symonds.

EXISTING ACT.

I. Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all and every person and persons, bodies politic or corporate, who now is or are or hereafter may be interested in or entitled unto any part of the National Debt redeemable by law which now carries an interest after the rate of four pounds per centum per annum, and is usually known by the name of "Four per centum annuities one thousand eight hundred and twenty-six," payable at the Bank of England, and who shall not signify his, her, or their dissent in manner hereinafter mentioned, shall, in lieu of every one hundred pounds of such four pounds per centum annuities, respectively receive and be entitled to the sum of one hundred pounds in "The new three pounds and ten shillings per centum annuities," and to carry an interest after the rate of three pounds and ten shillings per centum per annum, and so in proportion for any greater or less amount than one hundred pounds of such four pounds per centum annuities respectively; and that the dividends thereof shall be payable half-yearly, at the Bank of England, upon the fifth day of January and the fifth day of July in each and every year; and the first dividend, namely, one quarter of a year's dividend, on the said new three pounds and ten shillings per centum annuities shall be payable at the Bank of England on the fifth day of January one thousand eight hundred and thirty-five; and that the said new three pounds and ten shillings per centum annuities shall be subject and liable to redemption at any time after the fifth day of January one thousand eight hundred and forty, and not before that period; and that the said new three pounds and ten shillings per centum annuities shall be free from all taxes, charges, and impositions, in the like manner as the said four pounds per centum annuities.

II. And be it further enacted, That the interest and dividends payable in respect of the said new three pounds and ten shillings per centum annuities shall be charged and chargeable upon, and shall be issued and paid out of, the Consolidated Fund of the United Kingdom of Great Britain and Ireland, in the same manner as the interest and dividends of the said four pounds per centum annuities respectively now stand charged on the said Fund.

III. And be it further enacted, That all and every person and persons, bodies politic or corporate, who shall not, on or before the twenty-eighth day of May one thousand eight hundred and thirty-four, signify his, her, or their dissent from accepting and receiving a share in the said new three pounds and ten shillings per centum annuities, in lieu of his, her, or their respective shares in the said respective four pounds per centum annuities, or for any part of such respective shares in such last-mentioned annuities, in the manner hereinafter directed, shall be deemed and taken to have consented to accept and receive the same: Provided always, That if any proprie-

IMPROVED DRAFT.

II. CONVERSION OF FOUR PER CENTS.

1. *Conversion.*

£3½ per cents.] AND BE IT ENACTED, That the said four per cents shall be converted into three-and-a-half per cents.

2. *Redemption.*

Period of Redemption.] And such new three-and-a-half per cents shall not become redeemable until the fifth day of January one thousand eight hundred and forty. And thenceforward they shall be redeemable.

3. *Consolidation.*

New three-and-a-half per cents.] And the several annuities of three-and-a-half per cents created by this act shall be consolidated with the annuities bearing interest at the rate of three-and-a-half per cent existing at the time of the passing of this act, called the "New three-and-a-half per cent annuities." And these annuities shall be one capital or joint stock.

DISSENTS.

1. *Rights of Dissentients.*

Payment of Dissentients.] AND BE IT ENACTED, That every person who dissents from accepting the new three-and-a-half per cents in lieu of the said four per cents shall be paid off.

Periods of Dissenting.] But all persons so dissenting shall signify their dissent to the Bank of England, within the time specified in the schedule of dissentients, contained in the Appendix of Schedules.

2. *Absent Dissentients.*

Proof of Absence.] And in order to entitle a dissentient proprietor, absent from the United Kingdom, or from Europe, to the extended periods given in the said schedule, he shall prove to the satisfaction of the Governor and Di-

upon this service as one of the most unexceptionable in which the public money could be employed. He considered that every practicable means should be adopted for bringing before the eyes of the citizen the laws he is called on to obey, and that, in their distribution, profusion is the safer error. He thought that so much of instruction in the laws as could be conveyed to the mind in youth should be taught in schools, and that the books in which the laws are printed, if not given gratuitously, should be purchaseable at a merely nominal price. He proposed that the portions of the law which affected particular classes of persons should, separately from the general body of the law, be distributed among those whom they particularly affected. Thus, each soldier on enlistment should receive a copy of The Soldier's Code,* and each mariner on joining his profession should receive a copy of The Seaman's Code. † An individual conducting a trade subject to the operation of the Revenue laws, should, on the same principle, have a copy of The Revenue Code.

He proposed that each separate description of contract should have a species of paper set apart to be used in embodying its terms; and it was one of the services to be accomplished by this arrangement, that the paper should contain on its margin, an abridgment of the law relating to the contract. In markets and other places of public resort, the peculiar regulations of which might be of sufficient brevity for being so promulgated, the old Roman system should be adopted, of having them legibly set forth on tables adapted to public inspection. In Courts of justice, the forms of Procedure, and the respective duties of the Judges, the Officers of Court, the Lawyers, Parties, Jurors, and Witnesses, should be exhibited in the same manner.‡

To enable the public the better to

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tor or proprietors of the said respective four pounds per centum annuities shall not have been within the limits of the United Kingdom at any time between the eighth day of May and the twenty-eighth day of May one thousand eight hundred and thirty-four, both days inclusive, but shall have been in any other part of Europe, it shall be lawful for such proprietor or proprietors to signify such dissent at any time before the sixth day of July one thousand eight hundred and thirty-four: and if any such proprietor or proprietors shall not, at any time between the eighth day of May and the fifth day of July one thousand eight hundred and thirty-four, both days inclusive, have been within any part of Europe, it shall be lawful for him, or her, or them to signify such dissent at any time before the first day of March one thousand eight hundred and thirty-five; such proprietor or proprietors proving to the satisfaction of the Governor and Directors of the Bank of England, or any two or more of them, his, her, or their absence from the United Kingdom, or out of Europe, as the case shall happen, and that his, her, or their share or shares of such four pounds per centum annuities stood in his, her, or their name or names respectively, or in the name or names of any one or more trustee or trustees on his, her, or their behalf, on the eighth day of May one thousand eight hundred and thirty-four, in the books of the Governor and Company of the Bank of England; and provided also, That such proprietor or proprietors so absent from the United Kingdom, or out of Europe, shall signify his, her, or their dissent within ten days after his, her, or their return to the United Kingdom.

rectors of the Bank of England, or any two of them, (1.) The fact of absence, within the times limited in the schedule; and, (2.) That his share of such four per cents stood in his name, or in the name of a trustee on his behalf, on the eighth day of May eighteen hundred and thirty-four, in the Bank books.

* See Works, vol. ix. p. 355.

† Ibid. p. 412. This arrangement is proposed in conjunction with a Plan for registering merchant seamen, and for defining their duties and the power of their officers. The principle of these suggestions has been realized in the Merchant Seaman's Act, 5 & 6 Will. IV., c. 19.

‡ See, generally, as to the Promulgation of the Laws, Works, vol. i. p. 157 *et seq.*; iv. 455; vi. 65, 522, 578.

comprehend the full tenor and object of the laws when promulgated, he proposed that they should be accompanied by a *Rationale* or series of reasons. The necessity of adopting such a course would, he maintained, make the laws themselves more rational; for legislators, being bound to give reasons to the public, must have reasons to give, and would not be likely to frame laws on the dictate of caprice or tyranny. An acknowledgment of the principle is to be found in the Preambles of Acts of Parliament; but as in this case there is only one general reason given for the tone, as it were, of the whole statute, and not a reason for each individual enactment, the check is, necessarily, very imperfect. Having the reasons along with the laws, the public, it is believed, would not only have more confidence in the justice of the enactments, but, seeing their use, would have a guide to honest and sincere obedience, which the simple terms of the command conveyed in the law itself might fail to provide them with. There have been many breaches of law that would never have occurred, if those who had committed them had been reasoned into the opinion that the laws were just.*

The principles on which the judicial establishment of a country should be founded, occupied Bentham's mind from an early period of his life to the end of his days. In 1790, he published the draught of a Code for the organization of the Judicial establishment in France;† and the arrangements there suggested only differ in their being less fully developed, from those which he embodied in the Constitutional Code,‡ at different times subsequently to the year 1820. In both, there is a system of Local courts, for the purpose of bringing justice as near as it can practicably be brought to every man's door; the general principle of admeasurement being such as will allow every inhabitant of a district to go to and return from the Judgment seat in one day. In both works, and in almost all his numerous works on Law Reform, he desired that justice should be administered in each court by a single judge, for the reasons of which a sketch has been given in the preceding Section in connexion with responsibility (see p. 50-51.) He thought that the habits of a practising lawyer, keeping the mind in a constant state of active partisanship, did not form a suitable school for judges, whose duty it is to hold the scales of justice with a steady hand. On the other hand, he considered, that permitting any class of men, not trained to the study of law and the weighing of evidence, (*e. g.* justices of peace and municipal magistrates,) to administer justice, was nothing better than a permission to one section of the community to sport with the property and liberties of all others. His own plan contemplated the education of a class of lawyers for the bench. He suggested the appointment of deputes to the regular judges; and, through the instrumentality of this arrangement, he would provide for those who have been induced to fix upon the bench as their profession, getting an introduction, and the opportunity of practice and experience, as assistants in the lowest grade, rising thence according to their abilities and exertions.§ He held that the judgment-seat should be accessible at all hours of the day and night—that justice should sleep only when injustice slept. To provide this accessibility at the smallest cost, is the object of many minute provisions in the Constitutional Code.‖ The delays occasioned in England by the system of circuits and vacations, are the object of repeated and severe denunciation.¶

A common feature of both his earlier and later works on judicial reform is, the appointment of Public Prosecutors, and of Advocates for the Poor.** The latter proposition is connected with the

* See Works, vol. iv. pp. 454, 491, 538; viii. 517; ix. 1.

† Ibid. vol. iv. p. 285.

‡ Ibid. vol. ix. p. 454 *et seq.*

§ See Works, vol. ii. p. 22; iv. 357, 368; ix. 544 *et seq.*, 592.

‖ Ibid. vol. ix. p. 515 *et seq.*; iv. 356.

¶ Ibid. vol. iv. p. 336; vii. 243, 371 *et seq.*

** Ibid. vol. iv. p. 354 *et seq.*, 384 *et seq.*; ix. 516 *et seq.*, 570 *et seq.*, 577 *et seq.*

view, that justice, instead of being sold to the highest bidder, should be presented gratis, whenever this can be done without preponderant mischief. The evil that might occur from offering the assistance of the law to every one who might desire it, without cost or personal exertion, would undoubtedly be the entailment on the community of ceaseless lawsuits, carried on by all its litigious members. On the other hand, there is the consideration, that it is not he who gains it only who profits by a lawsuit, but that the public have an advantage, in the establishment of a precedent, and the exhibition of justice vindicated. The expense of employing lawyers in the vindication of a just claim, is of itself sufficiently oppressive: the addition of taxes on law proceedings, and fees to the court and its officers, is simply the taking advantage of an opportunity for pillaging the oppressed. The opinions of Bentham have been so far conceded to, that taxes on law proceedings have been abolished, and that fees have been, in almost all the courts of the empire, much reduced. Still the nation does not provide sufficiently for justice being done to the helpless. When a man, because he cannot afford to pay for it, is denied the service of the law to procure justice, it is proclaimed that the nation is still only on its way from that state of things "where he should take who has the power, and he should keep who can."*

He considered the system of having different courts for the adjudication of different classes of causes, to be most perniciously productive of complexity and expense. The division of the English system — a division happily unknown in Scotland and in the rest of Europe—into common law and equity, afforded him a flagrant exemplification of the evil. The law by which each man's rights and duties are defined should be homogeneous,—each portion connected with the others, and the whole capable of being brought within the grasp of one mind. If one judge cannot administer the whole law, what chance has any private citizen of knowing enough of it to keep him from transgression? It does not follow that the division of the law into two systems makes any approach to a division of labour. The effect generally is—and it is strikingly developed in England—to make each portion more complicated and extensive than the whole would be under a uniform system. The very preservation of the boundaries between two such systems creates a science by itself. He thought, however, that while the jurisdiction of the courts of ordinary law ought to be partitioned according to geographical principles solely, that there was still room, in the case of persons separated from the position of the ordinary citizen, for tribunals having in view the administration of their rights and obligations among each other. On this principle he contemplated courts-martial, and ecclesiastical courts, as tribunals of exception.†

With regard to trial by jury, on which Bentham has written much,—partly in relation to the best method of reforming it, and partly for the purpose of rationally limiting its operation,—he was of opinion that, in the case of criminal charges, it was a necessary protection; but that the existing system demanded many reforms, and among others the discontinuance of unanimity, and the abolition of the Grand jury. In civil actions, he thought the operation of the system should be much restricted. He objected to the unbending rule which forces the case before a jury, when both parties might prefer the decision of a judge. He considered that the part which a jury has to act—that of a committee of the citizens at large to watch the operations of the bench—need not be so palpably exhibited, and that it might be presumed that the judges have honesty and public spirit enough to do right, without the constant presence of so imperative a check. In a country where there is publicity for justice, and a high tone of public opinion, he be-

* See Works, vol. ii. pp. 211, 431, 573 *et seq.*; vii. 199

† See Works, vol. iv. p. 334; v. 473, 525; vi. 134; vii. 291 *et seq.*

lieved that supervisance, especially if added to the influence of the appeal system, would make judges cautious, and would secure a nearer approach to clear substantial justice, than can be found in the oscillations of the jury system. He proposed then, that in ordinary civil cases, the jury should be had recourse to only in the way of appeal,* —a plan by which, while no one who wished to have his case judged "by his country," as it is termed, could complain that the boon was refused him, the number of jury trials, and, consequently, the expense of the system, would be much diminished. In the Constitutional Code, the juries, under the republican system there promulgated, are merely to be assessors to the judge, under the title of Quasi-jurors.†

The method of so conducting the proceedings of the courts of Law, that they might administer justice accompanied with the smallest possible amount of delay, vexation, and expense to the litigant, is a subject referred to in almost all the works of Bentham, which bear on law reform. One work, "the Principles of Judicial Procedure,"‡ is devoted to the organization of such a system. The various facilities for coming rapidly at the knowledge of the question at issue, keeping up a communication between all the parties concerned in the discussion, securing obedience to the decision pronounced, &c., cannot be here enumerated;§ and it will be impossible to go into detail beyond a slight glance at that principle of personal responsibility, which peculiarly characterizes the whole system. As the public interest requires personal responsibility on the part of all public officers, so does it on the part of those who, by an appeal to the law, exercise the privilege which every one should be possessed of, of demanding the performance of judicial services—in other words, of litigants. To this end it is a leading principle of judicial procedure, that litigants should be confronted with their judges and with each other, that they should be questioned as to the statements on which they found, and that they should be made responsible for falsehood, whether it be uttered with the deliberate design of deceiving, or be rashly stated without that amount of consideration which a man gives to his words when the consequences of a mistake fall upon himself. The litigant is to be entitled to employ a professional assistant; but grades of professional lawyers transacting different departments in lawsuits—as represented by barrister and attorney in English practice—are objected to. In an ordinary lawsuit, the country attorney receives his client's communication, and transfers it to the town attorney, who communicates it to the barrister. From the variety of the channels through which the history is thus communicated to the judicatory, impediments are created to the discovery of the party who may be the author of any falsehood that may have been uttered; and there is a general frittering away of responsibility for the proper conduct of the cause. Let the party himself be accessible when wanted, and let him have but one adviser between him and the judge: falsehoods will then be easily traced to their source, and being so traceable, will not be so readily committed.‖

The privilege possessed by counsel, of stating facts which they do not believe to be true—whether in civil or in criminal cases—is denounced as tending to the perversion of justice, and to the confusion, in those quarters where bad example is most dangerous, of the distinction between right and wrong—between truth and falsehood. The false morality of the profession, on this point,

* See Works, vol. ii. p. 122.

† Ibid. vol. ix. p. 554 *et seq.*

‡ Beginning of vol. ii. of the Works.

§ In connexion with the subjects of Evidence and of Punishment, some of the views in relation to procedure are elsewhere incidentally noticed.

‖ In the operations of Procedure, various incidents are found which tend to fritter away personal responsibility. Thus, witnesses examined on affidavit are represented in the minutes of evidence in the third person; and there is thus an article of confusion introduced which prevents them from determining whether their evidence is accurately minuted or not.—See Works, vol. vi. p. 439.

is repeatedly and severely attacked by Bentham; and his animadversions have in view the alternative of either producing a legislative remedy, or, by the force of reasoning on the public and the profession of the law, of raising the standard of morality in relation to this practice. To see the full extent of the hardships that may be occasioned by fraudulently false, or lax statements in relation to lawsuits, it must be remembered, that the very fact of requiring to be a party to a litigation is itself a hardship, which, if it cannot be saved to the party who is in the right, should at least be so arranged that its pressure may be as light upon him as it can be made. The person who, by a certain document called a writ, can compel another man to lodge a document in answer, or to appear before a court, possesses a power of persecuting his fellow citizens, which no one should possess uncontrolled. If there were no punishment, by the infliction of costs or otherwise, on the *malâ fide* suitor, his power of annoyance would be nearly absolute; and it is precisely to the extent to which there is a check on his privilege of telling falsehoods, that the public are protected from the machinations of the judicial persecutor. Where there are great inequalities in point of wealth, the extent of hardship which may be thus committed is enlarged; and thus the rigorous enforcement of veracity, in legal pleadings, is the poor man's protection against the tyranny of the rich.*

SECTION VI.

PRINCIPLES OF PUNISHMENT.

The end of punishment is the prevention of crime; and all punishments inflicted under any other impulse, are wasted, or run the risk of being so. There is no other criterion of punishment which can be a fixed one. There may be mistakes and disputes as to what description of punishment is in reality best calculated to prevent crime; but with this principle in view, reasoners have a common field of argument; and the course of experience, enriched by the collection of statistical facts, will check aberrations, and bring the disputants more closely to each other in their mutual approach to accuracy. Those principles of punishment, if they can be called principles, which are involved in popular dicta, are as vague and indefinable as the human mind is various in its passions and prejudices. The simple word "ought," sometimes involves the whole of the principle expounded. Murder *ought* to be punished with death. Forgery *ought* to be punished with death, &c. The supporters of a ministry will say, "sedition ought to be punished with transportation," because they wish to humble and persecute their opponents. The opposition will say it ought not to be so punished —wishing to protect their friends from evil. When a riot takes place at an election, the party injured says the conduct of the mob was "dastardly brutal and ruffianly, and a parcel of them should be hanged:" those on the other side "are far from vindicating the conduct of the rioters; but it was a mere petty ebullition of party spirit, and a few days imprisonment will be a severe enough retribution."

But it is not only in offences of a political character that the divergencies of the popular principle of punishment are exhibited. Each man, with his mind concentrated on his own interest and pleasure, holds all offences that militate against them as the most atrocious with which society can be visited; and when he has the power, he acts the Nero and Domitian, and exterminates those who give him trouble. Thus is it that the landholders of England, being resolved, at all hazards, to preserve to themselves the sports of the field, and having the power, through their pre-

* See, besides the Principles of Procedure, Works, vol. ii. pp. 58, 73, 577; iv. 318; vi. 136, 297, 337; vii. 202, 230, 262, 373.

ponderant representation in parliament, of making what laws on the subject they think fit, have enacted a code of game laws, which renders the preservation of the lives and morals of the people secondary to securing the monopoly in the destruction of hares and pheasants; and makes provision that the country should become depopulated by the transportation of criminals, rather than that the squire's preserves should be thinned.

When an attempt is made to involve the popular feeling on the subject of punishment, in a proposition or principle, it does not in general become more reasonable. It is said that the punishment "should be equivalent to the offence;" or "should be of the same character as the offence;" or "should be like the offence." There are no two things which less admit of real parallelism (however much they may of imaginative) than punishments and offences. Of two persons, precisely in the same rank of life, and of the same bodily frame, the one gets the other held down by accomplices, and inflicts on him certain blows with a stick. In this case it would not be difficult to assign a punishment precisely the parallel of the offence. But take another case. A thief puts his hand in a banker's pocket as he is returning home from business, and extracts therefrom a bundle of bank notes. Where are the elements of similarity in the position of the two parties, out of which a punishment similar to the offence can be created? Nor, if the problem of finding a parallel could be solved, does it appear very distinctly how the public could be benefited by the elaboration of such a specimen of curious uniformity.

But another principle of punishment, and by far the most common, (for it has existence in many a bosom which is unconscious of its presence,) is retaliation —in other words, revenge, or obedience to the impulse of wrath. The case of an election mob cited above, may serve as an illustration. The principle of retaliation is frequently vindicated, as if it could be reduced to a fixed rule: but how can it be so, since, as has been already shown, there can be no parallelism between punishments and offences? For the very small number of cases which occur, exactly in terms of the instance of assault above cited, it would be easy to fix the rule of retaliation, by making the punishment identical with the offence. But who is to make a rule of retaliation for the banker robbed of his notes? The legislator has the whole field of inflictions out of which he may choose one which shall be a retaliation, and it is needless to say that his view of retaliation will be whatever his passions dictate. If the legislature should consist entirely of bankers, when he who has been robbed joins his peers with an empty pocket and inflamed passions, which sympathy and common interest propagate through the assembly, the retaliation, it is easy to believe, will be fierce and crushing. If the legislature should consist entirely of spendthrifts and pennyless younger sons, the sympathetic excitement would not be so intense, and the punishment would be more reasonable. If the legislature should consist of blacklegs and pickpockets, the worthy banker would be laughed at, and sent about his business. This last result, intended to exemplify the fallacy of any appeal to parties interested in an injustice, is not without a modified exemplification in this country. Bentham repeatedly refers to the exemption of real property from simple contract debts—the power of landed proprietors to undertake pecuniary engagements and protect their property from being seized in fulfilment of them. It was not until after his death, that this anomaly was partly rectified. *

It has to be noticed, that the retaliatory and other barbarous principles of punishment have produced counter-fallacies among those who have been groping about for the sound principles of punishment, and have been unable to find them. Thus, those who have an indistinct view of the defects of the punishment of death, say, "You are not entitled to deprive any man of the life which God has given him;" or, perhaps, "you are not permitted to take life, but

* See Works, vol. v. p. 533; vi. 85.

for the crime of murder." There is a text in Scripture which, referring to the effect of violence in rousing the retaliatory propensities of mankind, says, "Whoso sheddeth man's blood, by man shall his blood be shed"—meaning, that while men are beings of passion as they are, one violent death will naturally follow another. It is under the shadow of what is apparently a misinterpretation of this text that the exception to the rule as to the title to punish with death is generally ensconced. It is to capital punishment that the question of title is usually restricted, but sometimes it is extended to others—thus, "you are not entitled to make a slave for life, of a man born free," &c.—the term, for life, being generally inserted, because, if the punishment of slavery or the restriction of liberty were abolished, it would be difficult to find a means of inflicting any punishment on any one who has not palpable property capable of being seized. In the utilitarian system, the question of title is very simply disposed of, by striking the balance of good and evil to society at large. If there are cases in which the infliction of the punishment of death leaves a balance of good—that is to say, if more evil would be done to society through the inducement to crime that would exist were the punishment more lenient, than the evil occasioned by the infliction of the punishment—then let death be the allotted penalty. It will be for every man who has anything to say in the legislation of his country, to examine the question according to his abilities, to strike the balance, and to act accordingly. The conclusion come to by a member of the legislature will bear strongly on the result: that of an elector will have less effect, and that of a non-elector whose influence on the legislature is merely that of reasoning, will have still less: but it behoves them all, as members of society, to take the same method of coming to a right judgment.

It has been already remarked, that the Utilitarian Philosophy, like the Baconian, has not tended so much to point out any perfectly new direction to the human intellect, as to keep it steady in a course of which it had previously but a slight and vague knowledge, and from which it was every now and then straying. There is perhaps no department of the subject in which this is better developed, than the philosophy of punishment. On appealing to a moderately educated man in any civilized country, he would probably be found to admit, in some vague or general terms, that the object of punishment is the repression of crime. Yet so far have men, in the pursuit of their secondary ends, lost sight of this, the main one, that in England it became a general feeling, that it mattered not how many murders were committed, provided some one were hanged for each. Of the legitimate results of a scientific inquiry into the subject on the utilitarian principle, such as that carried on by Bentham and his disciples, the improvements which, for several years past, the legislature has been making in the administration of criminal justice, are so many illustrations.

In calculating the proper weight of punishment, the first element that comes into consideration is the offence. When it is scientifically examined, an offence is found to consist of more elements of evil than those which directly meet the senses. Bentham found a simple method of classifying the evils of a mischievous act, by dividing them into the primary and the secondary.* A man is murdered on the high-way: the death of the individual is the primary evil. The secondary evils arise out of the danger there exists of other people being murdered either by the same man, or by others following his example, and the alarm so occasioned in the neighbourhood. But it depends on a number of minute circumstances, what will be the extent of this danger and alarm, and, as a consequence, what will be the best legislative measures for protecting the people against them,—and hence arises Bentham's scientific analysis of crimes and their results, and his rules for adapting the punishment to the exigencies of each occasion.

* See Works, vol. i. p. 69 *et seq.*, 215 *et seq.*; vi. 535.

To this end, in looking at the consequences of a mischievous act, among other circumstances, the following are kept in view: 1st, The state of the actor's mind as to voluntariness or involuntariness. Thus, deliberate murder shows a disposition at war with mankind, from which any one may suffer who is in the position of supplying the assassin with a sufficient motive; while death, occasioned by carelessness, shows a want of respect for life, which the public must protect itself from; and uncontrollable accident is a source of mischief which punishment cannot protect from, and as to which its infliction would be thrown away. 2d, The motive of the offender. Thus, the motive of acquisition being in continual action, is found to be the most dangerous. When a man slays for vengeance, he only strikes his enemy; if he be allowed to go unpunished he will be prepared to slay some one else, but not till there has been a cause of enmity. The example of his impunity will encourage others to slay also, but only their enemies. But when a man murders for the sake of robbery, he acts on a motive which all men feel more or less towards all others; and those whom impunity encourages to follow his example, see victims in all of their fellow-beings who have anything to be deprived of. Other circumstances to be held in view are, the situation of the perpetrator in regard to the means of repeating the act, his means of concealing such acts, his means of escape, the obstacles he has overcome, the extent of temptation which was necessary to induce him to combat with them, &c. The position of the party injured must also be taken into view. Females, children, and invalids, require protection from acts against which able-bodied men need none. The poor require protection from injuries to which the rich are not liable,—such as oppressive litigation. The rich, on the other hand, have their peculiar demands, chiefly arising from the superior amount of their property, on the protection of the law. There are, besides, many other circumstances in which the richer and higher classes of society are subjected to evils which do not fall on the lower. Their tastes and habits are more fastidious, and should be protected from wanton outrage. They possess a greater proportion of objects in which there is a "value in affection,"—such as heir-looms, old pleasure-grounds, &c.; and the law ought to look on these as having a value beyond their mere intrinsic worth.*

When the extent of the evil to society occasioned by each offence, has been as accurately estimated as human knowledge and reason admit of its being, the counteracting power, in the shape of punishment, has then to be graduated accordingly. And here it has to be kept in view, that the infliction of punishment is itself an evil—an evil not only to him on whom it is inflicted, but to the community by which the trouble and expense of inflicting it have been incurred. Every item, therefore, of punishment, beyond what is necessary to the production of preponderant good, is punishment wasted—is a wanton act of mischief—is a crime. If it can be proved that a crime can be suppressed by the infliction of a year's imprisonment, and that the extension of imprisonment to two years will not make the suppression of it more complete, or tend more to the benefit of the public,—then is the imposition of an imprisonment for two years, instead of for one year, a wanton act of injury. It is seldom that the superfluous punishment is designedly added to the necessary: the whole is generally awarded in rashness and ignorance, and thus resolves itself into the minor offence of a want of due care for the welfare of the public. Who shall justify the infliction of a year's imprisonment, wantonly inflicted upon a man, though he be a criminal? If a justification be offered, let the following case, for the sake of distinctness, be taken. A man is tried for an offence, and the adequate punishment awarded against him is a year's imprisonment. When he leaves the prison, he is again seized, and subjected to another year's imprisonment; not because he has committed any fresh offence—not because his previous punishment was inadequate—but

* See Works, vol. i. p. 322.

because he has been a criminal; and such a person may be punished, just as the prejudices and passions of those who administer the law may dictate.

The penal code being an institution intended for the benefit of the public at large, and the public consisting of individuals, there are two classes of persons prominently interested in its administration, whose claims have been overlooked in empirical systems of criminal law—the criminals themselves, and the individual against whom the crimes are committed. The principle of vengeance is at the root of the omission in both cases—the laws retaliate on the criminal, and the act of retaliation is considered a sufficient compensation to the injured. The utilitarian system views the matter differently—conceives that the person who has been robbed is not a savage, who is to be satiated with the blood of his adversary—and enjoins the criminal to labour to the end of making compensation, so far as it may be practicable, to the injured party. With regard to the criminal himself, the punishment, on the principles above laid down, must not be more than what is necessary to serve the legitimate purposes of punishment. If, while he is undergoing it, the convict can be reformed, there is not only a positive good done to himself, but a benefit is conferred on society, by restoring to its bosom a useful and moral man, at the expiry of the period of imprisonment. If, along with the accomplishment of this object, and of compensation to the injured party, the criminal can be compelled or induced to work, so as wholly or partly to defray the cost of his imprisonment, there is a still farther gain to society, by the reduction of a heavy burden—a burden which has a tendency to weigh against the zeal of the public in the enforcement of the laws.

Looking beyond the individual himself, to the effects of his punishment on society at large, reason will be found for deciding that it should be exemplary. As this is the element from which it derives its quality of awing the public into obedience to the laws, there might at first sight seem reason for concluding that the punishment cannot be too severe for such a purpose; but a little consideration will show, that it is its adaptation to this end that makes it chiefly of importance that the punishment, if brought up to the point which will be sufficient to deter by example, should not exceed it. Where punishments are not meted to offences, the criminal classes of the population see that the law hits at random; and, with the characteristic improvidence of their order, they gamble on its chances. Moreover, where punishments are unpopularly severe, the people will not give their assistance to the enforcement of the laws. The annals of English jurisprudence present even the official guardians of the law, the judges, joining with prosecutors, juries, and witnesses, in saving the criminal. The punishment of death for forgery has strikingly illustrated this truth. At the present moment the duellist is confounded with the assassin who steps behind his enemy and secretly stabs him. The public feel that the duellist injures society and should be punished; but they revolt at such a barbarous confusion of names and punishments: and the manslayer escapes by the connivance of the witnesses, the jury, the prosecutor, and the judge himself.

To deter others by the force of example, the punishment must, as nearly as human means can make it, follow the crime with the same regularity with which natural effects follow their causes. The *certainty* of imprisonment with hard labour will do far more in the way of prevention than the *chance* of suffering death. A proper allotment of punishment is one of the main ingredients in this certainty—others have been devised by Bentham, in his projects for the reform of criminal procedure.

It is necessary to the efficiency of the penal law, in the way of example, that the offence and the transactions concerning the trial and punishment, should not be encumbered with a barbarous technical nomenclature, which may shroud the real nature of the connexion between the crime and its punishment from the public eye. It is further necessary that the innocent

should not be involved with the guilty —a result produced by the forfeitures, and corruption of blood, of the English law. The punishment should be awarded in virtue of a fixed law, and should neither actually be, nor appear to be, influenced either in increase or diminution by the will of an individual. Thus, laws awarding extravagant punishments, with a power of pardon or diminution, are unserviceable in the way of example. The punishment fixed by the law is either too high or not too high. If it be too high, it should be reduced: if it be not, the exercise of the pardon power, popularly called the prerogative of mercy, is an injury to society. Thus, wherever the pardon power is rightly exercised there is tyranny in the law—where it is wrongly exercised it is itself tyranny.

It is of the highest moment, for the sake of example, that the punishment should proceed, as far as may be practicable, before the eyes of the public. This object, as well as that of the reformation of the convict, is defeated by the plan of transportation to distant colonies. The criminal is removed from the sight and knowledge of those companions in iniquity to whom it is essential that his punishment, coupled with its cause, should be present as a perpetual warning; and instead of a lively consciousness of the sufferings and privation he is undergoing, experience too truly shows that they often envy his imagined lot, and raise day-dreams of independence and a wandering life in distant and fruitful lands, which serve a very different purpose from that of a solemn warning to depart from their evil ways. Another main object to be kept in view in punishment, is the avoidance of contamination. This is an evil which needs no further explanation. At the time when Bentham wrote, the jails were academies for instructing the youth, whom a petty indiscretion or a small offence had driven to them, in the higher and more complex walks of crime. Many reforms have been made in this department of prison discipline: but the repeated complaints of the press show how much remains still to be done.

It was to accomplish these objects, in relation to punishment, that Bentham devised the principles of prison discipline, expounded in his work on the Panopticon. The plan of the building, which was to admit of an inspection of all parts from a central point, was suggested by the architectural ingenuity of his brother, Sir Samuel Bentham. In this institution the prisoners were, without being subjected to the enervating and uncivilizing influence of solitary confinement, to be kept from communication with each other. They were to be kept at hard labour. As unproductive compulsory labour for the mere sake of punishment is in itself uneconomical, has no influence in improving the criminal, and tends to sour and harden his mind by the daily recurrence of inflictions, which have no other end but his personal vexation, the convicts were to be taught useful trades, as an encouragement to work; and, that they might have some opportunity of knowing how pleasing are the fruits of honest industry, they were to receive a portion of the results of their meritorious and successful exertion. They were to receive the ministrations of religion, and, to a certain extent, to be educated. Provision was made to supply them with a sufficiency of wholesome food, to ventilate all their apartments, and to keep them clean. Various methods were propounded for keeping their intellects from being stagnant, or viciously employed, when their hands were idle. And, finally, to prevent their being thrown upon the world with a tainted character, which might, by depriving them of the means of gaining their livelihood honestly, drive them back upon their old courses, arrangements were proposed for providing them with employment after their period of imprisonment had expired.*

But the founder of the Utilitarian

* On the subject of Punishment generally, see the Rationale of Punishment, Works, vol. i. p. 388 *et seq.* See also the Principles of Morals and Legislation, at the commencement of vol. i.; iv. p. 1 *et seq.*; ix. 22 *et seq.* On the subject of the Panopticon, see vol. i. p. 498; iv. 39 *et seq.*; xi. 96 *et seq.*

system, looking upon punishment of every description as the application of medicine to a moral disease, goes back into the operations of the mind, that he may discover the causes in which the disease has its origin, and prescribe a regimen conducive to the preservation of the moral health of the public. In a system of punishment, he sees the political sanction only put in motion; but he finds that the Religious, and the Moral or Popular sanction, have each their respective spheres of action, in which they may be employed to restrain the mind from vicious inclinations. It is not by its restrictive action, in regard to this or that individual offence, that either of these sanctions will operate in its largest shape; but, by superinducing on the mind habits of thought so much opposed to crime, that when an opportunity of committing it occurs, the principle of restraint being an established feature in the mind, there is no actual struggle to resist the seeming temptation. In ordinary acquisitive crimes, the operation of the sanctions is strongly marked. To the greater portion of the well-educated and well-trained part of the population of Britain, an opportunity of committing a lucrative theft can scarcely be said to hold out any temptation; and the question, whether detection and punishment would be likely to follow—*i. e.* whether the political sanction would be called into operation, is not considered, for the religious and moral sanction have long ago fixed the course of action. Of the beneficial effects of the religious sanction, it is needless to adduce illustrations in a country where its influence is so strongly felt. As its good influences, however, are powerful, so are its evil, when it is directed to bad purposes. Its evil effects are—religious wars, persecutions, and assassinations; polemical disputation carried to the extent of rousing the bad passions; priestcraft; superstition; spiritual pride; and that chronic hypocrisy, so vividly exhibited in the character of Tartuffe, which, without directly assuming religion as a cloak to crime, arrogates a special familiarity with the Deity, which sanctifies all the worldly desires, and bad passions of "the elect." As an illustration of the extent to which the operation of the sanctions may be ramified, the serviceable employment of the moral sanction in the prevention of violent crimes, may be found in the practice of inculcating humanity to animals in children. Minds callous to one description of animal suffering will not sympathize with another; and the murderer is nursed in the torturer of kittens. The knowledge of this truth is evinced in Hogarth's stages of cruelty, and in the popular belief that butchers are incapacitated to serve as jurymen. As already stated, Bentham was desirous that the legal sanction should be brought to the aid of the popular in this department, and that cruelty to animals should be restrained by strict penal laws.*

His works abound with the promulgation of secondary operative measures for keeping the population pure from criminal propensities, the majority of which, to a greater or less degree, have been, and still are, the subject of public discussion. Among the most prominent of them is National education. The system for the management of the poor, having for its end the drying up the sources of poverty, would, by the same operation, dry up the main sources of crime—(*see the next section.*) The arrangements for training pauper children —foundlings and the outcasts of society —would have the effect of subjecting a class, whose world of public opinion is the professional emulation of felons, to the restraints and superintendence of the better portion of society; and of giving to those, whose fate seemed to place them at war with honesty and the laws, an industrial interest in the well-being of their country, and in the administration of its justice. Calamity and disease are looked upon, independently of their own distinctive evils, as generators of crime; and it is in this view that their prevention appeals to the interests and self-preservation of those who are, or may think themselves, ex-

* See Deontology, Principles of Morals and Legislation.

cluded from their influence. The officers nominated in the Constitutional Code, for preserving the public against accidents and calamities, for guarding the public health, and for removing objects which, from their being noxious to the senses, are both dangerous to the health and demoralising in their immediate operation on the habits,—are thus so many active agents clearing the moral atmosphere from the malaria which produces mental disease.*

SECTION VII.

POOR LAWS, EDUCATION, AND OTHER INSTITUTIONS FOR NATIONAL AMELIORATION.

At the time when Bentham devoted his attention to the poor law, (1797-8,)† the then existing system had proceeded for some years in that course of degeneracy from the strict principles of the statute of Elizabeth, which commenced with Gilbert's Act in 1782, and was consummated by East's Act in 1815. Long before he could get others to join in the opinion, he saw that any system founded on the principle of merely relieving suffering, and not containing within itself restrictions calculated to stem the growth of pauperism, would gradually undermine the industrial stamina of the country, by creating more pauperism than it relieved. Subsistence being, as already stated, (see p. 31,) one of the main objects of the law, according to his division, he thought it the duty of the legislature to provide a system which should obviate, as far as human foresight could, the chance of any human being suffering from starvation. In accomplishing this, however, it was necessary to keep in view the counter-error of giving a boon to indolence, by allowing the idle pauper to consume the wealth of the industrious and enterprising producer.

The method by which he proposed to adjust the proper medium, was the same in its leading principles with that which was lately sanctioned by the legislature, as the result of the searching investigation of the Commission of Inquiry,—the rigid application of the Labour test to the able-bodied, and the supervisance of all, by their location in buildings under the inspection of the officials and the public. He was able to foresee the evils of the strictly parochial system,—the comparative costliness, and propensity to jobbing in small local establishments,—the restrictions on the freedom, and consequently on the productiveness of labour by the settlement laws,—the abuses of all sorts that in remote districts might be preying on the vitals of society unobserved,—and the cruel hardships to which those whose position entitled them to relief might be subjected, from their not being on the right spot when misfortune overtakes them; and he contemplated the bold design of a uniform national system under central authority.

He did not propose that the central authority should be in the hands of official persons appointed by the Government. In all national institutions which involve receipt and expenditure of money, varying according to the success of the management, he advocated the contract system in preference to the stipendiary, as more economical and efficacious. His system of prison discipline, under the Panopticon plan, (see above, p. 67,) was to have been conducted under contract management, he himself being the contractor.‡ In the present case, his contractors were to be a joint-stock com-

* These subjects will be more particularly considered in the next section.

† See the Tracts on the Poor Law, Works, vol. viii. p. 358 *et seq.* See also vol. i. p. 314; iii. 72; ix. 13.

‡ The history of his vexations and disappointments in regard to this project, will be found detailed in the Appendix to the Memoirs, (vol. xi. p. 96 *et seq.*,) and in other parts of the Works. The chief objection which official persons appeared to find in the scheme was, that the terms were too favourable to the public to be practicable,—a feature for which either its Author's sanguine temper, or his practical sagacity must stand responsible.

pany, whose directors were to be the central board of management. Their funds were to consist in such poor-rates as it should be found necessary to levy, and the produce of the industry of the able-bodied paupers, with other contingencies. Their profits were to be so far limited, that while they might have sufficient encouragement for economical and energetic management, they should not be put in possession of the power of levying a poor-rate to provide extravagant profits to themselves. The Plan of Pauper Management—it is to be regretted that hitherto only a skeleton of it has seen the light—contains a multitude of minute arrangements for obviating mismanagement, preserving order, regularity, and good habits, educating the paupers, and generally elevating their moral standard,—which cannot be here enumerated.

In 1797, a Bill for making alterations on the poor law was brought in by Pitt. It is difficult to estimate the disastrous consequences which must have followed this measure had it been passed. A critical examination of it was written by Bentham, and sent in MS. to Pitt;* and the fortunate consequence of this lucid demonstration was, the abandonment of the measure. The general aim of this measure was simply an enlargement—and that a sudden one—of the pernicious principles which had been gaining ground for some years—that there was only one thing to be kept in view in a poor law, the satisfaction of all demands made upon the wealth of the community by its poverty, without asking questions; and that whatever deficiency appeared in the operation of the existing system, was to be simply remedied by conveying more of the money of those who had it to those who had it not. One of the provisions of the act was, an allowance, in the case of a large family, to each child unable to support itself; and it was very distinctly shown in the criticism, that the parentage of a large family would thus become a far surer road to wealth than ordinary honest industry. Another of the proposals in this singular measure was, to provide cows to respectable paupers, likely to convert the benefit into a means of eking out a livelihood. On this proposal it is remarked: "The cow *dies* or is *stolen*, or (what is much more likely) is *supposed* to be stolen, being clandestinely *sold* to an obliging purchaser at a distance. What is to be done? '*Want of relief*' warranted the *first* cow; the same cause will necessitate a *second*—limit who can the succeeding *series* of cows: The disappearance of the *first* cow (it may be said) will excite *suspicion;* the disappearance of a second cow will *strengthen suspicion;* true, but upon a mere suspicion without *proof* will a family be left to *starve?* The utmost security then amounts to *this*, that to a certain number of successive pensions thus *bought out* will succeed a pension which will *not* be bought out."†

Bentham contemplated a system of poor laws as a means of removing out of the way the damaged part of the population, and of improving the improveable; and not as a mere provision for existing destitution. In his eyes, therefore, it was a great moral engine which might be applied to various useful purposes. The most important of these was the suppression of vagrancy and mendicancy. His officials, holding out relief with the one hand, were to be entitled to treat all mendicants who refused to accept of it, not as persons who supplicated charity to relieve their wants, but as professors of the criminal trade of begging, and so amenable to punishment. It was part of his plan, that, until some responsible person should be prepared to answer for his following an honest calling, no beggar should be removed from the workhouse. The suppression of mendicancy would, it was believed, have a great influence in reducing the number of graver crimes. A disposal of all the vagrants of a country within workhouses, unless they find security to work elsewhere, would, undoubtedly, if it came into actual and satisfactory practical operation, have that effect which the Author anticipated from it,—

* See Works, vol. viii. p. 440.

† Works, vol. viii. p. 447.

of destroying the nests in which criminals are reared.

The great subject of National Education, for which Brougham has obtained a place in the public mind worthy of its eminence, may appear to some to be treated with indignity, when discussed as subsidiary to a poor law. Bentham, however, was of opinion that the education of the indigent is far more important, in the eye of the public, than that of the rich: more important, because it serves as an instrument of social organization, which the opulent will supply to themselves, on the voluntary principle; while the means of procuring a supply for the poorer classes, becomes a matter of public policy. In this view, as a system which must be provided for by an eleemosynary fund, he considered that National education was connected with the poor law.

The system proposed in the Plan of Pauper Management, unites both training and education. The Author had the sagacity to see, what has been in later times too often exemplified, that the seeds of the higher branches of knowledge cast into minds unprepared for their reception, may produce bad or worthless fruit. His great object was to redeem pauper children from a position in which, as outcasts from society, they were likely to remain during their lives either a burden on the charity of the community or enemies to its property; and to elevate them into the position of productive members. In a community where there are no unproductive members there can be no permanent paupers; and the very best form, in point of economy, which a provision to the poor can assume, is that in which it converts any class of persons from consuming to productive members of society. With this view, the principal end in the education of pauper children, after they have been taught the principles and practice of morality and religion, is to fit them for some trade by which they can make their bread, to train them in those regular habits which a respectable man finds necessary to his happiness, and to accustom them to value those comforts and appliances with which industry and regularity only will supply them. A portion of intellectual instruction should, of course, accompany this training; for, of all inducements which the man who labours with his hands can have to keep him from degrading habits, intellectual resources are the most potent. It is only, however, as accompanying the means of making a livelihood, and in connexion with well-regulated habits, that intellectual instruction can be calculated upon as serviceable to beings in the position of pauper children.*

The remarks which Bentham left behind him, on a proper system of education for the richer classes, are to be found in certain fragmentary essays, brought together under the title of Chrestomathia.† The work consists partly in an exposition of the benefits of intellectual instruction, partly in the description of a project for establishing a national school for the middle classes, and partly in an analytical examination of some of the departments of instruction suited to such an institution. He adopted, in a great measure, the system of division of labour suggested by Lancaster and Bell. There are several principles of tuition laid down, the main feature of which is, the establishing a rigid mental discipline in the minds of youth—preventing their thoughts from straying, and taking measures for ascertaining, with respect to the several steps of the progress, that nothing is left in a crude and undigested state, but that whatever is learnt is *well* learnt. It is generally as a discipline to the mind, that the devotion of so much of the time of youth to the acquisition of classical syntax, prosody, and etymology, is vindicated. There is no doubt that the operation of mastering languages, so philosophical in their structure, and so little capable of being made

* See Works, vol. viii. p. 395 *et seq.* The Report on the training of pauper children, presented by the Poor Law Commissioners in 1841, is a practical adaptation and illustration of Bentham's opinion. It is to be regretted that the commissioners have not been enabled to carry out their practical application of the system to the extent which appears to have been contemplated by them.

† See the commencement of vol. viii.

use of without a scientific acquaintance with them, as the Greek and Latin tongues, is in itself a powerful mental tonic. But if the same discipline can be accomplished by instruction in subjects more likely to be afterwards made practically available by the pupil, there would be undoubted economy in the change. Neither his own personal inclinations, nor his judgment, would have prompted Bentham to deny their due weight to classical studies. "He was a scholar, and a ripe and good one," in the ordinary sense of the term. He was partial to the Greek language, which he maintained to be, in its structure, the best suited for a scientific nomenclature. His partiality towards it has betrayed itself in many of the titles of his works — witness the Chrestomathia itself, (χρηστομάθεια the study of useful things,) Nomography, Deontology, Pannomial Fragments, &c. To his case, therefore, the common remark, that none attack the so generally conceded supremacy of ancient learning, but those who have not had the good fortune to receive a classical education, does not apply.

To those who take much interest in the teaching of the higher branches of knowledge, the Chrestomathia, though only a collection of fragments, must convey many useful hints, from the clear manner in which every branch of instruction is separated from all others, and each is presented in its turn as a topic to be separately exhausted.

The subject of the education of the higher classes of society, has, from a natural analogy, been here treated in juxtaposition with the means of training and instructing the children of the poor. The main object of the present section, however, is to glance at the subsidiary legislative measures for internal organization and improvement contemplated by Bentham; and to these it is now necessary to return.

The concluding chapters of the Constitutional Code, contain a multitude of minor arrangements for purposes of public utility, of which the general Registration system is, perhaps, the most conspicuous. Legislation has made a great stride in relation to this subject since Bentham wrote. He had to suggest the system of a uniform Register of births, marriages, and deaths, so arranged, that the making entry in the register should not depend on the choice of individuals, but should be imperatively enforced. He viewed such a general register as a grand store-house of facts, applicable not only as evidence for legal purposes in relation to the persons appearing on the register, but as providing a fund of vital statistics, upon which political economists might reason, and the legislature act. To make the vital statistics serviceable, in relation to the influence of trades, habits of life, places of residence, &c., on health, he suggested that the professions of the parties should be entered, and, in the entry of each death, the disease or other occasion of it. Those who are acquainted with the general Registration act for England, (6 & 7 Will. IV. c. 86,) will recognise it as founded on the principles laid down by Bentham, as they appear in the Constitutional Code.* The part of the code in which they appear, was not published until after that act had passed, but they had been for ten years promulgated in the Rationale of Evidence.† At the time when the Bill for England was under discussion, a similar measure was brought in for Scotland; but it was opposed by the clergy, was dropped, and has not been revived.

The Registration system in the Constitutional Code embraces other elements, which have not been yet experimented on—a Record of arrivals at the age of majority, and of lapses from, and restorations to sanity.‡ The proposal of a General Register, applicable to Real property, and to contracts and other transactions, did not originate with Bentham. The system has been illustrated in Scotland and in France, and partially even in England; and efforts have been made by practical statesmen, of whom Oliver Cromwell was, perhaps, the first, and Lord Campbell has been the last, to put the system in practice

* Works, vol. ix. p. 625 *et seq.*
† Ibid. vol. vi. p. 566 *et seq.*
‡ Ibid. vol. ix. p. 630-632.

on a wider basis. The importance of such a system, and the best arrangements for its operation, are fully examined in more than one of Bentham's works.*

In the Constitutional Code, provision is made for a public officer, whose duty it is to perform those remedial functions for the public, of which the want is so often felt in a thickly-peopled country, and which magistrates and police authorities cannot easily fulfil. Among the multifarious duties assigned to him, is the settlement of momentary disputes with coachmen, innkeepers, porters, &c. The traveller is much at the mercy of these classes, who, in respect to judicial control, readily distinguish, for their victims, those who will not have time or opportunity to follow up an inquiry. The principle of interference in such cases is no infringement on freedom of trade and labour. The object of all just regulation on the subject, is, not to compel the hirer to employ for, or the hired to work for an arbitrary price, but to settle, by regulation, terms which parties are presumed to accept of when they make no specific stipulation. The Local headman has many other, perhaps more important spheres of action. He is to give information to parties wishing to be acquainted with the wages of labour and the means of living, &c. in his district, to give friendly advice in disputes, explaining the probable results of an appeal to the Law, &c.†

The Health-minister has important functions assigned to him in the Constitutional Code. In conjunction with the Indigence-relief minister, he has control over the medical officers of all eleemosynary institutions. He exercises the appropriate functions in hospitals for the sick, lunatic asylums, and prisons. The object in view, in the appointment of such an officer, is to have, in the shape of instruction, direction, and control, the application to the operations of inferior officers, of that skill which can be purchased by high pay and official distinction. This officer is to have other powers for protecting the public health. He has to see that there is a proper supply of water for the public use; to take cognizance of all means by which the public health may be injured, by overcrowded buildings, undrained lands, places of interment, and noxious manufactures; he is to exercise, indeed, in general, the functions of a central officer for the enforcement of sanatory regulations.‡

In the tracts on the Poor Law there are various minor suggestions for increasing the comforts, and raising the tone of character, of the working classes. The extent to which those who are better informed, and have larger influence in society, may aid them in counteracting their besetting sin, improvidence, is strongly urged. In the Pauper Management, a plan is suggested for the establishment of Frugality Banks,§ the main features of which have been adopted in the legislative establishment of Savings Banks.‖ At the time when he wrote, Friendly Societies had received but slight aid from the legisla-

* See Works, vol. v. p. 417; ix. 634; x. 350.

† Ibid. vol. ix. p. 612 *et seq.*

‡ Ibid. vol. ix. p. 443 *et seq.* It would be an injustice to that friend of Bentham who has so thoroughly laid before the public the grounds on which Sanatory Legislation ought to be based, to allow it to be presumed that the Constitutional Code contains on this subject anything beyond simple suggestions as to the general subjects to which the regulations should apply. The suggestions might have remained unnoticed like many of their author's other valuable hints. The public owe the full inductive sifting which this subject has received solely to Mr Chadwick, some of whose remarks on sanatory regulations, written long before he could have anticipated an opportunity of bringing forward his views in an authoritative form, were quoted by Bentham as illustrative matter for the Constitutional Code. See Works, vol. ix. p. 648.

§ See Works, vol. viii. p. 407 *et seq.*

‖ It is a singular illustration of the smallness of the extent to which the very valuable tracts on Pauper Management have been perused, —probably from their having been published only in a periodical work, (viz., "The Annals of Agriculture,") that the first suggestion of Savings Banks is almost universally attributed to the Proposals circulated by Mr Smith of Wendover, two years after the publication of the Pauper Management. In that work, instead of the few crude suggestions with which such projects generally commence, the whole system, with its deferred annuities, and other characteristics, will be found to be distinctly explained.

ture, and were subject to all the risks, inconveniences, and miscalculations, which the operations of small bodies of uninstructed men would naturally entail on them. Their vital calculations, founded on imperfect data, were generally erroneous; and it frequently occurred, that a society which, at first, appeared to be prosperous, became exhausted before it met the claims of those who, having longest contributed to its funds, had the best equitable claim to its benefits. The meetings could be held nowhere but in public-houses; and thus the practice of frugality was attempted to be commenced in the midst of those inducements to excess which are its greatest enemies.* These evils received no correction till they were prominently exposed by the select committee appointed in 1825.

The facilitation of the transfer of small sums of money from place to place, is urged, in the Pauper Management, as an important adjunct to frugality and commercial integrity.† The plan has been practically adopted in the system of Post-office money-orders.

Though he could not be said to have made any approach to the valuable discovery of Mr Hill, Bentham so far anticipated the modern opinion of the functions of a Post-office, that he viewed it, when established on proper principles, as an institution fraught with internal improvement—with the progress of knowledge, the nourishment of the social virtues, and the facilitation of trade. He thought it ought to meet with encouragement from the legislature, and that it ought not to be a source of revenue.‡

On the enlightening and civilizing influence of the press, he wrote at more length.§ He considered the editor of a newspaper as the admitted president of a department of the public-opinion tribunal, viz.—that portion of the public who support, or are directed by, the opinions of the newspaper. He was a friend of the perfect freedom of the press—that is to say, of the principle, that those who write in it should be permitted to do precisely what they please, subject to punishment for every offence against person, reputation, or property, which they may commit through a newspaper, just as if they had committed the same offence through any other means. The English law of Libel he considered despotic and capricious. Its principle is, that every man who finds anything in print which offends him, and who has money enough to raise an action, may inflict a heavy punishment on the writer. He sarcastically characterized the formality of a trial as a mockery, when founded on such doctrines; as, the very fact of a man being at the expense of prosecuting is of itself the best evidence of his feelings being hurt.‖ All taxes on knowledge, he considered injuries to the welfare of a state, as an impediment thrown—generally designedly—in the way of national improvement.¶

SECTION VIII.

INTERNATIONAL LAW.

All that Bentham wrote on this subject, is comprised within a comparatively small compass;** but it would be unpardonable to omit all mention of a science which he was the means of revolutionizing, and which, previously to his taking it in hand, had not even received a proper distinctive name. No work, bearing separately on this subject, written by Bentham, was published during his lifetime, and his "Principles of International Law" made their first appearance in the collected edition. From observations here and there scat-

* See Works, vol. viii. p. 410 *et seq.*
† Ibid. vol. viii. p. 417.
‡ Ibid. vol. viii. p. 583.
§ Ibid. vol. ii. p. 275 *et seq.*; v. 97 *et seq.*; viii. 560 *et seq.*; ix. 53 *et seq.*
‖ Works, vol. i. p. 574 *et seq.*; v. 97 *et seq.*
¶ Ibid. vol. ix. p. 451.
** Ibid. vol. ii. p. 535-560. See the subject casually introduced vol. iii. pp. 200, 611; ix. 58, 382.

tered through his works, his opinions on the subject might be gathered; but it was almost solely in the great article by Mr Mill on the "Law of Nations" in the Encyclopædia Britannica, that the public could find a distinct account of the utilitarian theory of International law.

It was necessary to establish a distinction between International laws, and laws calculated for internal government, which had not been distinctly drawn in the previous works on the subject. The internal laws of a country have always a superordinate authority to enforce them when any dispute regarding them takes place among the inhabitants; but when nations fall into disputes there is no such superordinate impartial authority to bind them to conformity with any fixed rules —whether the community of civilized nations may hereafter be able to establish such a tribunal is a separate question. It hence arises that, in the internal laws of a state, there is always an approach more or less near to a uniformity of decision in disputed cases, and that the decisions may be referred to as precedents for future action. In disputes between nations, however, the decisions, if they may be called so, are more properly the victories of the stronger party, and are precedents to be followed by those who are able to imitate them, and to be submitted to by those who must submit. Hence, a reference to precedent, as the foundation of International law, must be fallacious, and no principles founded on it can be just.

What had been done, being quite useless as a guide in this department, it was maintained that the way to serve mankind in any view that could be taken of the subject was, by showing what ought to be done. The question intervenes—what is the use of showing what ought to be done, when it is admitted that there is no authority capable of doing it, and that we must leave it in the hands which we charge with having already abused it—those of the stronger party in each dispute? The answer is, that though there be no distinct official authority capable of enforcing right principles of International law, there is a power bearing with more or less influence on the conduct of all nations, as of all individuals, however transcendently potent they may be—this is the power of public opinion; and it is to the end of directing this power rightly, that rules of International law should be framed.

The power in question has, it is true, various degrees of influence. The strong are better able to put it at defiance than the weak. Countries which, being the most populous, are likely also to be the strongest, carry a certain support of public opinion with all their acts, whatever they may be. But still it is the only power that can be moved to good purposes in this case; and, however high some may appear to be above it, there are, in reality, none who are not more or less subject to its influence. The conquerors who have nearly annihilated their enemies, are far from being exempt from the judgment of the public-opinion tribunal, regarding the extent to which, while victorious, they have exercised the virtues of generosity and humanity.

Bentham was opposed to war, as he was to every practice that brought with it destruction and misery; but he held that there were circumstances which might justify it as a choice of evils. He thought there were occasions on which a display of energy was essential to peace and security; and that those theorists who eschewed war as "unlawful," were frequently only saved from a series of oppressions which would form a dangerous precedent against all peaceably-inclined communities, by the exertions of the bolder spirits with whom they were mingled.* The wars commonly called "glorious"—the wholesale murder of human beings, on no better impulse than the lust of power and the gratification of vanity, he denounced with all the indignation of his ardent nature. His views of the right principles on which

*"In *defensive* force the principle is, no doubt, involved, that attack may be remotely necessary to *defence*. *Defence* is a fair ground for war. The Quaker's objection cannot stand. What a fine thing it would have been for Buonaparte to have had to do with Quaker nations!"—Vol. x. p. 581.

the sword should be drawn, involved a self-sacrifice, founded on a conscientious and serious calculation of results. His just national wars were a deliberate and well-weighed resignation of present luxuries and advantages, to obtain some end good for the community, and good for mankind; to obtain relief from the demoralising and degrading influence of servitude; or to help a weak nation struggling with a powerful.

Thus, judging that there were circumstances which would justify declarations of war, he appealed to the tribunal of public opinion regarding the method of conducting hostilities towards the desired end, with the smallest infringement of the Greatest-happiness principle. On this principle, no evil act should be done to an enemy, unless it will produce a proportional amount of benefit to the side effecting it. The vicissitudes of war afford many opportunities for a choice of operations, in which a benevolent mind will be able to accomplish as much for his own country as a malevolent, without the same sacrifice of life and property. It will be a ruling principle to strike at the government instead of the people. The disablement of the former is sure to produce the end aimed at, and may occasion a comparatively small amount of misery. When a government is weakened through attacks on the people, the operation is performed in the most cruel manner in which it can be accomplished. There can seldom be much good done by destroying the food and clothing of the people, or by appropriating such necessaries, unless they are wanted for the invading army: and the effect to be produced on a contest by such heartless acts, can seldom enter into comparison with the efficacy of a seizure of warlike stores. The one must always be productive of cruelty; the other may, in the end, serve the purposes of humanity, by terminating the contest. Here, as in private ethics, self-regarding prudence goes hand in hand with effective benevolence. There are none against whom the flame of human passion burns more fiercely and enduringly than those who, forgetting the humanity of the man, and the heroism of the soldier, have marked their progress through a hostile territory, by smoking hamlets, devastated fields, and homeless orphans.

As there are mischiefs to be abstained from in war, there are services for nations to perform to each other in time of peace. They should afford all facilities for commercial intercourse between their own and other nations, and between those foreign states which may have occasion to use their territory as a highway. The civilized part of the world is coming, day by day, nearer to just principles of international intercourse. France affording a highway for our communication with our great oriental empire, and conveying through its government telegraph the earliest news of our operations in the east, is a symptom of progress which it would have afforded Bentham the liveliest gratification to witness. Nations should afford each other every reasonable assistance in the enforcement of the law of private rights belonging to each. A community of nations bound to give assistance to each other's *political* laws, would be a most dangerous alliance; it would be too apt to become a combination of monarchs for the support of despotism. In agreeing, however, to make parties who seek refuge within its territory amenable to the private laws of the country they have fled from, whether they have attempted to escape from a civil obligation, or from the punishment of a crime, each nation confers a benefit on every other, and, by the reciprocity, a benefit on itself. When nations are better accustomed to the performance of these services to each other, and when free trade has brought them within the circumference of common interests, they will daily find more inducements to preserve the blessings of peace, and fewer causes of irritation urging them to war.

SECTION IX.

POLITICAL ECONOMY.

Like all the later writers on the subject of Political Economy, Bentham acknowledged Adam Smith as his master; and he professed only to analyze some of those departments which the founder of the science had not examined, or in relation to which he had adopted views inconsistent with the great principles of his own system.

The chief service which Bentham has done to this science, has been in the application of his exhaustive system to the carrying out, to their full extent, the doctrines of Free Trade. As in every other subject, he applied to this the criterion of the Greatest-happiness principle, and its bearing on legislation. Political Economy, if it were to be looked upon as an art, he conceived to be the art of supplying mankind at large with the greatest possible quantity of the produce of industry, and of distributing it in the manner most conducive to the wellbeing of humanity. When he asked what legislation ought to do towards the accomplishment of these ends, the answer was—Let it leave each man to do what seems best to himself. The wealth of individuals is the wealth of the community; and each man is the best architect of his own fortunes. The preservation of security is all that Political Economy looks to from the legislature—security for wealth created—security for the exercise of ingenuity and industry in creating more—security for enforcing the performance of contracts.*

This, its essential and simple duty, the legislature was found to be neglecting, while it was occupied in making abortive attempts to perform the unperformable task of increasing productiveness or decreasing consumption. It denied to the creditor, what it might so easily have given him—facilities for immediate access to the funds of the dishonest or obstinate debtor. The debtor might be deprived of his liberty on the oath of any ruffian, and his creditor might make him a slave for life; but there was no middle course where justice could meet humanity—where the unfortunate might be spared the punishment due only to a felon, and the fraudulent might be deprived of the means of defying the law. This state of matters has been much improved in the course of modern Legislation. It cannot be denied that these improvements are in a great measure owing to the writings of Bentham, † and they are respectively additions to that security which, in his opinion, was all that Political Economy demanded of the Law.

Though it cannot, however, frame laws for directly increasing or preserving the wealth of the community, legislation may do much to enable the individual members to do these things rightly for themselves. Its chief means of accomplishing this is Education. On the effect of intelligence in increasing individual, and thence national production, it is quite unnecessary to enlarge. It gives the engineer the means of inventing, and properly applying machinery. It gives the merchant the means of knowing the most profitable markets. It gives the labourer the means of knowing where his labour is most valued, and enables him, when he finds the trade he is occupied in, falling, or becoming overstocked, to turn his hand to another. In short, in all circumstances, skill, the fruit of education, gives the producer the means of increasing the value of his produce to his own benefit, and to that of the community. (See above, p. 71.)

Rewards, for exhibitions of skill or genius in arts and manufactures, are aids to the operation of education: they serve to create emulation, and to open

* See Works, vol. ii. p. 1-103. See also vol. i. p. 302; ii. 269; ix. 11.

† See Works, vol. i. p. 546; iii. 428; v. 533; vi. 135, 176, 180; vii. 381.

and improve the faculties. On the most judicious means of adapting these rewards to their ends, he wrote a considerable quantity of remarks and elucidations. He thought the most ingeniously devised source of reward, was that of giving a monopoly, in the use of an invention, to the inventor, for some limited time—the Patent system. The great value of this arrangement he found to be in its power of adjusting the amount of the reward to the extent to which society found itself benefited. He did not adopt the view, that the produce of intellectual labour, or of skill, should be declared by the law to be like the physical subjects of appropriation, something which must be for ever the property of him who brought it into existence, or of those deriving right from him. If such a principle had been opened up at the time when he wrote, he would probably have found, on a comparison of the end proposed to be accomplished, with the means of performing it, that human legislation could not accomplish so difficult a task as that of keeping all subjects of invention, and all productions of intellect, the perpetual property of some person or other, as it does in the case of physical objects—even had such a result been desirable. Accordingly, the foundation on which the Patent and Copyright laws are placed, is that of Privilege, granted as a reward for services. The impediments thrown in the way of the acquisition of the reward, by the costly and cumbrous machinery of the Patent laws, is much deplored. Bentham's suggestions as to a simpler system of Patent laws, have been taken advantage of in a series of statutes, which have been remodelled and consolidated by the 5 & 6 Vic. c. 100. This act adopts a practical facility for its operation, which was likewise suggested by Bentham—viz. a register of the inventions or patterns as to which the privilege is held, with a series of marks for separating and individualizing them.*

Bentham found one important element, in relation to which Adam Smith had lost hold of the pure principles of free trade. The father of political economy had not succeeded in so completely clearing the nature of money of its adventitious and popular acceptations, as to be able to treat it like an ordinary commodity, subject to the common rules of trade. Hence he supported the Usury laws, which are essentially a restriction of free trade in money. As an exposition of this fallacy, Bentham wrote his "Defence of Usury."† It has often been remarked that this title is not a descriptive one—the work is no more a defence of usury than it is a defence of high prices. It merely proves the folly and mischievousness of any attempt to fix the price that should be paid for the use of money. It will be unnecessary to make any analysis of arguments which have now been seconded by the almost entire abolition of the Usury laws.

Bentham's other works on Political Economy are chiefly occupied in the exposure of the fallacy of those artificial efforts which legislation makes to increase the country's wealth. One of the most prominent and extravagant of these he found to be colonies.‡ The expense which they occasion, not only in the way of continuous support, but as the cause of wars, is enormous. They give nothing to the mother country; for they will never consent to be taxed. A trade with them is not more advantageous than a trade with any other people;—they will not give more than the market price for our goods, or sell their own to us at less. They can make no addition to our trade; for it is limited by our capital—by that amount of the proceeds of industry which we have saved up from consumption. If we can double our capital, we may double our trade; but we can never increase it by wasting our capital in compelling people to buy from us. We may give our colonies the monopoly of a certain trade with the mother country—this is just going to a narrow,

* See Works, vol. ii. p. 212; iii. 71; v. 373; vi. 584.

† Commencement of vol. iii. of the Works.

‡ See Works, vol. ii. p. 547 *et seq.*; iii. 52 *et seq.*; iv. 408 *et seq.*

and consequently disadvantageous market, instead of a wide, and consequently good one. We may compel them to consume our manufactures—we must first contrive to give them the money to buy them with ; and thus we hire purchasers, to keep up a trade which cannot support itself.

Colonization is, however, not without its advantages, though few of these fall to the share of the mother country. It may be the means of removing the damaged part of a population, through a system of emigration. It is only, however, in peculiar circumstances that it will not be a very extravagant means of accomplishing this end. If there is another country which will absorb our damaged* population, the support of colonies for the purpose, is just paying for what may be got for nothing. Colonization may be the means of spreading the blessings of civilisation among savage tribes : here there is a palpable advantage to those tribes themselves, and to the world at large ; but it is obtained at a sacrifice on the part of the mother country. It will sometimes occur, that the possession of fortified places abroad is serviceable for the protection of the free commerce of a nation ; but this is a benefit of rare occurrence, and is very often supposed to be obtained when it is not.

The science of Political Economy has made so much progress, especially in the department of free trade, since the date of Bentham's writings on the subject, that it will hardly be of service to analyze his arguments against Monopolies, Prohibitions, Restrictions, and Bounties.† Perhaps no other writer on Political Economy has given so clear an account of the incidence of bounties on exportation. He describes them as tribute paid to the foreign consumer. If we can produce the article cheaper than other nations can, the foreigner buys from us of course. If we reduce it below its proper remunerating price, he is not the less ready to buy from us—but the only way in which we can so reduce it, is by paying part of the price for him.

In the case of *bounties upon exportation*, the error is not so palpable as in that of *bounties upon production*, but the evil is greater. In both cases, the money is equally lost : the difference is in the persons who receive it. What you pay for production, is received by your countrymen—what you pay for exportation, you bestow upon strangers. It is an ingenious scheme for inducing a foreign na-

* The term "surplus population" is generally employed in relation to emigration ; but this implies an application of the system too wide to be practicable. Population never can be too great when there is employment for all ; and no nation could afford to carry off the numbers annually added to a population which, by such removals, has free room to grow. All who can be removed by any practicable system are immediately replaced ; and, before any advantage can be had by the removal, it must be shown that, by some improvement in the institutions and habits of the country, the unproductive individuals removed are to be replaced by productive. The committee of the House of Commons, of 1841, on emigration from the Highlands, with great caution, recommended that no money for the purpose should be advanced by Government until there was some security, in an amendment of the Scottish Poor Law, that a similar unproductive population should not succeed to those so removed.

† Probably the only subject in relation to which Bentham is behind the knowledge of the present age, (his works on Political Economy were almost all written in the 18th century,) is in his views of the incidence of machinery on the wages of labour. Taking the direct advantages of machinery on the one side —cheapness of production, and the command of foreign markets arising out of that cheapness—he deducted from these the loss to labour, (vol. iii. pp. 39, 67-68.) He had forgotten to keep in view, that of the capital exhausted on hand-made, and that on machine-made produce, it is not a necessary fact that a less proportion of the latter should go in the form of wages of labour than of the former. In the case, for instance, of a certain capital spent on the production of stockings, if they are hand-knit, the wages go to the knitter ; while, if they be machine-made, the wages go to the miner, the smelter, the machine-maker, &c. The elements of the prices of commodities are, rent of land, on which the raw material is produced—wages of labour—and profits of stock. These elements will vary in their proportions, according to incidental circumstances ; but it does not follow that they will be necessarily different in the case of hand-produce, from what they are in the case of machine-produce. Another discovery of modern science in this department, which seems not to have been anticipated by Bentham, is, the fallacy as to the influence of the Sinking Fund, so clearly exposed by Dr Robert Hamilton in his work on the National Debt.

tion to receive tribute from you without being aware of it; a little like that of the Irishman who passed his light guinea, by cleverly slipping it between two halfpence. . . .

The Irishman who passed his light guinea was very cunning; but there have been French and English more cunning than he, who have taken care not to be imposed upon by his trick. When a cunning individual perceives you have gained some point with him, his imagination mechanically begins to endeavour to get the advantage of you, without examining whether he would not do better were he to leave you alone. Do you appear to believe that the matter in question is advantageous to you? He is convinced by this circumstance that it is proportionally disadvantageous to him, and that the safest line of conduct for him to adopt, is to be guided by your judgment. Well acquainted with this disposition of the human mind, an Englishman laid a wager, and placed himself upon the Pont-neuf, the most public thoroughfare in Paris, offering to the passengers a crown of six francs for a piece of twelve sous. During half a day he only sold two or three.

Since individuals in general are such dupes to their self-mistrust, is it strange that governments, having to manage interests which they so little understand, and of which they are so jealous, should have fallen into the same errors? A government, believing itself clever, has given a bounty upon the exportation of an article, in order to force the sale of it among a foreign nation: what does this other nation in consequence? Alarmed at the sight of this danger, it takes all possible methods for its prevention. When it has ventured to prohibit the article, everything is done. It has refused the six-franc pieces for twelve sous. When it has not dared to prohibit it, it has balanced this bounty by a counter-bounty upon some article that it exports. Not daring to refuse the crown of six francs for twelve sous, it has cleverly slipped some little diamond between the two pieces of money—and thus the cheat is cheated.—Vol. iii. p. 62-63.

The reader who takes an interest in financial projects will find much to engage his attention in the plan for converting stock into Annuity notes.* The project is an improvement on the Exchequer Bill system. It invites Government to come into the field in opposition to the private banks, with the advantage in its favour of allowing interest on its paper securities. The notes are to be of various amounts. They are to carry interest daily from the day of issue, and are each to have a table by which its value in interest added to capital may be ascertained on any given day. The Author was of opinion that these notes would be used as cash, as of their value on each day according to the table.

SECTION X.

LOGIC AND METAPHYSICS.†

Bentham did not draw a line of distinction between these sciences; and he seems to have considered the terms almost convertible. It follows that he did not treat the subject of Logic, as it has generally been done, particularly by late writers, as a formal science,‡ teaching the laws of thought, as distinct from those sciences which treat of the matter of thought. How far he would have continued his mixture of the two subjects, after he had made some approach to completeness in his examination of the various departments of mental philosophy, it is difficult to say. He seems to have projected, as already stated, (see p. 10,) a full and searching inquiry into all the qualities and operations of the human mind, including an investigation not only of the laws of thought, but of the materials on which they work. To this end, he more than once set himself down to examine and classify the powers of the mind. He exhibited an intention of pursuing the examination of mental operations with a comprehensive, and, at the same time, most minute anatomy. To this purpose, he divided and subdivided the materials of thought; and being brought by his subdivisions into an analysis of the matter of language and grammar, left, in his fragments on these two sub-

* Works, vol. iii. p. 105 *et seq.*

† The Works referred to in this Section are those in vol. viii. down to p. 357. See also vol. iii. p. 285 *et seq.*

‡ The single word science is here used, for the sake of brevity, though Bentham, like Whately, considered that Logic was both a Science and an Art.

jects, specimens of the minuteness with which he intended to go over the whole field.

His notion of Logic was, that it was the means of getting at the truth, in relation to all departments of human knowledge;* and that it thus was, to use his own expression, the schoolmistress of all the other arts and sciences.† It would seem, then, to be included in his view of the subject, that any system of Logic, which left the student ignorant of the means of ascertaining the truth in regard to any one element of human knowledge, was an imperfect system. If Logic be considered as divided into the Analytic and Dialectic branches, the latter half of the subject was entirely rejected by Bentham; for, viewing dialectics in its original signification of the art of debating, he considered it as an instrument of deception rather than of truth—as a system of rules for enabling the more adroit disputant to defeat the less able. If, however, Logic be divided into the Analytic branch and the Synthetic,‡ he has left behind him traces of his labours in both departments: in the former examining the phenomena which the mind exhibits in the process of acquiring truth; in the latter, constructing instruments to facilitate its discovery.

Perhaps the most remarkable and original feature of the analytic portion of the fragments, is the division of all nouns substantive into names of Real, and names of Fictitious entities; a distinction which he follows out with his usual clearness and consistency, and of which he never, in any of his works, loses sight. If this classification in some measure resemble Aristotle's division into Primary and Secondary substances, it will be found, on examination, to have a much more comprehensive influence, and, from the manner in which its author employs it, to have a much more important application to the arrangement of the elements of thought. Nouns expressing real entities are names of things of which we predicate the actual existence—such as a ball, a wheel, an impression on the mind, &c. Nouns expressive of fictitious entities, are, all those nouns which do not express such actual existences. The distinction seems to be a pretty obvious one; but the uses which its Author makes of it are novel and important. In our phraseology as to fictitious entities, we borrow the forms of words which have been invented for explaining the phenomena of real entities; and we cannot speak of the former without the actual use, or think of them without the mental use, of these forms of words. Thus *motion* is a fictitious entity. We talk of motion being *in* a thing, or of a thing being *in* motion; and in using the preposition *in*, we borrow a word which was invented to be used upon physical matter. *Relation* is a fictitious entity—one thing is said to *have* a relation to another, and in this word *have* we are obliged to borrow a word constructed for the purpose of intimating corporal possession. The method in which I *have* my pen, and the method in which logic may *have* a relation to metaphysics, are two very different ideas; but we cannot express the latter without borrowing the use of those words which were constructed to represent the former. Hence, fictitious entities cannot appear in language, our instrument of thought, except through the use of borrowed words. They have no phraseology of their own, and can have none. Whether they have separate existence or not is a question we have not data for determining: to our minds they are so unreal, that we cannot think of them without clothing them for the time-being

* Works, vol. viii. pp. 220, 222.

† Ibid. p. 76.

‡ Bentham would not himself have admitted the use of the terms Analysis and Synthesis with this popular acceptation. In a very curious note, (vol. viii. p. 75,) he has shown that the same elements separated in analysis are never the same that are put together in synthesis. The pieces, if they may be so called, with which the process of synthesis is performed, are not the same which result from the process of analysis. "The subject analysed is an aggregate or *genus*, which is divided into *species*, those into *sub-species*, and so on. The only case in which *synthesis* is exactly opposite and correspondent to, and no more than co-extensive with analysis, is, when between the ideas put together there is that sort of conformity from which the act of putting them together receives the name of *generalization*."

in the words which are invented for thinking of real entities.* How far a pursuit of this subject would throw light on the old dispute of the Realists and Materialists—how far misapprehension as to the actual subject of discussion may have arisen from this necessity of borrowing the phraseology of real entities for the purpose of discussing fictitious entities, is an inquiry on which the present writer cannot venture.

The next feature prominently demanding attention in the logical tracts, is the instrument which their Author used for analyzing and laying out his subjects —his exhaustive method of division, on the Dichotomous or Bifurcate plan. He took the hint of this system from the old editions of the Isagoge of Porphyry, in which there is a diagram exhibiting an exemplification of it, commonly attributed to the inventive genius of Porphyry himself, but probably the work of an editor. The dichotomous mode of division is frequently alluded to in the writings of the Aristotelian logicians, and it received considerable attention from Ramus; but it was, like many other instruments of discovery, a mere plaything for the intellect, until it fell into the hands of a man who was able to adapt it to practical service. The Porphyrian tree represents as the centre or trunk a *genus generalissimum*, from which successive branches issuing carry off some separable quality, until it has gone through as many processes of division as can be applied to it, and leaves in the two last condividends the two most concrete entities which can be comprehended within the general term.

The service which Bentham derived from the study of this diagram, was in its leading him to the conclusion that the only species of division which in its very terms bears to be exhaustive, is a division into two. It may happen that any other division—such as that of the works of nature into the animal, vegetable, and mineral kingdoms, may turn out to be exhaustive: but the object is to find a formula the use of which of itself secures exhaustiveness.

It is only by a division into two parts that logical definition *per genus et differentiam* can be accomplished. The species is marked off by its possessing the quality of the genus, and some differential quality which separates it from the other species of that genus. It is only by the expression of a difference as between two, that thought and language enable us to say whether the elements of the thing divided are exhausted in the condividends. We can only compare two things together—we cannot compare three or more at one time. In common language we do speak of comparing together more things than two; but the operation by which we accomplish this end is compound, consisting of deductions drawn from a series of comparisons, each relating to only two things at a time. Comparison is the estimate of differences; and language, by giving us the word "between," as that by which we take the estimate, shows that we can only operate on two things at a time. Thus, if we have a division of an aggregate into three, we cannot give such a nomenclature to these three elements as will show that they exhaust the aggregate. If we say law is divided into penal and non-penal, we feel certain, in the very form of the statement, that we include every sort of law under one or other of these designations; but if we say that law is divided into real, personal, and penal, we cannot be, in the same manner, sure that we include every kind of law. If we wish to proceed farther in the division, and, after dividing the law into penal and non-penal, say the non-penal is divided into that which affects persons and that which does not affect persons, we are sure still to be exhaustive; and this system we can continue with the same certainty *ad infinitum*.

The system is undoubtedly a laborious and a tedious one, when the subject is large, and the examination minute. The exemplifications which the Author has given in his tables are the produce of great labour, and cover but a limited extent of subject. It was more as a test of the accuracy of the analysis made by the *mind* when proceeding with its ordi-

* See Works, vol. viii. pp. 119, 126, 195 *et seq.*, 263.

nary abbreviated operations, than as an instrument to be actually used on all occasions, that the Author adopted the bifurcate system. As a means of using it with the more clearness and certainty, he recommended the adaptation to it of the Contradictory formula—viz., the use of a positive affirmation of a quality in one of the condividends, and the employment of the correspondent negative in the other. The value of this test, as applicable to any description of argumentative statement, is, in its bringing out intended contrasts with clearness and certainty. It is not necessary that the Differential formula should be actually employed. In its constant use there would be an end to all freedom and variety in style. But it is highly useful, to take the statement to pieces, and try whether its various propositions contain within them the essence of the bifurcate system and the formula; in other words, to see that when differences are explained, or contrasts made, they be clearly applied to only two things at a time, and that the phraseology, instead of implying vague elements of difference, explains distinctly what the one thing has, and what the other has not.*

* For an account of the Bifurcate system, see Works, vol. viii. pp. 95, 103, 107, 110, 114, 253.

THE END.

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AN

INTRODUCTION

TO THE

PRINCIPLES

OF

MORALS AND LEGISLATION.

BY JEREMY BENTHAM, ESQ.

BENCHER OF LINCOLN'S INN; AND LATE OF
QUEEN'S COLLEGE, OXFORD, M. A.

WITH THE

LAST CORRECTIONS BY THE AUTHOR,

AND ADDITIONS FROM

DUMONT'S TRAITÉS DE LEGISLATION, &c.

THE FIRST EDITION OF THIS WORK WAS PRINTED
IN THE YEAR 1780.

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PREFACE.

THE following sheets were, as the title-page expresses, printed so long ago as the year 1780. The design, in pursuance of which they were written, was not so extensive as that announced by the present title. They had at that time no other destination than that of serving as an introduction to a plan of a penal code, *in terminis*, designed to follow them, in the same volume.

The body of the work had received its completion according to the then present extent of the author's views, when, in the investigation of some flaws he had discovered, he found himself unexpectedly entangled in an unsuspected corner of the metaphysical maze. A suspension, at first not apprehended to be more than a temporary one, necessarily ensued: suspension brought on coolness; and coolness, aided by other concurrent causes, ripened into disgust.

Imperfections pervading the whole mass had already been pointed out by the sincerity of severe and discerning friends; and conscience had certified the justness of their censure. The inordinate length of some of the chapters, the apparent inutility of others, and the dry and metaphysical turn of the whole, suggested an apprehension, that, if published in its present form, the work would contend under great disadvantages for any chance, it might on other accounts possess, of being read, and consequently of being of use.

But, though in this manner the idea of completing the present work slid insensibly aside, that was not by any means the case with the considerations which had led him to engage in it. Every opening, which promised to afford the lights he stood in need of, was still pursued: as occasion arose, the several departments connected with that in which he had at first engaged, were successively explored; insomuch that, in one branch or other of the pursuit, his researches have nearly embraced the whole field of legislation.

Several causes have conspired at present to bring to light, under this new title, a work which under its original one had been imperceptibly, but as it had seemed irrevocably, doomed to oblivion. In the course of eight years, materials for various works, corresponding to the different branches of the subject of legislation, had been produced, and some nearly reduced to shape: and, in every one of those works, the principles exhibited in the present publication had been found so necessary, that, either to transcribe them piecemeal, or to exhibit them somewhere, where they could be referred to in the lump, was found unavoidable. The former course would have occasioned repetitions too bulky to be employed without necessity in the execution of a plan unavoidably so voluminous: the latter was therefore indisputably the preferable one.

To publish the materials in the form in which they were already printed, or to work them up into a new one, was therefore the only alternative: the latter had all along been his wish; and, had time and the requisite degree of alacrity been at command, it would as certainly have been realized. Cogent considerations, however, concur with the irksomeness of the task, in placing the accomplishment of it at present at an unfathomable distance.

Another consideration is, that the suppression of the present work, had it been ever so decidedly wished, is no longer altogether in his power. In the course of so long an interval, various incidents have introduced copies into various hands, from some of which they have been transferred, by deaths and other accidents, into others that are unknown to him. Detached, but considerable extracts, have even been published, without any dishonourable views (for the name of the author was very honestly subjoined to them), but without his privity, and in publications undertaken without his knowledge.

It may perhaps be necessary to add, to complete his excuse for offering to the public a work pervaded by blemishes, which have not escaped even the author's partial eye, that the censure, so justly bestowed upon the form, did not extend itself to the matter.

In sending it thus abroad into the world with all its imperfections upon its head, he

thinks it may be of assistance to the few readers he can expect, to receive a short intimation of the chief particulars, in respect of which it fails of corresponding with his maturer views. It will thence be observed how in some respects it fails of quadrating with the design announced by its original title, as in others it does with that announced by the one it bears at present.

An introduction to a work which takes for its subject the totality of any science, ought to contain all such matters, and such matters only, as belong in common to every particular branch of that science, or at least to more branches of it than one. Compared with its present title, the present work fails in both ways of being conformable to that rule.

As an introduction to the principles of *morals*, in addition to the analysis it contains of the extensive ideas signified by the terms *pleasure*, *pain*, *motive*, and *disposition*, it ought to have given a similar analysis of the not less extensive, though much less determinate, ideas annexed to the terms *emotion*, *passion*, *appetite*, *virtue*, *vice*, and some others, including the names of the particular *virtues* and *vices*. But as the true, and, if he conceives right, the only true groundwork for the development of the latter set of terms, has been laid by the explanation of the former, the completion of such a dictionary, so to style it, would, in comparison of the commencement, be little more than a mechanical operation.

Again, as an introduction to the principles of *legislation in general*, it ought rather to have included matters belonging exclusively to the *civil* branch, than matters more particularly applicable to the *penal:* the latter being but a means of compassing the ends proposed by the former. In preference, therefore, or at least in priority, to the several chapters which will be found relative to *punishment*, it ought to have exhibited a set of propositions which have since presented themselves to him as affording a standard for the operations performed by government, in the creation and distribution of proprietary and other civil rights. He means certain axioms of what may be termed *mental pathology*, expressive of the connexion betwixt the feelings of the parties concerned, and the several classes of incidents, which either call for, or are produced by, operations of the nature above mentioned.*

The consideration of the division of offences, and every thing else that belongs to offences, ought, besides, to have preceded the consideration of punishment: for the idea of *punishment* presupposes the idea of *offence:* punishment, as such, not being inflicted but in consideration of offence.

Lastly, the analytical discussions relative to the classification of offences would, according to his present views, be transferred to a separate treatise, in which the system of legislation is considered solely in respect of its form: in other words, in respect of its *method* and *terminology*.

In these respects, the performance fails of coming up to the author's own ideas of what should have been exhibited in a work, bearing the title he has now given it, viz. that of an *Introduction to the Principles of Morals and Legislation*. He knows however of no other that would be less unsuitable: nor, in particular, would so adequate an intimation of its actual contents have been given, by a title corresponding to the more limited design, with which it was written; viz. that of serving as an *introduction to a penal code*.

Yet more. Dry and tedious as a great part of the discussions it contains must unavoidably be found by the bulk of readers, he knows not how to regret the having written them, nor even the having made them public. Under every head, the practical uses, to which the discussions contained under that head appeared applicable, are indicated: nor is there, he believes, a single proposition that he has not found occasion to build upon in the penning of some article or other of those provisions of detail, of which a body of law, authoritative or unauthoritative, must be composed. He will venture to specify particularly, in this view, the several chapters shortly characterized by the words *Sensibility*, *Actions*, *Intentionality*, *Consciousness*, *Motives*, *Dispositions*, *Consequences*. Even in the enormous chapter on the division of offences, which, notwithstanding the forced compression the plan has undergone in several of its parts, in manner there mentioned, occupies no fewer than one hundred and four closely printed quarto pages,† the ten concluding ones are employed in a statement of the practical advantages that may be reaped from the plan of classification which it exhibits. Those in whose sight the Defence of Usury has been fortunate enough to find favour, may reckon, as one instance of those advantages, the discovery of the principles

* For example: *It is worse to lose than simply not to gain. A loss falls the lighter by being divided. The suffering, of a person hurt in gratification of enmity, is greater than the gratification produced by the same cause.* These, and a few others which he will have occasion to exhibit at the head of another publication, have the same claim to the appellation of axioms, as those given by mathematicians under that name; since, referring to universal experience as their immediate basis, they are incapable of demonstration, and require only to be developed and illustrated, in order to be recognised as incontestable.

† The first edition was published in 1789, in quarto.

developed in that little treatise. In the preface to an anonymous tract published so long ago as in 1776,* he had hinted at the utility of a natural classification of offences, in the character of a test for distinguishing genuine from spurious ones. The case of usury is one among a number of instances of the truth of that observation. A note at the end of Sect. xxxv. Chap. xvi. of the present publication, may serve to show how the opinions developed in that tract owed their origin to the difficulty experienced in the attempt to find a place in his system for that imaginary offence. To some readers, as a means of helping them to support the fatigue of wading through an analysis of such enormous length, he would almost recommend the beginning with those ten concluding pages.

One good at least may result from the present publication; viz. that the more he has trespassed on the patience of the reader on this occasion, the less need he will have so to do on future ones: so that this may do to those, the office which is done by books of pure mathematics to books of mixed mathematics and natural philosophy. The narrower the circle of readers is, within which the present work may be condemned to confine itself, the less limited may be the number of those to whom the fruits of his succeeding labours may be found accessible. He may therefore, in this respect, find himself in the condition of those philosophers of antiquity, who are represented as having held two bodies of doctrine, a popular and an occult one: but with this difference, that in his instance the occult and the popular will, he hopes, be found as consistent as in those they were contradictory; and that, in his production, whatever there is of occultness has been the pure result of sad necessity, and in no respect of choice.

Having, in the course of this advertisement, had such frequent occasion to allude to different arrangements, as having been suggested by more extensive and maturer views, it may perhaps contribute to the satisfaction of the reader, to receive a short intimation of their nature: the rather, as without such explanation, references made here and there to unpublished works might be productive of perplexity and mistake. The following, then, are the titles of the works by the publication of which his present designs would be completed. They are exhibited in the order which seemed to him best fitted for apprehension, and in which they would stand disposed, were the whole assemblage ready to come out at once: but the order in which they will eventually appear, may probably enough be influenced in some degree by collateral and temporary considerations.

Part the 1st. — Principles of legislation in matters of *civil*, more distinctively termed *private distributive*, or for shortness, *distributive*, *law*.

Part the 2d. — Principles of legislation in matters of *penal law*.

Part the 3d. — Principles of legislation in matters of *procedure:* uniting in one view the *criminal* and *civil* branches, between which no line can be drawn, but a very indistinct one, and that continually liable to variation.

Part the 4th. — Principles of legislation in matters of *reward*.

Part the 5th. — Principles of legislation in matters of *public distributive*, more concisely as well as familiarly termed *constitutional*, law.

Part the 6th. — Principles of legislation in matters of *political tactics:* or of the art of maintaining *order* in the proceedings of political assemblies, so as to direct them to the end of their institution; viz. by a system of rules, which are to the constitutional branch, in some respects, what the law of procedure is to the civil and the penal.

Part the 7th. — Principles of legislation in matters betwixt nation and nation, or, to use a new though not inexpressive appellation, in matters of *international* law.

Part the 8th. — Principles of legislation in matters of *finance*.

Part the 9th. — Principles of legislation in matters of *political economy*.

Part the 10th. — Plan of a body of law, complete in all its branches, considered in respect of its *form;* in other words, in respect of its method and terminology; including a view of the origination and connexion of the ideas expressed by the short list of terms, the exposition of which contains all that can be said with propriety to belong to the head of *universal jurisprudence*.†

The use of the principles laid down under the above several heads is to prepare the way for the body of law itself exhibited *in terminis:* and which, to be complete with reference to any political state, must consequently be calculated for the meridian, and adapted to the circumstances, of some one such state in particular.

Had he an unlimited power of drawing upon *time*, and every other condition necessary, it would be his wish to postpone the publication of each part to the completion of the whole. In particular, the use of the ten parts, which exhibit what appear to him the dictates of utility in every line, being no other than to furnish reasons for the several corresponding provisions contained in the body of law itself, the exact truth of the former can never be precisely ascertained, till

* A Fragment on Government, &c. reprinted 1822.

† Such as obligation, right, power, possession, title, exemption, immunity, franchise, privilege, nullity, validity, and the like.

the provisions, to which they are destined to apply, are themselves ascertained, and that *in terminis*. But as the infirmity of human nature renders all plans precarious in the execution, in proportion as they are extensive in the design, and as he has already made considerable advances in several branches of the theory, without having made correspondent advances in the practical applications, he deems it more than probable, that the eventual order of publication will not correspond exactly with that which, had it been equally practicable, would have appeared most eligible. Of this irregularity the unavoidable result will be, a multitude of imperfections, which, if the execution of the body of law *in terminis* had kept pace with the development of the principles, so that each part had been adjusted and corrected by the other, might have been avoided. His conduct, however, will be the less swayed by this inconvenience, from his suspecting it to be of the number of those in which the personal vanity of the author is much more concerned, than the instruction of the public: since whatever amendments may be suggested in the detail of the principles, by the literal fixation of the provisions to which they are relative, may easily be made in a corrected edition of the former, succeeding upon the publication of the latter.

In the course of the ensuing pages, references will be found, as already intimated, some to the plan of a penal code, to which this work was meant as an introduction; some to other branches of the above-mentioned general plan, under titles somewhat different from those by which they have been mentioned here. The giving this warning is all which it is in the author's power to do, to save the reader from the perplexity of looking out for what has not as yet any existence. The recollection of the change of plan will in like manner account for several similar incongruities not worth particularizing.

Allusion was made, at the outset of this advertisement, to some unspecified difficulties as the causes of the original suspension, and unfinished complexion, of the present work. Ashamed of his defeat, and unable to dissemble it, he knows not how to refuse himself the benefit of such an apology as a slight sketch of the nature of those difficulties may afford.

The discovery of them was produced by the attempt to solve the questions that will be found at the conclusion of the volume: *Wherein consisted the identity and* completeness *of a law? What the distinction, and where the separation, between* a penal *and a* civil *law? What the distinction, and where the separation, between the* penal *and* other branches *of* the law?

To give a complete and correct answer to these questions, it is but too evident that the relations and dependencies of every part of the legislative system, with respect to every other, must have been comprehended and ascertained. But it is only upon a view of these parts themselves, that such an operation could have been performed. To the accuracy of such a survey one necessary condition would therefore be, the complete existence of the fabric to be surveyed. Of the performance of this condition no example is as yet to be met with any where. *Common* law, as it styles itself in England, *judiciary* law, as it might more aptly be styled every where, that fictitious composition which has no known person for its author, no known assemblage of words for its substance, forms every where the main body of the legal fabric: like that fancied ether, which, in default of sensible matter, fills up the measure of the universe. Shreds and scraps of real law, stuck on upon that imaginary ground, compose the furniture of every national code. What follows? That he who, for the purpose just mentioned, or for any other, wants an example of a complete body of law to refer to, must begin with making one.

There is, or rather there ought to be, a *logic* of the *will*, as well as of the *understanding:* the operations of the former faculty are neither less susceptible, nor less worthy, than those of the latter, of being delineated by rules. Of these two branches of that recondite art, Aristotle saw only the latter: succeeding logicians, treading in the steps of their great founder, have concurred in seeing with no other eyes. Yet so far as a difference can be assigned between branches so intimately connected, whatever difference there is, in point of importance, is in favour of the logic of the will; since it is only by their capacity of directing the operations of this faculty, that the operations of the understanding are of any consequence.

Of this logic of the will, the science of *law*, considered in respect of its *form*, is the most considerable branch, — the most important application. It is, to the art of legislation, what the science of anatomy is to the art of medicine: with this difference, that the subject of it is what the artist has to work *with*, instead of being what he has to operate *upon*. Nor is the body politic less in danger from a want of acquaintance with the one science, than the body natural from ignorance in the other. One example, amongst a thousand that might be adduced in proof of this assertion, may be seen in the note which terminates this volume.

Such, then, were the difficulties: such the preliminaries: — an unexampled work to achieve, and then a new science to create: a new branch to add to one of the most abstruse of sciences

Yet more: a body of proposed law, how complete soever, would be comparatively useless and uninstructive, unless explained and justified, and that in every tittle, by a continued accompaniment, a perpetual commentary of *reasons*:* which reasons, that the comparative value of such as point in opposite directions may be estimated, and the conjunct force of such as point in the same direction may be felt, must be marshalled, and put under subordination to such extensive and leading ones as are termed *principles*. There must be therefore, not one system only, but two parallel and connected systems, running on together; the one of legislative provisions, the other of political reasons; each affording to the other correction and support.

Are enterprises like these achievable? He knows not. This only he knows, that they have been undertaken, proceeded in, and that some progress has been made in all of them. He will venture to add, if at all achievable, never at least by one, to whom the fatigue of attending to discussions, as arid as those which occupy the ensuing pages, would either appear useless, or feel intolerable. He will repeat it boldly (for it has been said before him), truths that form the basis of political and moral science are not to be discovered but by investigations as severe as mathematical ones, and beyond all comparison more intricate and extensive The familiarity of the terms is a presumption but it is a most fallacious one, of the facilit of the matter. Truths in general have bee called stubborn things: the truths just mer tioned are so in their own way. They ar not to be forced into detached and genera propositions, unincumbered with explanation and exceptions. They will not compres themselves into epigrams. They recoil fro the tongue and the pen of the declaime They flourish not in the same soil with se timent. They grow among thorns; and a not to be plucked, like daisies, by infants a they run. Labour, the inevitable lot of humanity, is in no tract more inevitable than here. In vain would an Alexander bespeak a peculiar road for royal vanity, or a Ptolemy a smoother one for royal indolence. There is no *King's Road*, no *Stadtholder's Gate*, to legislative, any more than to mathematic science.

* To the aggregate of them a common denomination has since been assigned — *the rationale*.

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AN

INTRODUCTION

TO THE

PRINCIPLES OF MORALS AND LEGISLATION.

CHAPTER I.

OF THE PRINCIPLE OF UTILITY.

NATURE has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The *principle of utility** recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.

But enough of metaphor and declamation: it is not by such means that moral science is to be improved.

II.

The principle of utility is the foundation of the present work: it will be proper therefore at the outset to give an explicit and determinate account of what is meant by it. By the principle† of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government.

III.

By utility is meant that property in any object, whereby it tends to produce benefit,

* Note by the Author, July 1822—
To this denomination has of late been added, or substituted, the *greatest happiness* or *greatest felicity* principle: this for shortness, instead of saying at length *that principle* which states the greatest happiness of all those whose interest is in question, as being the right and proper, and only right and proper and universally desirable, end of human action: of human action in every situation, and in particular in that of a functionary or set of functionaries exercising the powers of Government. The word *utility* does not so clearly point to the ideas of *pleasure* and *pain* as the words *happiness* and *felicity* do: nor does it lead us to the consideration of the *number*, of the interests affected; to the *number*, as being the circumstance, which contributes, in the largest proportion, to the formation of the standard here in question; the *standard of right and wrong*, by which alone the propriety of human conduct, in every situation, can with propriety be tried. This want of a sufficiently manifest connexion between the ideas of *happiness* and *pleasure* on the one hand, and the idea of *utility* on the other, I have every now and then found operating, and with but too much efficiency, as a bar to the acceptance, that might otherwise have been given, to this principle.

† [Principle.] The word principle is derived from the Latin principium: which seems to be compounded of the two words *primus*, first, or chief, and *cipium*, a termination which seems to be derived from *capio*, to take, as in *mancipium*, *municipium*; to which are analogous *auceps*, *forceps*, and others. It is a term of very vague and very extensive signification: it is applied to any thing which is conceived to serve as a foundation or beginning to any series of operations: in some cases, of physical operations: but of mental operations in the present case.

The principle here in question may be taken for an act of the mind; a sentiment; a sentiment of approbation; a sentiment which, when applied to an action, approves of its utility, as that quality of it by which the measure of approbation or disapprobation bestowed upon it ought to be governed.

advantage, pleasure, good, or happiness (all this in the present case comes to the same thing), or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.

IV.

The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning of it is often lost. When it has a meaning, it is this. The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what?—the sum of the interests of the several members who compose it.

V.

It is in vain to talk of the interest of the community, without understanding what is the interest of the individual.* A thing is said to promote the interest, or to be *for* the interest, of an individual, when it tends to add to the sum total of his pleasures: or, what comes to the same thing, to diminish the sum total of his pains.

VI.

An action then may be said to be conformable to the principle of utility, or, for shortness sake, to utility (meaning with respect to the community at large), when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.

VII.

A measure of government (which is but a particular kind of action, performed by a particular person or persons) may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it.

VIII.

When an action, or in particular a measure of government, is supposed by a man to be conformable to the principle of utility, it may be convenient, for the purposes of discourse, to imagine a kind of law or dictate, called a law or dictate of utility: and to speak of the action in question, as being conformable to such law or dictate.

IX.

A man may be said to be a partizan of the principle of utility, when the approbation or disapprobation he annexes to any action, or to any measure, is determined, by and proportioned to the tendency which he conceives it to have to augment or to diminish the happiness of the community: or in other words, to its conformity or unconformity to the laws or dictates of utility.

X.

Of an action that is conformable to the principle of utility, one may always say either that it is one that ought to be done, or at least that it is not one that ought not to be done. One may say also, that it is right it should be done; at least that it is not wrong it should be done: that it is a right action; at least that it is not a wrong action. When thus interpreted, the words *ought*, and *right* and *wrong*, and others of that stamp, have a meaning: when otherwise, they have none.

XI.

Has the rectitude of this principle been ever formally contested? It should seem that it had, by those who have not known what they have been meaning. Is it susceptible of any direct proof? It should seem not: for that which is used to prove every thing else, cannot itself be proved: a chain of proofs must have their commencement somewhere. To give such proof is as impossible as it is needless.

XII.

Not that there is or ever has been that human creature breathing, however stupid or perverse, who has not on many, perhaps on most occasions of his life, deferred to it. By the natural constitution of the human frame, on most occasions of their lives men in general embrace this principle, without thinking of it: if not for the ordering of their own actions, yet for the trying of their own actions, as well as of those of other men. There have been, at the same time, not many, perhaps, even of the most intelligent, who have been disposed to embrace it purely and without reserve. There are even few who have not taken some occasion or other to quarrel with it, either on account of their not understanding always how to apply it, or on account of some prejudice or other which they were afraid to examine into, or could not bear to part with. For such is the stuff that man is made of: in principle and in practice, in a right track and in a wrong one, the rarest of all human qualities is consistency.

XIII.

When a man attempts to combat the principle of utility, it is with reasons drawn, without his being aware of it, from that very principle itself.† His arguments, if they prove

* [Interest, &c.] Interest is one of those words, which not having any superior *genus*, cannot in the ordinary way be defined.

† "The principle of utility (I have heard it said) is a dangerous principle: it is dangerous on certain occasions to consult it." This is as much as to say, what? that it is not consonant

any thing, prove not that the principle is *wrong*, but that, according to the applications he supposes to be made of it, it is *misapplied*. Is it possible for a man to move the earth? Yes; but he must first find out another earth to stand upon.

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to utility, to consult utility; in short, that it is *not* consulting it, to consult it.

Addition by the Author, July 1822—

Not long after the publication of the Fragment on Government, anno 1776, in which, in the character of an all-comprehensive and all-commanding principle, the principle of *utility* was brought to view, one person by whom observation to the above effect was made was *Alexander Wedderburn*, at that time Attorney or Solicitor General, afterwards successively Chief Justice of the Common Pleas, and Chancellor of England, under the successive titles of Lord Loughborough and Earl of Rosslyn. It was made—not indeed in my hearing, but in the hearing of a person by whom it was almost immediately communicated to me. So far from being self-contradictory, it was a shrewd and perfectly true one. By that distinguished functionary, the state of the Government was thoroughly understood: by the obscure individual, at that time not so much as supposed to be so: his disquisitions had not been as yet applied, with any thing like a comprehensive view, to the field of Constitutional Law, nor therefore to those features of the English Government, by which the greatest happiness of the ruling *one* with or without that of a favoured few, are now so plainly seen to be the only ends to which the course of it has at any time been directed. The *principle of utility* was an appellative, at that time employed—employed by me, as it had been by others, to designate that which, in a more perspicuous and instructive manner, may, as above, be designated by the name of the *greatest happiness principle*. "This principle (said Wedderburn) is a dangerous one." Saying so, he said that which, to a certain extent, is strictly true: a principle, which lays down, as the only *right* and justifiable end of Government, the greatest happiness of the greatest number—how can it be denied to be a dangerous one? dangerous it unquestionably is, to every government which has for its *actual* end or object, the greatest happiness of a certain *one*, with or without the addition of some comparatively small number of others, whom it is matter of pleasure or accommodation to him to admit, each of them, to a share in the concern, on the footing of so many junior partners. *Dangerous* it therefore really was, to the interest—the sinister interest—of all those functionaries, himself included, whose interest it was, to maximize delay, vexation, and expense, in judicial and other modes of procedure, for the sake of the profit, extractible out of the expense. In a Government which had for its end in view the greatest happiness of the greatest number, Alexander Wedderburn might have been Attorney General and then Chancellor: but he would not have been Attorney General with £15,000 a-year, nor Chancellor with a peerage, with a veto upon all justice, with £25,000 a-year, and with 500 sinecures at his disposal, under the name of Ecclesiastical Benefices, besides *et cæteras*.

XIV.

To disprove the propriety of it by arguments is impossible; but, from the causes that have been mentioned, or from some confused or partial view of it, a man may happen to be disposed not to relish it. Where this is the case, if he thinks the settling of his opinions on such a subject worth the trouble, let him take the following steps, and at length, perhaps, he may come to reconcile himself to it.

1. Let him settle with himself, whether he would wish to discard this principle altogether; if so, let him consider what it is that all his reasonings (in matters of politics especially) can amount to?

2. If he would, let him settle with himself, whether he would judge and act without any principle, or whether there is any other he would judge and act by?

3. If there be, let him examine and satisfy himself whether the principle he thinks he has found is really any separate intelligible principle; or whether it be not a mere principle in words, a kind of phrase, which at bottom expresses neither more nor less than the mere averment of his own unfounded sentiments; that is, what in another person he might be apt to call caprice?

4. If he is inclined to think that his own approbation or disapprobation, annexed to the idea of an act, without any regard to its consequences, is a sufficient foundation for him to judge and act upon, let him ask himself whether his sentiment is to be a standard of right and wrong, with respect to every other man, or whether every man's sentiment has the same privilege of being a standard to itself?

5. In the first case, let him ask himself whether his principle is not despotical, and hostile to all the rest of human race?

6. In the second case, whether it is not anarchial, and whether at this rate there are not as many different standards of right and wrong as there are men? and whether even to the same man, the same thing, which is right to-day, may not (without the least change in its nature) be wrong to-morrow? and whether the same thing is not right and wrong in the same place at the same time? and in either case, whether all argument is not at an end? and whether, when two men have said, "I like this," and "I don't like it," they can (upon such a principle) have any thing more to say?

7. If he should have said to himself, No: for that the sentiment which he proposes as a standard must be grounded on reflection, let him say on what particulars the reflection is to turn? If on particulars having relation to the utility of the act, then let him say whether this is not deserting his own principle, and borrowing assistance from that

very one in opposition to which he sets it up: or if not on those particulars, on what other particulars?

8. If he should be for compounding the matter, and adopting his own principle in part, and the principle of utility in part, let him say how far he will adopt it?

9. When he has settled with himself where he will stop, then let him ask himself how he justifies to himself the adopting it so far? and why he will not adopt it any farther?

10. Admitting any other principle than the principle of utility to be a right principle, a principle that it is right for a man to pursue; admitting (what is not true) that the word *right* can have a meaning without reference to utility, let him say whether there is any such thing as a *motive* that a man can have to pursue the dictates of it: if there is, let him say what that motive is, and how it is to be distinguished from those which enforce the dictates of utility: if not, then lastly let him say what it is this other principle can be good for?

CHAPTER II.

OF PRINCIPLES ADVERSE TO THAT OF UTILITY.

I.

If the principle of utility be a right principle to be governed by, and that in all cases, it follows from what has been just observed, that whatever principle differs from it in any case must necessarily be a wrong one. To prove any other principle, therefore, to be a wrong one, there needs no more than just to show it to be what it is, a principle of which the dictates are in some point or other different from those of the principle of utility: to state it is to confute it.

II.

A principle may be different from that of utility in two ways: 1. By being constantly opposed to it: this is the case with a principle which may be termed the principle of *asceticism*.* 2. By being sometimes opposed to it, and sometimes not, as it may happen: this is the case with another, which may be termed the principle of *sympathy* and *antipathy*.

III.

By the principle of asceticism I mean that principle, which, like the principle of utility, approves or disapproves of any action, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; but in an inversive manner: approving of actions in as far as they tend to diminish his happiness; disapproving of them in as far as they tend to augment it.

IV.

It is evident that any one who reprobates any the least particle of pleasure, as such, from whatever source derived, is *pro tanto* a partizan of the principle of asceticism. It is only upon that principle, and not from the principle of utility, that the most abominable pleasure which the vilest of malefactors ever reaped from his crime would be to be reprobated, if it stood alone. The case is, that it never does stand alone; but is necessarily followed by such a quantity of pain (or, what comes to the same thing, such a chance for a certain quantity of pain) that the pleasure in comparison of it, is as nothing: and this is the true and sole, but perfectly sufficient, reason for making it a ground for punishment.

V.

There are two classes of men of very different complexions, by whom the principle of asceticism appears to have been embraced; the one a set of moralists, the other a set of religionists. Different accordingly have been the motives which appear to have recommended it to the notice of these different parties. Hope, that is, the prospect of pleasure, seems to have animated the former: hope, the aliment of philosophic pride: the hope of honour and reputation at the hands of men. Fear, that is, the prospect of pain, the latter: fear, the offspring of superstitious fancy: the fear of future punishment at the hands of a splenetic and revengeful Deity. I say in this case fear: for of the invisible future, fear is more powerful than hope.

* [Asceticism.] Ascetic is a term that has been sometimes applied to Monks. It comes from a Greek word which signifies *exercise*. The practices by which Monks sought to distinguish themselves from other men were called their Exercises. These exercises consisted in so many contrivances they had for tormenting themselves. By this they thought to ingratiate themselves with the Deity. For the Deity, said they, is a Being of infinite benevolence: now a Being of the most ordinary benevolence is pleased to see others make themselves as happy as they can: therefore to make ourselves as unhappy as we can is the way to please the Deity. If any body ask them, what motive they could find for doing all this? Oh! said they, you are not to imagine that we are punishing ourselves for nothing: we know very well what we are about. You are to know, that for every grain of pain it costs us now, we are to have a hundred grains of pleasure by and by. The case is, that God loves to see us torment ourselves at present: indeed he has as good as told us so. But this is done only to try us, in order just to see how we should behave: which it is plain he could not know, without making the experiment. Now then, from the satisfaction it gives him to see us make ourselves as unhappy as we can make ourselves in this present life, we have a sure proof of the satisfaction it will give him to see us as happy as he can make us in a life to come.

These circumstances characterize the two different parties among the partizans of the principle of asceticism: the parties and their motives different, the principle the same.

VI.

The religious party, however, appear to have carried it farther than the philosophical: they have acted more consistently and less wisely. The philosophical party have scarcely gone farther than to reprobate pleasure: the religious party have frequently gone so far as to make it a matter of merit and of duty to court pain. The philosophical party have hardly gone farther than the making pain a matter of indifference. It is no evil, they have said: they have not said, it is a good. They have not so much as reprobated all pleasure in the lump. They have discarded only what they have called the gross; that is, such as are organical, or of which the origin is easily traced up to such as are organical: they have even cherished and magnified the refined. Yet this, however, not under the name of pleasure: to cleanse itself from the sordes of its impure original, it was necessary it should change its name: the honourable, the glorious, the reputable, the becoming, the *honestum*, the *decorum*, it was to be called: in short, any thing but pleasure.

VII.

From these two sources have flowed the doctrines from which the sentiments of the bulk of mankind have all along receeived a tincture of this principle; some from the philosophical, some from the religious, some from both. Men of education more frequently from the philosophical, as more suited to the elevation of their sentiments: the vulgar more frequently from the superstitious, as more suited to the narrowness of their intellect, undilated by knowledge: and to the abjectness of their condition, continually open to the attacks of fear. The tinctures, however, derived from the two sources, would naturally intermingle, insomuch that a man would not always know by which of them he was most influenced: and they would often serve to corroborate and enliven one another. It was this conformity that made a kind of allianee between parties of a complexion otherwise so dissimilar: and disposed them to unite upon various occasions against the common enemy, the partizan of the principle of utility, whom they joined in branding with the odious name of Epieurean.

VIII.

The principle of asceticism, however, with whatever warmth it may have been embraced by its partizans as a rule of private conduct, seems not to have been carried to any considerable length, when applied to the business of government. In a few instances it has been carried a little way by the philosophical party: witness the Spartan regimen. Though then, perhaps, it may be considered as having been a measure of security: and an application, though a precipitate and perverse application, of the principle of utility. Scarcely in any instances, to any considerable length, by the religious: for the various monastic orders, and the societies of the Quakers, Dumplers, Moravians, and other religionists, have been free societies, whose regimen no man has been astricted to without the intervention of his own consent. Whatever merit a man may have thought there would be in making himself miserable, no such notion seems ever to have occurred to any of them, that it may be a merit, much less a duty, to make others miserable: although it should seem, that if a certain quantity of misery were a thing so desirable, it would not matter much whether it were brought by each man upon himself, or by one man upon another. It is true, that from the same source from whence, among the religionists, the attachment to the principle of asceticism took its rise, flowed other doctrines and practices, from which misery in abundance was produced in one man by the instrumentality of another: witness the holy wars, and the persecutions for religion. But the passion for producing misery in these cases proceeded upon some special ground: the exercise of it was confined to persons of particular descriptions: they were tormented, not as men, but as hereties and infidels. To have inflicted the same miseries on their fellow-believers and fellow-sectaries, would have been as blameable in the eyes even of these religionists, as in those of a partizan of the principle of utility. For a man to give himself a certain number of stripes was indeed meritorious: but to give the same number of stripes to another man, not consenting, would have been a sin. We read of saints, who for the good of their souls, and the mortification of their bodies, have voluntarily yielded themselves a prey to vermin: but though many persons of this class have wielded the reins of empire, we read of none who have set themselves to work, and made laws on purpose, with a view of stocking the body politic with the breed of highwaymen, housebreakers, or incendiaries. If at any time they have suffered the nation to be preyed upon by swarms of idle pensioners, or useless placemen, it has rather been from negligence and imbecility, than from any settled plan for oppressing and plundering of the people.* If at any time they have sapped the sources of national wealth, by cramping commerce, and driving the inhabitants into emigration, it has been with other views, and in pursuit of other ends. If they have declaimed against

* So thought Anno 1780 and 1789—Not so Anno 1814.—J. Bentham.

the pursuit of pleasure, and the use of wealth, they have commonly stopped at declamation: they have not, like Lycurgus, made express ordinances for the purpose of banishing the precious metals. If they have established idleness by a law, it has been not because idleness, the mother of vice and misery, is itself a virtue, but because idleness (say they) is the road to holiness. If under the notion of fasting, they have joined in the plan of confining their subjects to a diet, thought by some to be of the most nourishing and prolific nature, it has been not for the sake of making them tributaries to the nations by whom that diet was to be supplied, but for the sake of manifesting their own power, and exercising the obedience of the people. If they have established, or suffered to be established, punishments for the breach of celibacy, they have done no more than comply with the petitions of those deluded rigorists, who, dupes to the ambitious and deep-laid policy of their rulers, first laid themselves under that idle obligation by a vow.

IX.

The principle of asceticism seems originally to have been the reverie of certain hasty speculators, who having perceived, or fancied, that certain pleasures, when reaped in certain circumstances, have, at the long run, been attended with pains more than equivalent to them, took occasion to quarrel with every thing that offered itself under the name of pleasure. Having then got thus far, and having forgot the point which they set out from, they pushed on, and went so much further as to think it meritorious to fall in love with pain. Even this, we see, is at bottom but the principle of utility misapplied.

X.

The principle of utility is capable of being consistently pursued; and it is but tautology to say, that the more consistently it is pursued, the better it must ever be for human-kind. The principle of asceticism never was, nor ever can be, consistently pursued by any living creature. Let but one tenth part of the inhabitants of this earth pursue it consistently, and in a day's time they will have turned it into a hell.

XI.

Among principles adverse* to that of utility, that which at this day seems to have most influence in matters of government, is what may be called the principle of sym-

* The following Note was first printed in January 1789: —

It ought rather to have been styled, more extensively, the principle of *caprice*. Where it applies to the choice of actions to be marked out for injunction or prohibition, for reward or punishment, (to stand, in a word, as subjects for *obligations* to be imposed), it may indeed with propriety be termed, as in the text, the principle of *sympathy* and *antipathy*. But this appellative does not so well apply to it, when occupied in the choice of the *events* which are to serve as sources of *title* with respect to *rights*: where the actions prohibited and allowed, the obligations and rights being already fixed, the only question is, under what circumstances a man is to be invested with the one or subjected to the other? from what incidents occasion is to be taken to invest a man, or to refuse to invest him, with the one, or to subject him to the other? In this latter case it may more appositely be characterized by the name of the *phantastic principle*. Sympathy and antipathy are affections of the *sensible* faculty. But the choice of *titles* with respect to *rights*, especially with respect to proprietary rights, upon grounds unconnected with utility, has been in many instances the work, not of the affections but of the imagination.

When, in justification of an article of English Common Law, calling uncles to succeed in certain cases in preference to fathers, Lord Coke produced a sort of ponderosity he had discovered in rights, disqualifying them from ascending in a straight line, it was not that he *loved* uncles particularly, or *hated* fathers, but because the analogy, such as it was, was what his imagination presented him with, instead of a reason, and because, to a judgment unobservant of the standard of utility, or unacquainted with the art of consulting it, where affection is out of the way, imagination is the only guide.

When I know not what ingenious grammarian invented the proposition *Delegatus non potest delegare*, to serve as a rule of law, it was not surely that he had any antipathy to delegates of the second order, or that it was any pleasure to him to think of the ruin which, for want of a manager at home, may befal the affairs of a traveller, whom an unforeseen accident has deprived of the object of his choice: it was, that the incongruity, of giving the same law to objects so contrasted as *active* and *passive* are, was not to be surmounted, and that *-atus* chimes, as well as it contrasts, with *-are*.

When that inexorable maxim (of which the dominion is no more to be defined, than the date of its birth, or the name of its father, is to be found) was imported from England for the government of Bengal, and the whole fabric of judicature was crushed by the thunders of *ex post facto* justice, it was not surely that the prospect of a blameless magistracy perishing in prison afforded any enjoyment to the unoffended authors of their misery; but that the music of the maxim, absorbing the whole imagination, had drowned the cries of humanity along with the dictates of common sense.[a] *Fiat Justitia, ruat*

[a] Additional Note by the Author, July 1822 — Add, and that the bad system, of Mahometan and other native law, was to be put down at all events, to make way for the inapplicable and still more mischievous system, of English Judge-made law, and, by the hand of his accomplice Hastings, was to be put into the pocket of Impey — importer of this instrument of subversion — £8000 a-year contrary to law, in addition to the £8000 a-year lavished upon him, with the customary profusion, by the hand of law. — See the Account of this transaction in *Mill's British India*.

To this Governor a statue is erecting by a vote of East India Directors and Proprietors: on it should

pathy and antipathy. By the principle of sympathy and antipathy, I mean that principle which approves or disapproves of certain actions, not on account of their tending to augment the happiness, nor yet on account of their tending to diminish the happiness of

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ruat cœlum, says another maxim, as full of extravagance as it is of harmony: Go heaven to wreck—so justice be but done:—and what is the ruin of kingdoms, in comparison of the wreck of heaven?

So again, when the Prussian chancellor, inspired with the wisdom of I know not what Roman sage, proclaimed in good Latin, for the edification of German ears, *Servitus servitutis non datur* [Cod. Fred. tom. ii. par. 2. liv. 2, tit. x. § 6, p. 308], it was not that he had conceived any aversion to the lifeholder who, during the continuance of his term, should wish to gratify a neighbour with a right of way or water, or to the neighbour who should wish to accept of the indulgence; but that, to a jurisprudential ear, *-tus -tutis* sound little less melodious than *-atus -are*. Whether the melody of the maxim was the real reason of the rule, is not left open to dispute: for it is ushered in by the conjunction *quia*, reason's appointed harbinger: *quia servitus servitutis non datur*.

Neither would equal melody have been produced, nor indeed could similar melody have been called for, in either of these instances, by the opposite provision: it is only when they are opposed to general rules, and not when by their conformity they are absorbed in them, that more specific ones can obtain a separate existence. *Delegatus potest delegare*, and *Servitus servitutis datur*, provisions already included under the general adoption of contracts, would have been as unnecessary to the apprehension and the memory, as, in comparison of their energetic negatives, they are insipid to the ear.

Were the inquiry diligently made, it would be found that the goddess of harmony has exercised more influence, however latent, over the dispensations of Themis, than her most diligent historiographers, or even her most passionate panegyrists, seem to have been aware of. Every one knows, how, by the ministry of Orpheus, it

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should be inscribed — *Let it but put money into our pockets, no tyranny too flagitious to be worshipped by us.*

To this statue of the Arch-malefactor should be added, for a companion, that of the long-robed accomplice: the one lodging the bribe in the hand of the other. The hundred millions of plundered and oppressed Hindoos and Mahometans pay for the one: a Westminster-Hall subscription might pay for the other.

What they have done for Ireland with her seven millions of souls, the authorised deniers and perverters of justice have done for Hindostan with her hundred millions. In this there is nothing wonderful. The wonder is—that, under such institutions, men, though in ever such small number, should be found, whom the view of the injustices which, by *English Judge-made law*, they are compelled to commit, and the miseries they are thus compelled to produce, deprive of health and rest. Witness the Letter of an English Hindostan Judge, Sept. 1, 1819, which lies before me. I will not make so cruel a requital for his honesty, as to put his name in print: indeed the House of Commons' Documents already published leave little need of it.

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was she who first collected the sons of men beneath the shadow of the sceptre: yet, in the midst of continual experience, men seem yet to learn, with what successful diligence she has laboured to guide it in its course. Every one knows, that measured numbers were the language of the infancy of law: none seem to have observed, with what imperious sway they have governed her maturer age. In English jurisprudence in particular, the connexion betwixt law and music, however less perceived than in Spartan legislation, is not perhaps less real nor less close. The music of the Office, though not of the same kind, is not less musical in its kind, than the music of the Theatre; that which hardens the heart, than that which softens it:—sostenutos as long, cadences as sonorous; and those governed by rules, though not yet promulgated, not less determinate. Search indictments, pleadings, proceedings in chancery, conveyances: whatever trespasses you may find against truth and common sense, you will find none against the laws of harmony. The English Liturgy, justly as this quality has been extolled in that sacred office, possesses not a greater measure of it, than is commonly to be found in an English Act of Parliament. Dignity, simplicity, brevity, precision, intelligibility, possibility of being retained or so much as apprehended, every thing yields to Harmony. Volumes might be filled, shelves loaded, with the sacrifices that are made to this insatiate power. Expletives, her ministers in Grecian poetry, are not less busy, though in different shape and bulk, in English legislation; in the former, they are monosyllables;[a] in the latter, they are whole lines.[b]

To return to the *principle of sympathy and antipathy*: a term preferred at first, on account of its impartiality, to the *principle of caprice*. The choice of an appellative, in the above respects too narrow, was owing to my not having, at that time, extended my views over the civil branch of law, any otherwise than as I had found it inseparably involved in the penal. But when we come to the former branch, we shall see the *phantastic* principle making at least as great a figure there, as the principle of *sympathy and antipathy* in the latter.

In the days of Lord Coke, the light of utility can scarcely be said to have as yet shone upon the face of Common Law. If a faint ray of it, under the name of the *argumentum ab inconvenienti*, is to be found in a list of about twenty topics exhibited by that great lawyer as the co-ordinate leaders of that all-perfect system, the admission, so circumstanced, is as sure a proof of neglect, as, to the statues of Brutus and Cassius, exclusion was a cause of notice. It stands, neither in the front, nor in the rear, nor in any post of honour; but huddled in towards the middle, without the smallest mark of preference. [Coke Littleton. 11. a.] Nor is this Latin *inconvenience* by any means the same

——— thing

[a] Μεν, τοι, γε, νυν, &c.

[b] And be it further enacted by the authority aforesaid, that—Provided always, and it is hereby further enacted and declared that—&c. &c.

the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them: holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking out for any extrinsic ground. Thus far in the general department of morals: and in the particular department of politics, measuring out the quantum (as well as determining the ground) of punishment, by the degree of the disapprobation.

XII.

It is manifest, that this is rather a principle in name than in reality: it is not a positive principle of itself, so much as a term employed to signify the negation of all principle. What one expects to find in a principle is something that points out some external consideration, as a means of warranting and guiding the internal sentiments of approbation and disapprobation: this expectation is but ill fulfilled by a proposition, which does neither more nor less than hold up each of those sentiments as a ground and standard for itself.

XIII.

In looking over the catalogue of human actions (says a partizan of this principle) in order to determine which of them are to be marked with the seal of disapprobation, you need but to take counsel of your own feelings: whatever you find in yourself a propensity to condemn, is wrong for that very reason. For the same reason it is also meet for punishment: in what proportion it is adverse to utility, or whether it be adverse to utility at all, is a matter that makes no difference. In that same *proportion* also is it meet for punishment: if you hate much, punish much: if you hate little, punish little: punish as you hate. If you hate not at all, punish not at all: the fine feelings of the soul are not to be overborne and tyrannized by the harsh and rugged dictates of political utility.

XIV.

The various systems that have been formed concerning the standard of right and wrong, may all be reduced to the principle of sympathy and antipathy. One account may serve for all of them. They consist all of them in so many contrivances for avoiding the obligation of appealing to any external standard, and for prevailing upon the reader to accept of the author's sentiment or opinion as a reason, and that a sufficient one, for itself. The phrases different, but the principle the same.*

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thing with the English one. It stands distinguished from *mischief:* and because by the vulgar it is taken for something less bad, it is given by the learned as something worse. *The law prefers a mischief to an inconvenience*, says an admired maxim, and the more admired, because as nothing is expressed by it, the more is supposed to be understood.

Not that there is any avowed, much less a constant opposition, between the prescriptions of utility and the operations of the common law: such constancy we have seen to be too much even for ascetic fervor. [Supra, par. x.] From time to time, instinct would unavoidably betray them into the paths of reason: instinct which, however it may be cramped, can never be killed by education. The cobwebs spun out of the materials brought together by "the competition of opposite analogies," can never have ceased being warped by the silent attraction of the rational principle: though it should have been, as the needle is to the magnet, without the privity of conscience.

* It is curious enough to observe the variety of inventions men have hit upon, and the variety of phrases they have brought forward, in order to conceal from the world, and, if possible, from themselves, this very general and therefore very pardonable self-sufficiency.

1. One man [Lord Shaftesbury, Hutchinson, Hume, &c.] says, he has a thing made on purpose to tell him what is right and what is wrong; and that it is called a *moral sense:* and then he goes to work at his ease, and says, such a thing is right, and such a thing is wrong — why? "because my moral sense tells me it is."

2. Another man [Dr. Beattie] comes and alters the phrase: leaving out *moral*, and putting in *common*, in the room of it. He then tells you, that his common sense teaches him what is right and wrong, as surely as the other's moral sense did: meaning by common sense, a sense of some kind or other, which, he says, is possessed by all mankind: the sense of those, whose sense is not the same as the author's, being struck out of the account as not worth taking. This contrivance does better than the other; for a moral sense, being a new thing, a man may feel about him a good while without being able to find it out: but common sense is as old as the creation; and there is no man but would be ashamed to be thought not to have as much of it as his neighbours. It has another great advantage: by appearing to share power, it lessens envy: for when a man gets up upon this ground, in order to anathematize those who differ from him, it is not by a *sic volo sic jubeo*, but by a *velitis jubeatis.*

3. Another man [Dr. Price] comes, and says, that as to a moral sense indeed, he cannot find that he has any such thing: that however he has an *understanding*, which will do quite as well. This understanding, he says, is the standard of right and wrong: it tells him so and so. All good and wise men understand as he does: if other men's understandings differ in any point from his, so much the worse for them: it is a sure sign they are either defective or corrupt.

4. Another man says, that here is an eternal and immutable Rule of Right: that that rule of right dictates so and so: and then he begins giving you his sentiments upon any thing that comes uppermost: and these sentiments (you are to take for granted) are so many branches of the eternal rule of right.

5. Another man [Dr. Clark], or perhaps the same man (it's no matter) says, that there are certain practices conformable, and others repugnant,

XV.

It is manifest, that the dictates of this principle will frequently coincide with those of utility, though perhaps without intending any such thing. Probably more frequently than not: and hence it is that the business

to the Fitness of Things; and then he tells you at his leisure, what practices are conformable and what repugnant: just as he happens to like a practice or dislike it.

6. A great multitude of people are continually talking of the Law of Nature; and then they go on giving you their sentiments about what is right and what is wrong: and these sentiments, you are to understand, are so many chapters, and sections of the Law of Nature.

7. Instead of the phrase, Law of Nature, you have sometimes Law of Reason, Right Reason, Natural Justice, Natural Equity, Good Order. Any of them will do equally well. This latter is most used in politics. The three last are much more tolerable than the others, because they do not very explicitly claim to be any thing more than phrases: they insist but feebly upon the being looked upon as so many positive standards of themselves, and seem content to be taken, upon occasion, for phrases expressive of the conformity of the thing in question to the proper standard, whatever that may be. On most occasions, however, it will be better to say *utility*: *utility* is clearer, as referring more explicitly to pain and pleasure.

8. We have one philosopher [Woolaston], who says, there is no harm in any thing in the world but in telling a lie: and that if, for example, you were to murder your own father, this would only be a particular way of saying, he was not your father. Of course, when this philosopher sees any thing that he does not like, he says, it is a particular way of telling a lie. It is saying, that the act ought to be done, or may be done, when, *in truth*, it ought not to be done.

9. The fairest and openest of them all is that sort of man who speaks out, and says, I am of the number of the Elect: now God himself takes care to inform the Elect what is right: and that with so good effect, that let them strive ever so, they cannot help not only knowing it but practising it. If therefore a man wants to know what is right and what is wrong, he has nothing to do but come to me.

It is upon the principle of antipathy that such and such acts are often reprobated on the score of their being *unnatural*: the practice of exposing children, established among the Greeks and Romans, was an unnatural practice. Unnatural, when it means any thing, means unfrequent: and there it means something; although nothing to the present purpose. But here it means no such thing: for the frequency of such acts is perhaps the great complaint. It therefore means nothing; nothing, I mean, which there is in the act itself. All it can serve to express is, the disposition of the person who is talking of it: the disposition he is in to be angry at the thoughts of it. Does it merit his anger? Very likely it may: but whether it does or no is a question, which, to be answered rightly, can only be answered upon the principle of utility.

Unnatural, is as good a word as moral sense, or common sense; and would be as good a foundation for a system. Such an act is unnatural; that is, repugnant to nature: for I do not like to practise it; and, consequently, do not practise it. It is therefore repugnant to what ought to be the nature of every body else.

The mischief common to all these ways of thinking and arguing (which, in truth, as we have seen, are but one and the same method, couched in different forms of words) is their serving as a cloke, and pretence, and aliment, to despotism: if not a despotism in practice, a despotism however in disposition: which is but too apt, when pretence and power offer, to show itself in practice. The consequence is, that with intentions very commonly of the purest kind, a man becomes a torment either to himself or his fellow-creatures. If he be of the melancholy cast [Dr. Price,] he sits in silent grief, bewailing their blindness and depravity: if of the irascible [Dr. Beattie,] he declaims with fury and virulence against all who differ from him; blowing up the coals of fanaticism, and branding with the charge of corruption and insincerity, every man who does not think, or profess to think as he does.

If such a man happens to possess the advantages of style, his book may do a considerable deal of mischief before the nothingness of it is understood.

These principles, if such they can be called, it is more frequent to see applied to morals than to politics: but their influence extends itself to both. In politics, as well as morals, a man will be at least equally glad of a pretence for deciding any question in the manner that best pleases him, without the trouble of inquiry. If a man is an infallible judge of what is right and wrong in the actions of private individuals, why not in the measures to be observed by public men in the direction of those actions? Accordingly (not to mention other chimeras) I have more than once known the pretended law of nature set up in legislative debates, in opposition to arguments derived from the principle of utility.

"But is it never, then, from any other considerations than those of utility, that we derive our notions of right and wrong?" I do not know: I do not care. Whether a moral sentiment can be originally conceived from any other source than a view of utility, is one question: whether upon examination and reflection it can, in point of fact, be actually persisted in and justified on any other ground, by a person reflecting within himself, is another: whether in point of right it can properly be justified on any other ground, by a person addressing himself to the community, is a third. The two first are questions of speculation: it matters not, comparatively speaking, how they are decided. The last is a question of practice: the decision of it is of as much importance as that of any can be.

"I feel in myself," say you, "a disposition to approve of such or such an action in a moral view: but this is not owing to any notions I have of its being a useful one to the community. I do not pretend to know whether it be an useful one or not: it may be, for aught I know, a mischievous one." 'But is it then,' say I, 'a mischievous one? Examine; and if you can make yourself sensible that it is so, then, if duty means any thing, that is, moral duty, it is your *duty* at least to abstain from it: and more than

of penal justice is carried on upon that tolerable sort of footing upon which we see it carried on in common at this day. For what more natural or more general ground of hatred to a practice can there be, than the mischievousness of such practice? What all men are exposed to suffer by, all men will be disposed to hate. It is far yet, however, from being a constant ground: for when a man suffers, it is not always that he knows what it is he suffers by. A man may suffer grievously, for instance, by a new tax, without being able to trace up the cause of his sufferings to the injustice of some neighbour, who has eluded the payment of an old one.

XVI.

The principle of sympathy and antipathy is most apt to err on the side of severity. It is for applying punishment in many cases which deserve none: in many cases which deserve some, it is for applying more than they deserve. There is no incident imaginable, be it ever so trivial, and so remote from mischief, from which this principle may not extract a ground of punishment. Any difference in taste: any difference in opinion: upon one subject as well as upon another. No disagreement so trifling which perseverance and altercation will not render serious. Each becomes in the other's eyes an enemy, and, if laws permit, a criminal.* This is one of the circumstances by which the human race is distinguished (not much indeed to its advantage) from the brute creation.

XVII.

It is not, however, by any means unexampled for this principle to err on the side of lenity. A near and perceptible mischief moves antipathy. A remote and imperceptible mischief, though not less real, has no effect. Instances in proof of this will occur in numbers in the course of the work.* It would be breaking in upon the order of it to give them here.

XVIII.

It may be wondered, perhaps, that in all this while no mention has been made of the *theological* principle; meaning that principle which professes to recur for the standard of right and wrong to the will of God. But the case is, this is not in fact a distinct principle. It is never any thing more or less than one or other of the three before-mentioned principles presenting itself under an-

that, if it is what lies in your power, and can be done without too great a sacrifice, to endeavour to prevent it. It is not your cherishing the notion of it in your bosom, and giving it the name of virtue, that will excuse you.'

"I feel in myself," say you again, "a disposition to detest such or such an action in a moral view; but this is not owing to any notions I have of its being a mischievous one to the community. I do not pretend to know whether it be a mischievous one or not: it may be not a mischievous one: it may be, for aught I know, an useful one."—'May it indeed,' say I, 'an useful one? but let me tell you then, that unless duty, and right and wrong, be just what you please to make them, if it really be not a mischievous one, and any body has a mind to do it, it is no duty of your's, but, on the contrary, it would be very wrong in you, to take upon you to prevent him: detest it within yourself as much as you please; that may be a very good reason (unless it be also a useful one) for your not doing it yourself: but if you go about, by word or deed, to do any thing to hinder him, or make him suffer for it, it is you, and not he, that have done wrong: it is not your setting yourself to blame his conduct, or branding it with the name of vice, that will make him culpable, or you blameless. Therefore, if you can make yourself content that he shall be of one mind, and you of another, about that matter, and so continue, it is well: but if nothing will serve you, but that you and he must needs be of the same mind, I'll tell you what you have to do: it is for you to get the better of your antipathy, not for him to truckle to it.'

* King James the First of England had conceived a violent antipathy against Arians: two of whom he burnt.[a] This gratification he procured himself without much difficulty: the notions of the times were favourable to it. He wrote a furious book against Vorstius, for being what was called an Arminian: for Vorstius was at a distance. He also wrote a furious book, called "A Counterblast to Tobacco," against the use of that drug, which Sir Walter Raleigh had then lately introduced. Had the notions of the times co-operated with him, he would have burnt the Anabaptist and the smoker of tobacco in the same fire. However, he had the satisfaction of putting Raleigh to death afterwards, though for another crime.

Disputes concerning the comparative excellence of French and Italian music have occasioned very serious bickerings at Paris. One of the parties would not have been sorry (says Mr. D'Alembert[b]) to have brought government into the quarrel. Pretences were sought after and urged. Long before that, a dispute of like nature, and of at least equal warmth, had been kindled at London upon the comparative merits of two composers at London; where riots between the approvers and disapprovers of a new play are, at this day, not unfrequent. The ground of quarrel between the Big-endians and the Little-endians in the fable, was not more frivolous than many an one which has laid empires desolate. In Russia, it is said, there was a time when some thousands of persons lost their lives in a quarrel, in which the government had taken part, about the number of fingers to be used in making the sign of the cross. This was in days of yore: the ministers of Catherine II. are better *instructed*[c] than to take any other part in such disputes, than that of preventing the parties concerned from doing one another a mischief.

† See ch. xviii. [Division], par. 42, 44.

[a] Hume's Hist. vol. 6.

[b] Melanges Essai sur la Liberté de la Musique.

[c] Instruct. art. 474, 475, 476.

other shape. The *will* of God here meant cannot be his revealed will, as contained in the sacred writings: for that is a system which nobody ever thinks of recurring to at this time of day, for the details of political administration: and even before it can be applied to the details of private conduct, it is universally allowed, by the most eminent divines of all persuasions, to stand in need of pretty ample interpretations: else to what use are the works of those divines? And for the guidance of these interpretations, it is also allowed, that some other standard must be assumed. The will then which is meant on this occasion, is that which may be called the *presumptive* will: that is to say, that which is presumed to be his will on account of the conformity of its dictates to those of some other principle. What then may be this other principle? it must be one or other of the three mentioned above: for there cannot, as we have seen, be any more.

It is plain, therefore, that, setting revelation out of the question, no light can ever be thrown upon the standard of right and wrong, by any thing that can be said upon the question, what is God's will. We may be perfectly sure, indeed, that whatever is right is conformable to the will of God: but so far is that from answering the purpose of showing us what is right, that it is necessary to know first whether a thing is right, in order to know from thence whether it be conformable to the will of God.*

XIX.

There are two things which are very apt to be confounded, but which it imports us carefully to distinguish: — the motive or cause, which, by operating on the mind of an individual, is productive of any act . and the ground or reason which warrants a legislator, or other by-stander, in regarding that act with an eye of approbation. When the act happens, in the particular instance in question, to be productive of effects which we approve of, much more if we happen to observe that the same motive may frequently be productive, in other instances, of the like effects, we are apt to transfer our approbation to the motive itself, and to assume, as the just ground for the approbation we bestow on the act, the circumstance of its originating from that motive. It is in this way that the sentiment of antipathy has often been considered as a just ground of action. Antipathy, for instance, in such or such a case, is the cause of an action which is attended with good effects: but this does not make it a right ground of action in that case, any more than in any other. Still farther. Not only the effects are good, but the agent sees beforehand that they will be so. This may make the action indeed a perfectly right action: but it does not make antipathy a right ground of action. For the same sentiment of antipathy, if implicitly deferred to, may be, and very frequently is, productive of the very worst effects. Antipathy, therefore, can never be a right ground of action. No more, therefore, can resentment, which, as will be seen more particularly hereafter, is but a modification of antipathy. The only right ground of action, that can possibly subsist, is, after all, the consideration of utility, which, if it is a right principle of action, and of approbation, in any one case, is so in every other. Other principles in abundance, that is, other motives, may be the reasons why such and such an act *has* been done: that is, the reasons or causes of its being done: but it is this alone that can be the reason why it might or ought to have been done. Antipathy or resentment requires always to be regulated, to prevent its doing mischief: to be regulated by what? always by the principle of utility. The principle of utility neither requires nor admits of any other regulator than itself.

OBJECTIONS TO THE PRINCIPLE OF UTILITY ANSWERED.†

TRIFLING scruples and "trifling verbal difficulties may be raised in opposition to the principle of utility, but no real and distinct objection can be opposed to it. Indeed, how can it be combated, if not by reasons drawn from the principle itself? To say that it is

* The principle of theology refers every thing to God's pleasure. But what is God's pleasure? God does not, he confessedly does not now, either speak or write to us. How then are we to know what is his pleasure? By observing what is our own pleasure, and pronouncing it to be his. Accordingly, what is called the pleasure of God is and must necessarily be (revelation apart) neither more nor less than the good pleasure of the person, whoever he be, who is pronouncing what he believes, or pretends, to be God's pleasure. How know you it to be God's pleasure that such or such an act should be abstained from? whence come you even to suppose as much? "Because the engaging in it would, I imagine, be prejudicial upon the whole to the happiness of mankind;" says the partizan of the principle of utility: "Because the commission of it is attended with a gross and sensual, or at least with a trifling and transient satisfaction;" says the partizan of the principle of asceticism: "Because I detest the thoughts of it; and I cannot, neither ought I to be called upon to tell why;" says he who proceeds upon the principle of antipathy. In the words of one or other of these must that person necessarily answer (revelation apart) who professes to take for his standard the will of God.

† The following paragraphs are inserted here from Dumont's "Traités de Legislation," in order to complete the exhibition of Bentham's principles, as published in his lifetime.—[ED.]

dangerous, is to say that to consult utility *is* contrary to utility.

The difficulty in this question arises from the perversity of language. *Virtue* has been represented as opposed to utility. Virtue, it has been said, consists in the sacrifice of our interests to our duties. In order to express these ideas clearly; it is necessary to observe, that there are interests of different orders, and that different interests are in certain circumstances incompatible. Virtue is the sacrifice of a smaller to a greater interest — of a momentary to a permanent interest — of a doubtful to a certain interest. Every idea of virtue, which is not derived from this notion, is as obscure as the motive to it is precarious.

Those who, for the sake of peace, seeking to distinguish politics and morals, assign utility as the principle of the first, and justice of the second, only exhibit the confusion of their ideas. The whole difference between politics and morals is this: the one directs the operations of governments, the other directs the proceedings of individuals; their common object is happiness. That which is politically good cannot be morally bad; unless the rules of arithmetic, which are true for great numbers, are false as respects those which are small.

Evil may be done, whilst it is believed that the *principle of utility* is followed. A feeble and limited mind may deceive itself, by considering only a part of the good and evil. A man under the influence of passion may deceive himself, by setting an extreme value upon one advantage which hides from him the inconveniences attending upon it. What constitutes a wicked man, is the habit of seeking pleasures hurtful to others; and even this supposes the absence of many kinds of pleasures. But we ought not to charge upon this principle the faults which are opposed to it, and which it alone can serve to remove. If a man calculate badly, it is not arithmetic which is in fault, it is himself. If the reproaches which are heaped upon Machiavel are well founded, his errors do not arise from his having made use of the principle of utility; but from his having made false applications of it. The author of *Anti-Machiavel* has well understood this. He has refuted "The Prince," by shewing that its maxims are mischievous, and that bad faith is bad policy.

Those who, after reading the Offices of Cicero and the platonic moralists, have a confused notion of *utility* as opposed to *honesty*, often quote the saying of Aristides with regard to the project which Themistocles had unfolded to him alone: "The project of Themistocles is *very advantageous*," said Aristides to the assembled people, "but it is very unjust." They think they see here a decided opposition between utility and justice; but they deceive themselves: there is only a comparison of good and evil. Injustice is a term which presents to the mind the collection of all the evils resulting from a situation in which men can no longer trust one another. Aristides should have said, "The project of Themistocles would be useful for a moment, and hurtful for ages: what it would bestow is nothing in comparison with what it would take away."*

This *principle of utility*, it is said, is only the renewal of epicurism, and it is known what ravages this doctrine made in manners: it was always the doctrine of the most corrupt men.

Epicurus, it is true, is the only one among the ancients who has the merit of having known the true source of morality; but to suppose that his doctrine leads to the consequences imputed to it, is to suppose that happiness can be the enemy of happiness itself. "*Sic præsentibus utaris voluptatibus ut futuris non noceas.*" Seneca is here in accordance with Epicurus: and what more can be desired in morals than the cutting off of every pleasure hurtful to one's self or to others. But is not this the *principle of utility?*

"But it may be said, every one will be constituting himself judge of this utility: every obligation will cease when he no longer thinks he perceives in it his own interest.

Every one will constitute himself judge of his own utility; this is and this ought to be, otherwise man would not be a reasonable being. He who is not a judge of what is suitable for himself, is less than an infant, is a fool. The obligation which binds men to their engagements, is nothing but a feeling of an interest of a superior class, which outweighs an inferior interest. Men are not always held by the particular utility of a certain engagement; but in the case in which the engagement becomes burthensome to one of the parties, they are still held by the general utility of engagements—by the confidence that each enlightened man wishes to have placed in his word, that he may be considered as trustworthy, and enjoy the advantages attached to probity and esteem. It is not the engagement which constitutes the obligation by itself; for there are some void engagements; there are some unlawful. Why? Because they are considered as hurtful. It is the utility of the contract which gives it force.

* This anecdote is not worth quoting, except for the purpose of explaining the meaning of the words, since its falsehood is demonstrated. (See Mitford's History of Greece.) Plutarch, who desired to honour the Athenians, has been greatly embarrassed in reconciling this noble sentiment of justice with the greater part of their history.

The most exalted acts of virtue may be easily reduced to a calculation of good and evil. This is neither to degrade nor to weaken them, but to represent them as the effects of reason, and to explain them in a simple and intelligible manner.

Let us observe the circle in which we are compelled to move when the principle of utility is not recognized. I ought to keep my promise. Why? Because my conscience prescribes it. How do you know that your conscience prescribes it? Because I have an internal feeling of it. Why ought you to obey your conscience? Because God is the author of my nature; and to obey my conscience, is to obey God. Why ought you to obey God? Because it is my first duty. How do you know this? Because my conscience tells me so—&c. Such is the eternal round from which there is no exit: such is the source of obstinate and invincible errors; for if there is no where any judge but feeling, there is no method of distinguishing between the injunctions of an enlightened and a blind conscience. All persecutors have had the same title, and all fanatics possess the same right.

If you would reject the *principle of utility*, because it may be ill applied, what would you substitute in its stead? What rule have you found which cannot be abused?—what infallible guide do you possess?

Would you substitute some despotic principle, which directs men to act in a certain manner, without knowing why, from pure obsequiousness?

Would you substitute some anarchical and capricious principle, founded solely upon internal and peculiar feelings?

In these cases, what are the motives by which you would determine men to follow you? Would they be independent of their interest? If they do not agree with you, how will you reason with them?—how will you attempt to conciliate them? Where would you cite all the sects, all the opinions, all the contradictions, which overspread the earth, if not to the tribunal of *their common interest*.

The most obstinate adversaries of the principle of utility are those who fix themselves upon what they call the *religious principle*. They profess to take the will of God for the sole rule of good and evil. It is the only rule, they say, which possesses all the requisite characters, being infallible, universal, supreme, &c.

I reply, that the religious principle is not a distinct principle; that it is one or other of those of which we have already spoken, presented under another aspect. What is called the will of God, can only be *presumed* to be his will, except where God has explained himself to us by immediate and peculiar revelations. But how shall a man presume upon the will of God? According to his own will? Now his own will is always directed by one of the three before-mentioned principles. How do you know that God has willed a certain thing? "Because it would be prejudicial to the happiness of men," replies the partisan of utility. "Because it includes a gross and sensual pleasure that God disapproves," replies the ascetic. "Because it wounds my conscience, because it is contrary to my natural feelings, and ought to be detested without examination," is the language of antipathy.

But revelation, it may be said, is the direct expression of the will of God. In it there is nothing arbitrary. It is a guide which ought to govern all human reasoning.

I shall not indirectly reply, that revelation is not universal; that among Christian nations there are many individuals who do not admit it, and that some common principle of reasoning is required for all men

But I say that revelation is not a system of politics or of morals; that its precepts require to be explained, modified, limited the one by the other; that taken in a literal sense, they would overturn the world, annihilate self-defence, industry, commerce, reciprocal attachments. Ecclesiastical history is one incontestible proof of the frightful evils which result from religious maxims ill understood.

How great the differences between Protestant and Catholic theologians! between the moderns and the ancients! The evangelical morality of Paley is not the evangelical morality of St. Nicholas; that of the Jansenists is not the same as that of the Jesuits. The interpreters of the sacred writings divide themselves into three classes: one class is guided by criticism; the principle of utility; another follows ascetism; the other follows the confused impressions of sympathy and antipathy. The first, far from excluding pleasures, offer them as a proof of the goodness of God. The ascetics are the mortal enemies of pleasures: if they allow them, it is never for their own sake, but as a means to a certain necessary end. The last approve or condemn them according to their fancy, without being determined by the consideration of their consequences. Revelation is not therefore a separate principle: this title can only be given to what does not require proof, and which may be employed to prove every thing else.

CHAPTER III.

OF THE FOUR* SANCTIONS OR SOURCES OF PAIN AND PLEASURE.

I.

IT has been shown that the happiness of the individuals, of whom a community is composed, that is, their pleasures and their security, is the end and the sole end which the legislator ought to have in view: the sole standard, in conformity to which each individual ought, as far as depends upon the legislator, to be *made* to fashion his behaviour. But whether it be this or any thing else that is to be *done*, there is nothing by which a man can ultimately be *made* to do it, but either pain or pleasure. Having taken a general view of these two grand objects (*viz.* pleasure, and what comes to the same thing, immunity from pain) in the character of *final* causes; it will be necessary to take a view of pleasure and pain itself, in the character of *efficient* causes or means.

II.

There are four distinguishable sources from which pleasure and pain are in use to flow: considered separately, they may be termed the *physical*, the *political*, the *moral*, and the *religious*: and inasmuch as the pleasures and pains belonging to each of them are capable of giving a binding force to any law or rule of conduct, they may all of them be termed *sanctions*.†

III.

If it be in the present life, and from the ordinary course of nature, not purposely modified by the interposition of the will of any human being, nor by any extraordinary interposition of any superior invisible being, that the pleasure or the pain takes place or is expected, it may be said to issue from, or to belong to, the *physical sanction*.

IV.

If at the hands of a *particular* person or set of persons in the community, who under names correspondent to that of *judge*, are chosen for the particular purpose of dispensing it, according to the will of the sovereign or supreme ruling power in the state, it may be said to issue from the *political sanction*.

V.

If at the hands of such *chance* persons in the community, as the party in question may happen in the course of his life to have concerns with, according to each man's spontaneous disposition, and not according to any settled or concerted rule, it may be said to issue from the *moral* or *popular sanction*.‡

VI.

If from the immediate hand of a superior invisible being, either in the present life, or in a future, it may be said to issue from the *religious sanction*.

VII.

Pleasures or pains which may be expected to issue from the *physical*, *political*, or *moral* sanctions, must all of them be expected to be experienced, if ever, in the *present* life: those which may be expected to issue from the *religious* sanction, may be expected to be experienced either in the *present* life or in a *future*.

VIII.

Those which can be experienced in the present life, can of course be no others than

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* The following is an extract from a letter of Bentham's to Dumont, dated Oct. 28, 1821:—

"*Sanctions.* Since the Traites, others have been discovered. There are now, I. Human: six, viz. 1. Physical; 2. Retributive; 3. Sympathetic; 4. Antipathetic; 5. Popular, or Moral; 6. Political, including Legal and Administrative.

"II. Superhuman *vice* Religious: all exemplifiable in the case of drunkenness; viz. the punitory class.

"*Note*—Sanctions *in genere* duæ, punitoriæ et remuneratoriæ; *in serie*, septem ut super; seven multiplied by two, equal fourteen.

"The Judicatory of the popular or moral sanction has two Sections: that of the few, and that of the many: Aristocratical and Democratical: their laws, their decisions, are to a vast extent opposite."

† Sanctio, in Latin, was used to signify the *act of binding*, and, by a common grammatical transition, *any thing which serves to bind a man*: to wit, to the observance of such or such a mode of conduct. According to a Latin grammarian,[a] the import of the word is derived by rather a far-fetched process (such as those commonly are, and in a great measure indeed must be, by which intellectual ideas are derived from sensible ones) from the word *sanguis*, blood: because among the Romans, with a view to inculcate into the people a persuasion that such or such a mode of conduct would be rendered obligatory upon a man by the force of what I call the religious sanction (that is, that he would be made to suffer by the extraordinary interposition of some superior being, if he failed to observe the mode of conduct in question) certain ceremonies were contrived by the priests: in the course of which ceremonies the blood of victims was made use of.

A Sanction then is a source of obligatory powers or *motives*: that is, of *pains* and *pleasures*; which, according as they are connected with such or such modes of conduct, operate, and are indeed the only things which can operate, as *motives*. See Chap. x. [Motives.]

‡ Better termed *popular*, as more directly indicative of its constituent cause; as likewise of its relation to the more common phrase *public opinion*, in French *opinion publique*, the name there given to that tutelary power, of which of late so much is said, and by which so much is done. The latter appellation is however unhappy and inexpressive; since if *opinion* is material, it is only in virtue of the influence it exercises over action, through the medium of the affections and the will.

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[a] Servius. See Ainsworth's Dict. ad verbum *Sanctio*.

such as human nature in the course of the present life is susceptible of: and from each of these sources may flow all the pleasures or pains of which, in the course of the present life, human nature is susceptible. With regard to these, then (with which alone we have in this place any concern), those of them which belong to any one of those sanctions, differ not ultimately in kind from those which belong to any one of the other three: the only difference there is among them lies in the circumstances that accompany their production. A suffering which befals a man in the natural and spontaneous course of things, shall be styled, for instance, a *calamity*; in which case, if it be supposed to befal him through any imprudence of his, it may be styled a punishment issuing from the physical sanction. Now this same suffering, if inflicted by the law, will be what is commonly called a *punishment*; if incurred for want of any friendly assistance, which the misconduct, or supposed misconduct, of the sufferer has occasioned to be withholden, a punishment issuing from the *moral* sanction; if through the immediate interposition of a particular providence, a punishment issuing from the religious sanction.

IX.

A man's goods, or his person, are consumed by fire. If this happened to him by what is called an accident, it was a calamity: if by reason of his own imprudence (for instance, from his neglecting to put his candle out), it may be styled a punishment of the physical sanction: if it happened to him by the sentence of the political magistrate, a punishment belonging to the political sanction — that is, what is commonly called a punishment: if for want of any assistance which his *neighbour* withheld from him out of some dislike to his *moral* character, a punishment of the *moral* sanction: if by an immediate act of *God's* displeasure, manifested on account of some *sin* committed by him, or through any distraction of mind, occasioned by the dread of such displeasure, a punishment of the *religious* sanction.*

X.

As to such of the pleasures and pains belonging to the religious sanction, as regard a future life, of what kind these may be, we cannot know. These lie not open to our observation. During the present life they are matter only of expectation: and, whether that expectation be derived from natural or revealed religion, the particular kind of pleasure or pain, if it be different from all those which lie open to our observation, is what we can have no idea of. The best ideas we can obtain of such pains and pleasures are altogether unliquidated in point of quality. In what other respects our ideas of them *may* be liquidated, will be considered in another place.†

XI.

Of these four sanctions, the physical is altogether, we may observe, the ground-work of the political and the moral: so is it also of the religious, in as far as the latter bears relation to the present life. It is included in each of those other three. This may operate in any case (that is, any of the pains or pleasures belonging to it may operate) independently of *them*: none of *them* can operate but by means of this. In a word, the powers of nature may operate of themselves; but neither the magistrate, nor men at large, *can* operate, nor is God in the case in question *supposed* to operate, but through the powers of nature.

XII.

For these four objects, which in their nature have so much in common, it seemed of use to find a common name. It seemed of use, in the first place, for the convenience of giving a name to certain pleasures and pains, for which a name equally characteristic could hardly otherwise have been found: in the second place, for the sake of holding up the efficacy of certain moral forces, the influence of which is apt not to be sufficiently attended to. Does the political sanction exert an influence over the conduct of mankind? The moral, the religious sanctions, do so too. In every inch of his career are the operations of the political magistrate liable to be aided or impeded by these two foreign powers: who, one or other of them, or both, are sure to be either his rivals or his allies. Does it happen to him to leave them out in his calculations? he will be sure almost to find himself mistaken in the result. Of all this we shall find abundant proofs in the sequel of this work. It behoves him, therefore, to have them continually before his eyes; and that under such a name as exhibits the relation they bear to his own purposes and designs.

CHAPTER IV.

VALUE OF A LOT OF PLEASURE OR PAIN, HOW TO BE MEASURED.

I.

PLEASURES then, and the avoidance of pains are the *ends* which the legislator has in view: it behoves him therefore to understand their *value*. Pleasures and pains are the *instruments* he has to work with: it behoves him

* A suffering conceived to befal a man by the immediate act of God, as above, is often, for shortness sake, called a *judgment*: instead of saying, a suffering inflicted on him in consequence of a special judgment formed, and resolution thereupon taken, by the Deity.

† See ch. xv. [Cases unmeet], par. 2, Note.

therefore to understand their force, which is again, in another point of view, their value.

II.

To a person considered *by himself*, the value of a pleasure or pain considered *by itself*, will be greater or less, according to the four following circumstances:*

1. Its *intensity*.
2. Its *duration*
3. Its *certainty* or *uncertainty*.
4. Its *propinquity* or *remoteness*.

III.

These are the circumstances which are to be considered in estimating a pleasure or a pain considered each of them by itself. But when the value of any pleasure or pain is considered for the purpose of estimating the tendency of any *act* by which it is produced, there are two other circumstances to be taken into the account; these are,

5. Its *fecundity*, or the chance it has of being followed by sensations of the *same* kind: that is, pleasures, if it be a pleasure: pains, if it be a pain.

6. Its *purity*, or the chance it has of *not* being followed by sensations of the *opposite* kind: that is, pains, if it be a pleasure: pleasures, if it be a pain.

These two last, however, are in strictness scarcely to be deemed properties of the pleasure or the pain itself; they are not, therefore, in strictness to be taken into the account of the value of that pleasure or that pain. They are in strictness to be deemed properties only of the act, or other event, by which such pleasure or pain has been produced; and accordingly are only to be taken into the account of the tendency of such act or such event.

IV.

To a *number* of persons, with reference to each of whom the value of a pleasure or a pain is considered, it will be greater or less, according to seven circumstances: to wit, the six preceding ones; *viz.*

1. Its *intensity*.
2. Its *duration*.
3. Its *certainty* or *uncertainty*.
4. Its *propinquity* or *remoteness*.
5. Its *fecundity*.
6. Its *purity*.

And one other; to wit:

7. Its *extent*; that is, the number of persons to whom it *extends*; or (in other words) who are affected by it.

V.

To take an exact account, then, of the general tendency of any act, by which the interests of a community are affected, proceed as follows. Begin with any one person of those whose interests seem most immediately to be affected by it: and take an account,

1. Of the value of each distinguishable *pleasure* which appears to be produced by it in the *first* instance.

2. Of the value of each *pain* which appears to be produced by it in the *first* instance.

3. Of the value of each pleasure which appears to be produced by it *after* the first. This constitutes the *fecundity* of the first *pleasure* and the *impurity* of the first *pain*.

4. Of the value of each *pain* which appears to be produced by it after the first. This constitutes the *fecundity* of the first *pain*, and the *impurity* of the first pleasure.

5. Sum up all the values of all the *pleasures* on the one side, and those of all the pains on the other. The balance, if it be on the side of pleasure, will give the *good* tendency of the act upon the whole, with respect to the interests of that *individual* person; if on the side of pain, the *bad* tendency of it upon the whole.

6. Take an account of the *number* of persons whose interests appear to be concerned; and repeat the above process with respect to each. *Sum up* the numbers expressive of the degrees of *good* tendency, which the act has, with respect to each individual, in regard to whom the tendency of it is *good* upon the whole: do this again with respect to each individual, in regard to whom the tendency of it is *good* upon the whole: do this again with respect to each individual, in regard to whom the tendency of it is *bad* upon the whole. Take the *balance*; which, if on the side of *pleasure*, will give the general *good tendency* of the act, with respect to the total number or community of individuals concerned; if on the side of pain, the general *evil tendency*, with respect to the same community.

VI.

It is not to be expected that this process should be strictly pursued previously to every moral judgment, or to every legislative or judicial operation. It may, however, be always kept in view: and as near as the process actually pursued on these occasions approaches to it, so near will such process approach to the character of an exact one.

VII.

The same process is alike applicable to

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* These circumstances have since been denominated *elements* or *dimensions* of *value* in a pleasure or a pain.

Not long after the publication of the first edition, the following memoriter verses were framed, in the view of lodging more effectually, in the memory, these points, on which the whole fabric of morals and legislation may be seen to rest.

Intense, long, certain, speedy, fruitful, pure—
Such marks in *pleasures* and in *pains* endure.
Such pleasures seek, if *private* be thy end:
If it be *public*, wide let them *extend*.
Such *pains* avoid, whichever be thy view:
If pains *must* come, let them *extend* to few.

pleasure and pain, in whatever shape they appear; and by whatever denomination they are distinguished: to pleasure, whether it be called *good* (which is properly the cause or instrument of pleasure), or *profit* (which is distant pleasure, or the cause or instrument of distant pleasure), or *convenience*, or *advantage*, *benefit*, *emolument*, *happiness*, and so forth: to pain, whether it be called *evil* (which corresponds to *good*), or *mischief*, or *inconvenience*, or *disadvantage*, or *loss*, or *unhappiness*, and so forth.

VIII.

Nor is this a novel and unwarranted, any more than it is a useless theory. In all this there is nothing but what the practice of mankind, wheresoever they have a clear view of their own interest, is perfectly conformable to. An article of property, an estate in land, for instance, is valuable: on what account? On account of the pleasures of all kinds which it enables a man to produce, and, what comes to the same thing, the pains of all kinds which it enables him to avert. But the value of such an article of property is universally understood to rise or fall according to the length or shortness of the time which a man has in it: the certainty or uncertainty of its coming into possession: and the nearness or remoteness of the time at which, if at all, it is to come into possession. As to the *intensity* of the pleasures which a man may derive from it, this is never thought of, because it depends upon the use which each particular person may come to make of it; which cannot be estimated till the particular pleasures he may come to derive from it, or the particular pains he may come to exclude by means of it, are brought to view. For the same reason, neither does he think of the *fecundity* or *purity* of those pleasures.

Thus much for pleasure and pain, happiness and unhappiness, in *general*. We come now to consider the several particular kinds of pain and pleasure.

CHAPTER V.

PLEASURES AND PAINS, THEIR KINDS.

I.

HAVING represented what belongs to all sorts of pleasures and pains alike, we come now to exhibit, each by itself, the several sorts of pains and pleasures. Pains and pleasures may be called by one general word, interesting perceptions. Interesting perceptions are either simple or complex. The simple ones are those which cannot any one of them be resolved into more: complex are those which are resolvable into divers simple ones. A complex interesting perception may accordingly be composed either, 1. Of pleasures alone: 2. Of pains alone: or, 3. Of a pleasure or pleasures, and a pain or pains together. What determines a lot of pleasure, for example, to be regarded as one complex pleasure, rather than as divers simple ones, is the nature of the exciting cause. Whatever pleasures are excited all at once by the action of the same cause, are apt to be looked upon as constituting all together but one pleasure.

II.

The several simple pleasures of which human nature is susceptible, seem to be as follows: 1. The pleasures of sense. 2. The pleasures of wealth. 3. The pleasures of skill. 4. The pleasures of amity. 5. The pleasures of a good name. 6. The pleasures of power. 7. The pleasures of piety. 8. The pleasures of benevolence. 9. The pleasures of malevolence. 10. The pleasures of memory. 11. The pleasures of imagination. 12. The pleasures of expectation. 13. The pleasures dependent on association. 14. The pleasures of relief.

III.

The several simple pains seem to be as follows: 1. The pains of privation. 2. The pains of the senses. 3. The pains of awkwardness. 4. The pains of enmity. 5. The pains of an ill name. 6. The pains of piety. 7. The pains of benevolence. 8. The pains of malevolence. 9. The pains of the memory. 10. The pains of the imagination. 11. The pains of expectation. 12. The pains dependent on association.*

IV.

1. The pleasures of sense seem to be as follows: 1. The pleasures of the taste or palate; including whatever pleasures are experienced in satisfying the appetites of hunger and thirst. 2. The pleasure of intoxication. 3. The pleasures of the organ of smelling. 4. The pleasures of the touch. 5. The simple pleasures of the ear; independent of association. 6. The simple pleasures of the eye; independent of association. 7. The pleasure of the sexual sense. 8. The pleasure of health: or, the internal pleasurable feeling or flow of spirits (as it is

* The catalogue here given, is what seemed to be a complete list of the several simple pleasures and pains of which human nature is susceptible: insomuch, that if, upon any occasion whatsoever, a man feels pleasure or pain, it is either referable at once to some one or other of these kinds, or resolvable into such as are. It might perhaps have been a satisfaction to the reader, to have seen an analytical view of the subject, taken upon an exhaustive plan, for the purpose of demonstrating the catalogue to be what it purports to be, a complete one. The catalogue is in fact the result of such an analysis; which, however, I thought it better to discard at present, as being of too metaphysical a cast, and not strictly within the limits of this design. See ch. xv. [Cases unmeet] par. 2. Note.

called) which accompanies a state of full health and vigour; especially at times of moderate bodily exertion. 9. The pleasures of novelty: or, the pleasures derived from the gratification of the appetite of curiosity, by the application of new objects to any of the senses.*

v.

2. By the pleasures of wealth may be meant those pleasures which a man is apt to derive from the consciousness of possessing any article or articles which stand in the list of instruments of enjoyment or security, and more particularly at the time of his first acquiring them; at which time the pleasure may be styled a pleasure of gain or a pleasure of acquisition: at other times a pleasure of possession.

3. The pleasures of skill, as exercised upon particular objects, are those which accompany the application of such particular instruments of enjoyment to their uses, as cannot be so applied without a greater or less share of difficulty or exertion.†

vi.

4. The pleasures of amity, or self-recommendation, are the pleasures that may accompany the persuasion of a man's being in the acquisition or the possession of the good-will of such or such assignable person or persons in particular: or, as the phrase is, of being upon good terms with him or them: and as a fruit of it, of his being in a way to have the benefit of their spontaneous and gratuitous services.

vii.

5. The pleasures of a good name are the pleasures that accompany the persuasion of a man's being in the acquisition or the possession of the good-will of the world about him; that is, of such members of society as he is likely to have concerns with; and as a means of it, either their love or their esteem, or both: and as a fruit of it, of his being in the way to have the benefit of their spontaneous and gratuitous services. These may likewise be called the pleasures of good repute, the pleasures of honour, or the pleasures of the moral sanction.‡

viii.

6. The pleasures of power are the pleasures that accompany the persuasion of a man's being in a condition to dispose people, by means of their hopes and fears, to give him the benefit of their services: that is, by the hope of some service, or by the fear of some disservice, that he may be in the way to render them.

ix.

7. The pleasures of piety are the pleasures that accompany the belief of a man's being in the acquisition or in possession of the good-will or favour of the Supreme Being: and as a fruit of it, of his being in a way of enjoying pleasures to be received by God's special appointment, either in this life, or in a life to come. These may also be called the pleasures of religion, the pleasures of a religious disposition, or the pleasures of the religious sanction.‖

x.

8. The pleasures of benevolence are the pleasures resulting from the view of any pleasures supposed to be possessed by the beings who may be the objects of benevolence; to wit, the sensitive beings we are acquainted with; under which are commonly included, 1. The Supreme Being. 2. Human beings. 3. Other animals. These may also be called the pleasures of good-will, the pleasures of sympathy, or the pleasures of the benevolent or social affections.

xi.

9. The pleasures of malevolence are the pleasures resulting from the view of any pain supposed to be suffered by the beings who may become the objects of malevolence; to wit, 1. Human beings. 2. Other animals. These may also be styled the pleasures of ill-will, the pleasures of the irascible appetite, the pleasures of antipathy, or the pleasures of the malevolent or dissocial affections.

xii.

10. The pleasures of the memory are the pleasures which, after having enjoyed such and such pleasures, or even in some cases after having suffered such and such pains, a man will now and then experience, at recollecting them exactly in the order and in the circumstances in which they were actually enjoyed or suffered. These derivative pleasures may of course be distinguished into as many species as there are of original perceptions, from whence they may be copied. They may also be styled pleasures of simple recollection.

xiii.

11. The pleasures of the imagination are the pleasures which may be derived from the contemplation of any such pleasures as may happen to be suggested by the memory, but in a different order, and accompanied by different groups of circumstances. These may accordingly be referred to any one of the three cardinal points of time, present, past, or future. It is evident they may admit of as many distinctions as those of the former class.

* There are also pleasures of novelty, excited by the appearance of new ideas: these are pleasures of the imagination. See infra, xiii.

† For instance, the pleasure of being able to gratify the sense of hearing, by singing, or performing upon any musical instrument. The pleasure thus obtained, is a thing superadded to, and perfectly distinguishable from, that which a man enjoys from hearing another person perform in the same manner.

‡ See ch. iii. [Sanctions.]

‖ See ch. iii. [Sanctions.]

XIV.

12. The pleasures of expectation are the pleasures that result from the contemplation of any sort of pleasure, referred to time *future*, and accompanied with the sentiment of *belief*. These also may admit of the same distinctions.*

XV.

13. The pleasures of association are the pleasures which certain objects or incidents may happen to afford, not of themselves, but merely in virtue of some association they have contracted in the mind with certain objects or incidents which are in themselves pleasurable. Such is the case, for instance, with the pleasure of skill, when afforded by such a set of incidents as compose a game of chess. This derives its pleasurable quality from its association partly with the pleasures of skill, as exercised in the production of incidents pleasurable of themselves: partly from its association with the pleasures of power. Such is the case also with the pleasure of good luck, when afforded by such incidents as compose the game of hazard, or any other game of chance, when played at for nothing. This derives its pleasurable quality from its association with one of the pleasures of wealth; to wit, with the pleasure of acquiring it.

XVI.

14. Farther on we shall see pains grounded upon pleasures; in like manner may we now see pleasures grounded upon pains. To the catalogue of pleasures may accordingly be added the pleasures of *relief:* or, the pleasures which a man experiences when, after he has been enduring a pain of any kind for a certain time, it comes to cease, or to abate. These may of course be distinguished into as many species as there are of pains: and may give rise to so many pleasures of memory, of imagination, and of expectation.

XVII.

1. Pains of privation are the pains that may result from the thought of not possessing in the time present any of the several kinds of pleasures. Pains of privation may accordingly be resolved into as many kinds as there are of pleasures to which they may correspond, and from the absence whereof they may be derived.

XVIII.

There are three sorts of pains which are only so many modifications of the several pains of privation. When the enjoyment of any particular pleasure happens to be particularly desired, but without any expectation approaching to assurance, the pain of privation which thereupon results takes a particular name, and is called the pain of *desire*, or of unsatisfied desire.

XIX.

Where the enjoyment happens to have been looked for with a degree of expectation approaching to assurance, and that expectation is made suddenly to cease, it is called a pain of disappointment.

XX.

A pain of privation takes the name of a pain of regret in two cases: 1. Where it is grounded on the memory of a pleasure, which having been once enjoyed, appears not likely to be enjoyed again: 2. Where it is grounded on the idea of a pleasure, which was never actually enjoyed, nor perhaps so much as expected, but which might have been enjoyed (it is supposed) had such or such a contingency happened, which, in fact, did not happen.

XXI.

2. The several pains of the senses seem to be as follows: 1. The pains of hunger and thirst: or, the disagreeable sensations produced by the want of suitable substances which need at times to be applied to the alimentary canal. 2. The pains of the taste: or, the disagreeable sensations produced by the application of various substances to the palate, and other superior parts of the same canal. 3. The pains of the organ of smell: or, the disagreeable sensations produced by the effluvia of various substances when applied to that organ. 4. The pains of the touch: or, the disagreeable sensations produced by the application of various substances to the skin. 5. The simple pains of the hearing: or, the disagreeable sensations excited in the organ of that sense by various kinds of sounds; independently (as before) of association. 6. The simple pains of the sight: or, the disagreeable sensations, if any such there be, that may be excited in the organ of that sense by visible images, independent of the principle of association. 7.† The pains resulting from excessive heat or cold, unless these be referable to the touch. 8. The pains of disease: or, the acute and uneasy sensations resulting from the several diseases and indispositions to which human nature is liable. 9. The pain of exertion, whether bodily or mental: or, the uneasy sensation which is apt to accompany any intense effort, whether of mind or body.

XXII.

3.‡ The pains of awkwardness are the pains

* In contradistinction to these, all other pleasures may be termed pleasures of *enjoyment*.

† The pleasure of the sexual sense seems to have no positive pain to correspond to it: it has only a pain of privation, or pain of the mental class, the pain of unsatisfied desire. If any positive pain of body result from the want of such indulgence, it belongs to the head of pains of disease.

‡ The pleasures of novelty have no positive pains corresponding to them. The pain which a man experiences when he is in the condition

which sometimes result from the unsuccessful endeavour to apply any particular instruments of enjoyment or security to their uses, or from the difficulty a man experiences in applying them.*

XXIII.

4. The pains of enmity are the pains that may accompany the persuasion of a man's being obnoxious to the ill-will of such or such an assignable person or persons in particular: or, as the phrase is, of being upon ill terms with him or them: and, in consequence, of being obnoxious to certain pains of some sort or other, of which he may be the cause.

XXIV.

5. The pains of an ill-name are the pains that accompany the persuasion of a man's being obnoxious, or in a way to be obnoxious to the ill-will of the world about him. These may likewise be called the pains of ill-repute, the pains of dishonour, or the pains of the moral sanction.†

XXV.

6.‡ The pains of piety are the pains that accompany the belief of a man's being obnoxious to the displeasure of the Supreme Being: and, in consequence, to certain pains to be inflicted by his especial appointment, either in this life or in a life to come. These may also be called the pains of religion; the pains of a religious disposition; or the pains of the religious sanction. When the belief is looked upon as well-grounded, these pains are commonly called religious terrors; when looked upon as ill-grounded, superstitious terrors.‖

XXVI.

7. The pains of benevolence are the pains resulting from the view of any pains supposed to be endured by other beings. These may also be called the pains of good-will, of sympathy, or the pains of the benevolent or social affections.

XXVII.

8. The pains of malevolence are the pains resulting from the view of any pleasures supposed to be enjoyed by any beings who happen to be the objects of a man's displeasure. These may also be styled the pains of ill-will, of antipathy, or the pains of the malevolent or dissocial affections.

XXVIII.

9. The pains of the memory may be grounded on every one of the above kinds, as well of pains of privation as of positive pains. These correspond exactly to the pleasures of the memory.

XXIX.

10. The pains of the imagination may also be grounded on any one of the above kinds, as well of pains of privation as of positive pains: in other respects they correspond exactly to the pleasures of the imagination.

XXX.

11. The pains of expectation may be grounded on each one of the above kinds, as well of pains of privation as of positive pains. These may be also termed pains of apprehension.§

XXXI.

12. The pains of association correspond exactly to the pleasures of association.

XXXII.

Of the above list, there are certain pleasures and pains which suppose the existence of some pleasure or pain of some other person, to which the pleasure or pain of the person in question has regard: such pleasures and pains may be termed *extra-regarding*.

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of not knowing what to do with himself, that pain, which in French is expressed by a single word *ennui*, is a pain of privation: a pain resulting from the absence, not only of all the pleasures of novelty, but of all kinds of pleasure whatsoever.

The pleasures of wealth have also no positive pains corresponding to them: the only pains opposed to them are pains of privation. If any positive pains result from the want of wealth, they are referable to some other class of positive pains; principally to those of the senses. From the want of food, for instance, result the pains of hunger; from the want of clothing, the pains of cold; and so forth.

* It may be a question, perhaps, whether this be a positive pain of itself, or whether it be nothing more than a pain of privation, resulting from the consciousness of a want of skill. It is, however, but a question of words, nor does it matter which way it be determined.

† In as far as a man's fellow-creatures are supposed to be determined by any event not to regard him with any degree of esteem or *good* will, or to regard him with a less degree of esteem or *good* will than they would otherwise; not to do him any sorts of *good* offices, or not to do him so many *good* offices as they would otherwise; the pain resulting from such consideration may be reckoned a pain of privation: as far as they are supposed to regard him with such a degree of aversion or disesteem as to be disposed to do him positive *ill* offices, it may be reckoned a positive pain. The pain of privation, and the positive pain, in this case run one into another indistinguishably.

‡ There seem to be no positive pains to correspond to the pleasures of power. The pains that a man may feel from the want or the loss of power, in as far as power is distinguished from all other sources of pleasure, seem to be nothing more than pains of privation.

‖ The positive pains of piety, and the pains of privation, opposed to the pleasures of piety, run one into another in the same manner as the positive pains of enmity, or of an ill name, do with respect to the pains of privation, opposed to the pleasures of amity, and those of a good name. If what is apprehended at the hands of God is barely the not receiving pleasure, the pain is of the privative class: if, moreover, actual pain be apprehended, it is of the class of positive pains.

§ In contradistinction to these, all other pains may be termed pains of *sufferance*.

Others do not suppose any such thing: these may be termed *self-regarding*.* The only pleasures and pains of the extra-regarding class are those of benevolence, and those of malevolence: all the rest are self-regarding.†

XXXIII.

Of all these several sorts of pleasures and pains, there is scarce any one which is not liable, on more accounts than one, to come under the consideration of the law. Is an offence committed? It is the tendency which it has to destroy, in such or such persons, some of these pleasures, or to produce some of these pains, that constitutes the mischief of it, and the ground for punishing it. It is the prospect of some of these pleasures, or of security from some of these pains, that constitutes the motive or temptation: it is the attainment of them that constitutes the profit of the offence. Is the offender to be punished? It can be only by the production of one or more of these pains, that the punishment can be inflicted.‡

* See chap. x. [Motives.]

† By this means the pleasures and pains of amity may be the more clearly distinguished from those of benevolence: and on the other hand, those of enmity from those of malevolence. The pleasures and pains of amity and enmity are of the self-regarding cast: those of benevolence and malevolence of the extra-regarding.

‡ It would be a matter not only of curiosity, but of some use, to exhibit a catalogue of the several complex pleasures and pains, analyzing them at the same time into the several simple ones, of which they are respectively composed. But such a disquisition would take up too much room to be admitted here. A short specimen, however, for the purpose of illustration, can hardly be dispensed with.

The pleasures taken in at the eye and ear are generally very complex. The pleasures of a country scene, for instance, consist commonly, amongst others, of the following pleasures:

I. Pleasures of the senses.

1. The simple pleasure of sight, excited by the perception of agreeable colours and figures, green fields, waving foliage, glistening water, and the like.

2. The simple pleasures of the ear, excited by the perceptions of the chirping of birds, the murmuring of waters, the rustling of the wind among the trees.

3. The pleasures of the smell, excited by the perceptions of the fragrance of flowers, of new-mown hay, or other vegetable substances, in the first stages of fermentation.

4. The agreeable inward sensation, produced by a brisk circulation of the blood, and the ventilation of it in the lungs by a pure air, such as that in the country frequently is in comparison of that which is breathed in towns.

II. Pleasures of the imagination produced by association.

1. The idea of the plenty, resulting from the possession of the objects that are in view, and of the happiness arising from it.

2. The idea of the innocence and happiness of the birds, sheep, cattle, dogs, and other gentle or domestic animals.

3. The idea of the constant flow of health, supposed to be enjoyed by all these creatures: a notion which is apt to result from the occasional flow of health enjoyed by the supposed spectator.

4. The idea of gratitude, excited by the contemplation of the all-powerful and beneficent Being, who is looked up to as the author of these blessings.

These four last are all of them, in some measure at least, pleasures of sympathy.

The depriving a man of this group of pleasures is one of the evils apt to result from imprisonment; whether produced by illegal violence, or in the way of punishment, by appointment of the laws.

CHAPTER VI.

OF CIRCUMSTANCES INFLUENCING SENSIBILITY.

I.

PAIN and pleasure are produced in men's minds by the action of certain causes. But the quantity of pleasure and pain runs not uniformly in proportion to the cause; in other words, to the quantity of force exerted by such cause. The truth of this observation rests not upon any metaphysical nicety in the import given to the terms *cause*, *quantity*, and *force*: it will be equally true in whatsoever manner such force be measured.

II.

The disposition which any one has to feel such or such a quantity of pleasure or pain, upon the application of a cause of given force, is what we term the degree or *quantum* of his sensibility. This may be either *general*, referring to the sum of the causes that act upon him during a given period: or *particular*, referring to the action of any one particular cause, or sort of cause.

III.

But in the same mind such and such causes of pain or pleasure will produce more pain or pleasure than such or such other causes of pain or pleasure: and this proportion will in different minds be different. The disposition which any one has to have the proportion in which he is affected by two such causes, different from that in which another man is affected by the same two causes, may be termed the quality or *bias* of his sensibility. One man, for instance, may be most affected by the pleasures of the taste; another by those of the ear. So also, if there be a difference in the nature or proportion of two pains or pleasures which they respectively experience from the same cause; a case not so frequent as the former. From the same injury, for instance, one man may feel the same quantity of grief and resentment together as another man: but one of them shall feel a greater share of grief than of resentment: the other, a greater share of resentment than of grief.

IV.

Any incident which serves as a cause, either of pleasure or of pain, may be termed an *exciting* cause: if of pleasure, a pleasurable cause: if of pain, a painful, afflictive, or dolorific cause.*

V.

Now the quantity of pleasure, or of pain, which a man is liable to experience upon the application of an exciting cause, since they will not depend altogether upon that cause, will depend in some measure upon some other circumstance or circumstances: these circumstances, whatsoever they be, may be termed *circumstances influencing sensibility*.†

VI.

These circumstances will apply differently to different exciting causes; insomuch that to a certain exciting cause, a certain circumstance shall not apply at all, which shall apply with great force to another exciting cause. But without entering for the present into these distinctions, it may be of use to sum up all the circumstances which can be found to influence the effect of *any* exciting cause. These, as on a former occasion, it may be as well first to sum up together in the concisest manner possible, and afterwards to allot a few words to the separate explanation of each article. They seem to be as follows: 1. Health. 2. Strength. 3. Hardiness. 4. Bodily imperfection. 5. Quantity and quality of knowledge. 6. Strength of intellectual powers. 7. Firmness of mind. 8. Steadiness of mind. 9. Bent of inclination. 10. Moral sensibility. 11. Moral biases. 12. Religious sensibility. 13. Religious biases. 14. Sympathetic sensibility. 15. Sympathetic biases. 16. Antipathetic sensibility. 17. Antipathetic biases. 18. Insanity. 19. Habitual occupations. 20. Pecuniary circumstances. 21. Connexions in the way of sympathy. 22. Connexions in the way of antipathy. 23. Radical frame of body. 24. Radical frame of mind. 25. Sex. 26. Age. 27. Rank. 28. Education. 29. Climate. 30. Lineage. 31. Government. 32. Religious profession.‡

VII.

1. Health is the absence of disease, and consequently of all those kinds of pain which are among the symptoms of disease. A man may be said to be in a state of health, when he is not conscious of any uneasy sensations, the primary seat of which can be perceived to be any where in his body.‖ In point of general sensibility, a man who is under the pressure of any bodily indisposition, or, as the

* The exciting cause, the pleasure or pain produced by it, and the intention produced by such pleasure or pain in the character of a motive, are objects so intimately connected, that, in what follows, I fear I have not, on every occasion, been able to keep them sufficiently distinct. I thought it necessary to give the reader this warning; after which, should there be found any such mistakes, it is to be hoped they will not be productive of much confusion.

† Thus, in physical bodies, the momentum of a ball put in motion by impulse, will be influenced by the circumstance of gravity: being in some directions increased, in others diminished by it. So in a ship, put in motion by the wind, the momentum and direction will be influenced not only by the attraction of gravity, but by the motion and resistance of the water, and several other circumstances.

‡ An analytical view of all these circumstances will be given at the conclusion of the chapter: to which place it was necessary to refer it, as it could not well have been understood, till some of them had been previously explained.

To search out the vast variety of exciting or moderating causes, by which the degree or bias of a man's sensibility may be influenced, to define the boundaries of each, to extricate them from the entanglements in which they are involved, to lay the effect of each article distinctly before the reader's eye, is, perhaps, if not absolutely the most difficult task, at least one of the most difficult tasks, within the compass of moral physiology. Disquisitions on this head can never be completely satisfactory without examples. To provide a sufficient collection of such examples, would be a work of great labour as well as nicety: history and biography would need to be ransacked: a vast course of reading would need to be travelled through on purpose. By such a process the present work would doubtless have been rendered more amusing; but in point of bulk so enormous, that this single chapter would have been swelled into a considerable volume. Feigned cases, although they may upon occasion serve to render the general matter tolerably intelligible, can never be sufficient to render it palatable. On this therefore, as on so many other occasions, I must confine myself to dry and general instruction: discarding illustration, although sensible that without it instruction cannot manifest half its efficacy The subject, however, is so difficult, and so new, that I shall think I have not ill succeeded, if, without pretending to exhaust it, I shall have been able to mark out the principal points of view, and to put the matter in such a method as may facilitate the researches of happier inquirers.

The great difficulty lies in the nature of the words; which are not, like pain and pleasure, names of homogeneous real entities, but names of various fictitious entities, for which no common genus is to be found: and which therefore, without a vast and roundabout chain of investigation, can never be brought under any exhaustive plan of arrangement, but must be picked up here and there as they happen to occur.

‖ It may be thought, that in a certain degree of health, this negative account of the matter hardly comes up to the case. In a certain degree of health, there is often such a kind of feeling diffused over the whole frame, such a comfortable feel, or flow of spirits, as it is called, as may with propriety come under the head of positive pleasure. But without experiencing any such pleasurable feeling, if a man experience no painful one, he may be well enough said to be in health.

phrase is, is in an ill state of health, is less sensible to the influence of any pleasurable cause, and more so to that of any afflictive one, than if he were *well.*

VIII.

2. The circumstance of strength, though in point of causality closely connected with that of health, is perfectly distinguishable from it. The same man will indeed generally be stronger in a good state of health than in a bad one. But one man, even in a bad state of health, may be stronger than another even in a good one. Weakness is a common concomitant of disease: but in consequence of his radical frame of body, a man may be weak all his life long, without experiencing any disease. Health, as we have observed, is principally a negative circumstance: strength a positive one. The degree of a man's strength can be measured with tolerable accuracy.*

IX.

3. Hardiness is a circumstance which, though closely connected with that of strength, is distinguishable from it. Hardiness is the absence of irritability. Irritability respects either pain, resulting from the action of mechanical causes; or disease, resulting from the action of causes purely physiological. Irritability, in the former sense, is the disposition to undergo a greater or less degree of pain upon the application of a mechanical cause; such as are most of those applications by which simple afflictive punishments are inflicted, as whipping, beating, and the like. In the latter sense, it is the disposition to contract disease with greater or less facility, upon the application of any instrument acting on the body by its physiological properties; as in the case of fevers, or of colds, or other inflammatory diseases, produced by the application of damp air: or to experience immediate uneasiness, as in the case of relaxation or chilliness produced by an over or under proportion of the matter of heat.

Hardiness, even in the sense in which it is opposed to the action of mechanical causes, is distinguishable from strength. The external indications of strength are the abundance and firmness of the muscular fibres: those of hardiness, in this sense, are the firmness of the muscular fibres, and the callosity of the skin. Strength is more peculiarly the gift of nature: hardiness, of education. Of two persons who have had, the one the education of a gentleman, the other that of a common sailor, the first may be the stronger, at the same time that the other is the hardier.

X.

4. By bodily imperfection may be understood that condition which a person is in, who either stands distinguished by any remarkable deformity, or wants any of those parts or faculties, which the ordinary run of persons of the same sex and age are furnished with: who, for instance, has a hare-lip, is deaf, or has lost a hand. This circumstance, like that of ill health, tends in general to diminish more or less the effect of any pleasurable circumstance, and to increase that of any afflictive one. The effect of this circumstance, however, admits of great variety: inasmuch as there are a great variety of ways in which a man may suffer in his personal appearance, and in his bodily organs and faculties: all which difference will be taken notice of in their proper places.†

XI.

5. So much for circumstances belonging to the condition of the body: we come now to those which concern the condition of the mind: the use of mentioning these will be seen hereafter. In the first place may be reckoned the quantity and quality of the knowledge the person in question happens to possess: that is, of the ideas which he has actually in store, ready upon occasion to call to mind: meaning such ideas as are in some way or other of an interesting nature: that is, of a nature in some way or other to influence his happiness, or that of other men. When these ideas are many, and of importance, a man is said to be a man of knowledge; when few, or not of importance, *ignorant.*

XII.

6. By strength of intellectual powers may be understood the degree of facility which a man experiences in his endeavours to call to mind as well such ideas as have been already aggregated to his stock of knowledge, as any others, which, upon any occasion that may happen, he may conceive a desire to place there. It seems to be on some such occa-

* The most accurate measure that can be given of a man's strength, seems to be that which is taken from the weight or number of pounds and ounces he can lift with his hands in a given attitude. This indeed relates immediately only to his arms: but these are the organs of strength which are most employed; of which the strength corresponds with most exactness to the general state of the body with regard to strength; and in which the quantum of strength is easiest measured. Strength may accordingly be distinguished into *general* and *particular.*

Weakness is a negative term, and imports the absence of strength. It is, besides, a relative term, and accordingly imports the absence of such a quantity of strength as makes the share, possessed by the person in question, less than that of some person he is compared to. Weakness, when it is at such a degree as to make it painful for a man to perform the motions necessary to the going through the ordinary functions of life, such as to get up, to walk, to dress one's self, and so forth, brings the circumstance of health into question, and puts a man into that sort of condition in which he is said to be in ill health.

† See B. I. tit. [Irrep. Corp. Injuries.]

sion as this that the words *parts* and *talents* are commonly employed. To this head may be referred the several qualities of readiness of apprehension, accuracy and tenacity of memory, strength of attention, clearness of discernment, amplitude of comprehension, vividity and rapidity of imagination. Strength of intellectual powers, in general, seems to correspond pretty exactly to general strength of body: as any of these qualities in particular does to particular strength.

XIII.

7. Firmness of mind on the one hand, and irritability on the other, regard the proportion between the degrees of efficacy with which a man is acted upon by an exciting cause, of which the value lies chiefly in magnitude, and one of which the value lies chiefly in propinquity.* A man may be said to be of a firm mind, when small pleasures or pains, which are present or near, do not affect him, in a greater proportion to their value, than greater pleasures or pains, which are uncertain or remote;† of an irritable mind, when the contrary is the case.

XIV.

8. Steadiness regards the time during which a given exciting cause of a given value continues to affect a man in nearly the same manner and degree as at first, no assignable external event or change of circumstances intervening to make an alteration in its force.‡

XV.

9. By the bent of a man's inclinations may be understood the propensity he has to expect pleasure or pain from certain objects, rather than from others. A man's inclinations may be said to have such or such a bent, when, amongst the several sorts of objects which afford pleasure in some degree to all men, he is apt to expect more pleasure from one particular sort, than from another particular sort, or more from any given particular sort, than another man would expect from that sort; or when, amongst the several sorts of objects, which to one man afford pleasure, whilst to another they afford none, he is apt to expect, or not to expect, pleasure from an object of such or such a sort: so also with regard to pains. This circumstance, though intimately connected with that of the bias of a man's sensibility, is not undistinguishable from it. The quantity of pleasure or pain, which on any given occasion a man may experience from an application of any sort, may be greatly influenced by the expectations he has been used to entertain of pleasure or pain from that quarter; but it will not be absolutely determined by them: for pleasure or pain may come upon him from a quarter from which he was not accustomed to expect it.

XVI.

10. The circumstances of *moral*, *religious*, *sympathetic* and *antipathetic sensibility*, when closely considered, will appear to be included in some sort under that of *bent of inclination*. On account of their particular importance they may, however, be worth mentioning apart. A man's moral sensibility may be said to be strong, when the pains and pleasures of the moral sanction‖ show greater in his eyes, in comparison with other pleasures and pains (and consequently exert a stronger influence), than in the eyes of the persons he is compared with; in other words, when he is acted on with more than ordinary efficacy by the sense of honour: it may be said to be weak, when the contrary is the case.

XVII.

11. Moral sensibility seems to regard the average effect or influence of the pains and pleasures of the moral sanction, upon all sorts of occasions to which it is applicable, or happens to be applied. It regards the average force or *quantity* of the impulses the mind receives from that source during a given period. Moral *bias* regards the particular acts on which, upon so many particular occasions, the force of that sanction is looked upon as attaching. It regards the *quality* or direction of those impulses. It admits of as many varieties, therefore, as there are dictates which the moral sanction may be conceived to issue forth. A man may be said to have such or such a *moral bias*, or to have a moral bias in favour of such or such an action, when he looks upon it as being of the number of those of which the performance is dictated by the moral sanction.

XVIII.

12. What has been said with regard to moral sensibility, may be applied, *mutatis mutandis*, to religious.

XIX.

13. What has been said with regard to moral biases, may also be applied, *mutatis mutandis*, to religious biases.

XX.

14. By sympathetic sensibility is to be

* See chap. iv. [Value.]

† When, for instance, having been determined, by the prospect of some inconvenience, not to disclose a fact, although he should be put to the rack, he perseveres in such resolution after the rack is brought into his presence, and even applied to him.

‡ The facility with which children grow tired of their play-things, and throw them away, is an instance of unsteadiness: the perseverance with which a merchant applies himself to his traffic, or an author to his book, may be taken for an instance of the contrary. It is difficult to judge of the quantity of pleasure or pain in these cases, but from the effects which it produces in the character of a motive; and even then it is difficult to pronounce, whether the change of conduct happens by the extinction of the old pleasure or pain, or by the intervention of a new one.

‖ See ch. v. [Pleasures and Pains.]

understood the propensity that a man has to derive pleasure from the happiness, and pain from the unhappiness, of other sensitive beings. It is the stronger, the greater the ratio of the pleasure or pain he feels on their account is to that of the pleasure or pain which (according to what appears to him) they feel for themselves.

XXI.

15. Sympathetic bias regards the description of the parties who are the objects of a man's sympathy: and of the acts or other circumstances of or belonging to those persons, by which the sympathy is excited. These parties may be, 1. Certain individuals. 2. Any subordinate class of individuals. 3. The whole nation. 4. Human kind in general. 5. The whole sensitive creation. According as these objects of sympathy are more numerous, the *affection*, by which the man is biased, may be said to be the more *enlarged*.

XXII.

16, 17. Antipathetic sensibility and antipathetic biases are just the reverse of sympathetic sensibility and sympathetic biases. By antipathetic sensibility is to be understood the propensity that a man has to derive pain from the happiness, and pleasure from the unhappiness, of other sensitive beings.

XXIII.

18. The circumstance of insanity of mind corresponds to that of bodily imperfection. It admits, however, of much less variety, inasmuch as the soul is (for aught we can perceive) one indivisible thing, not distinguishable, like the body, into parts. What lesser degrees of imperfection the mind may be susceptible of, seem to be comprisable under the already-mentioned heads of ignorance, weakness of mind, irritability, or unsteadiness; or under such others as are reducible to them. Those which are here in view are those extraordinary species and degrees of mental imperfection, which, wherever they take place, are as conspicuous and as unquestionable as lameness or blindness in the body: operating partly, it should seem, by inducing an extraordinary degree of the imperfections above mentioned, partly by giving an extraordinary and preposterous bent to the inclinations.

XXIV.

19. Under the head of a man's habitual occupations, are to be understood, on this occasion, as well those which he pursues for the sake of profit, as those which he pursues for the sake of present pleasure. The consideration of the profit itself belongs to the head of a man's pecuniary circumstances. It is evident, that if by any means a punishment, or any other exciting cause, has the effect of putting it out of his power to continue in the pursuit of any such occupation, it must on that account be so much the more distressing. A man's habitual occupations, though intimately connected in point of causality with the bent of his inclinations, are not to be looked upon as precisely the same circumstance. An amusement, or channel of profit, may be the object of a man's *inclinations*, which has never been the subject of his *habitual occupations:* for it may be, that though he wished to betake himself to it, he never did, it not being in his power: a circumstance which may make a good deal of difference in the effect of any incident by which he happens to be debarred from it.

XXV.

20. Under the head of pecuniary circumstances, I mean to bring to view the proportion which a man's *means* bear to his *wants:* the sum total of his means of every kind, to the sum total of his wants of every kind. A man's means depend upon three circumstances: 1. His property. 2. The profit of his labour. 3. His connexions in the way of support. His wants seem to depend upon four circumstances: 1. His habits of expense. 2. His connexions in the way of burthen. 3. Any present casual demand he may have. 4. The strength of his expectation. By a man's property is to be understood, whatever he has in store independent of his labour. By the profit of his labour is to be understood the growing profit. As to labour, it may be either of the body principally, or of the mind principally, or of both indifferently: nor does it matter in what manner, nor on what subject, it be applied, so it produce a profit. By a man's connexions in the way of support, are to be understood the pecuniary assistances, of whatever kind, which he is in a way of receiving from any persons who, on whatever account, and in whatever proportion, he has reason to expect should contribute *gratis* to his maintenance: such as his parents, patrons, and relations. It seems manifest, that a man can have no other means than these. What he uses, he must have either of his own, or from other people: if from other people, either *gratis* or for a price. As to habits of expense, it is well known, that a man's desires are governed in a great degree by his habits. Many are the cases in which desire (and consequently the pain of privation connected with it*) would not even subsist at all, but for previous enjoyment. By a man's connexions in the way of burthen, are to be understood whatever expense he has reason to look upon himself as bound to be at in the support of those who by law, or the customs of the world, are warranted in looking up to him for assistance; such as children, poor relations, superannuated servants, and any other dependents whatsoever. As to present casual demand, it is manifest, that there are

* See ch. v. [Pleasures and Pains.]

occasions on which a given sum will be worth infinitely more to a man than the same sum would, at another time: where, for example, in a case of extremity, a man stands in need of extraordinary medical assistance: or wants money to carry on a law-suit, on which his all depends: or has got a livelihood waiting for him in a distant country, and wants money for the charges of conveyance. In such cases, any piece of good or ill fortune, in the pecuniary way, might have a very different effect from what it would have at any other time. With regard to strength of expectation; when one man expects to gain or to keep a thing which another does not, it is plain the circumstance of not having it will affect the former very differently from the latter; who, indeed, commonly will not be affected by it at all.

XXVI.

21. Under the head of a man's connexions in the way of sympathy, I would bring to view the number and description of the persons in whose welfare he takes such a concern, as that the idea of their happiness should be productive of pleasure, and that of their unhappiness of pain to him: for instance, a man's wife, his children, his parents, his near relations, and intimate friends. This class of persons, it is obvious, will for the most part include the two classes by which his pecuniary circumstances are affected: those, to wit, from whose means he may expect support, and those whose wants operate on him as a burthen. But it is obvious, that besides these, it may very well include others, with whom he has no such pecuniary connexion: and even with regard to these, it is evident that the pecuniary dependence, and the union of affections, are circumstances perfectly distinguishable. Accordingly, the connexions here in question, independently of any influence they may have on a man's pecuniary circumstances, have an influence on the effect of any exciting causes whatsoever. The tendency of them is to increase a man's general sensibility; to increase, on the one hand, the pleasure produced by all pleasurable causes; on the other, the pain produced by all afflictive ones. When any pleasurable incident happens to a man, he naturally, in the first moment, thinks of the pleasure it will afford immediately to himself: presently afterwards, however (except in a few cases, which it is not worth while here to insist on), he begins to think of the pleasure which his friends will feel upon their coming to know of it: and this secondary pleasure is commonly no mean addition to the primary one. First comes the self-regarding pleasure: then comes the idea of the pleasure of sympathy, which you suppose that pleasure of your's will give birth to in the bosom of your friend: and this idea excites again in your's a new pleasure of sympathy, grounded upon his. The first pleasure issuing from your own bosom, as it were from a radiant point, illuminates the bosom of your friend: reverberated from thence, it is reflected with augmented warmth to the point from whence it first proceeded: and so it is with pains.*

Nor does this effect depend wholly upon affection. Among near relations, although there should be no kindness, the pleasures and pains of the moral sanction are quickly propagated by a peculiar kind of sympathy: no article, either of honour or disgrace, can well fall upon a man, without extending to a certain distance within the circle of his family. What reflects honour upon the father, reflects honour upon the son: what reflects disgrace, disgrace. The *cause* of this singular and seemingly unreasonable circumstance (that is, its analogy to the rest of the phenomena of the human mind), belongs not to the present purpose. It is sufficient if the effect be beyond dispute.

XXVII.

22. Of a man's connexions in the way of antipathy, there needs not any thing very particular to be observed. Happily there is no primæval and constant source of antipathy in human nature, as there is of sympathy. There are no permanent sets of persons who are naturally and of course the objects of antipathy to a man, as there are who are the objects of the contrary affection. Sources, however, but too many, of antipathy, are apt to spring up upon various occasions during the course of a man's life: and whenever they do, this circumstance may have a very considerable influence on the effects of various exciting causes. As on the one hand a punishment, for instance, which tends to separate a man from those with whom he is connected in the way of sympathy, so on the other hand, one which tends to force him into the company of those with whom he is connected in the way of antipathy, will, on that account, be so much the more distressing. It is to be observed, that sympathy itself multiplies the sources of antipathy. Sympathy for your friend gives birth to antipathy on *your* part against all those who are objects of antipathy, as well as to sympathy for those who are objects of sympathy to *him*. In the same manner does antipathy multiply the sources of sympathy; though commonly perhaps with rather a less

* This is one reason why legislators in general like better to have married people to deal with than single; and people that have children than such as are childless. It is manifest that the stronger and more numerous a man's connexions in the way of sympathy are, the stronger is the hold which the law has upon him. A wife and children are so many pledges a man gives to the world for his good behaviour.

degree of efficacy. Antipathy against your enemy is apt to give birth to sympathy on *your* part towards those who are objects of antipathy, as well as to antipathy against those who are objects of sympathy, to *him*.

XXVIII.

23. Thus much for the circumstances by which the effect of any exciting cause may be influenced, when applied upon any given occasion, at any given period. But besides these supervening incidents, there are other circumstances relative to a man, that may have their influence, and which are co-eval to his birth. In the first place, it seems to be universally agreed, that in the original frame or texture of every man's body, there is a something which, independently of all subsequently intervening circumstances, renders him liable to be affected by causes producing bodily pleasure or pain, in a manner different from that in which another man would be affected by the same causes. To the catalogue of circumstances influencing a man's sensibility, we may therefore add his original or radical frame, texture, constitution, or temperament of body.

XXIX.

24. In the next place, it seems to be pretty well agreed, that there is something also in the original frame or texture of every man's mind, which, independently of all exterior and subsequently intervening circumstances, and even of his radical frame of body, makes him liable to be differently affected by the same exciting causes, from what another man would be. To the catalogue of circumstances influencing a man's sensibility, we may therefore further add his original or radical frame, texture, constitution, or temperament of mind.*

XXX.

It seems pretty certain, all this while, that a man's sensibility to causes producing pleasure or pain, even of mind, may depend in a considerable degree upon his original and acquired frame of body. But we have no reason to think that it can depend altogether upon that frame: since, on the one hand, we see persons whose frame of body is as much alike as can be conceived, differing very considerably in respect of their mental frame: and, on the other hand, persons whose frame of mind is as much alike as can be conceived, differing very conspicuously in regard to their bodily frame.†

XXXI.

It seems indisputable also, that the different sets of external occurrences that may befal a man in the course of his life, will make great differences in the subsequent texture of his mind at any given period: yet still those differences are not solely to be attributed to such occurrences. Equally far from the truth seems that opinion to be (if any such be maintained) which attributes all to nature, and that which attributes all to education. The two circumstances will therefore still remain distinct, as well from one another, as from all others.

XXXII.

Distinct however as they are, it is manifest, that at no period in the active part of a man's life can they either of them make their appearance by themselves. All they do is to constitute the latent ground-work which the other supervening circumstances have to work upon: and whatever influence those original principles may have, is so changed and modified, and covered over, as it were, by those other circumstances, as never to be separately discernible. The effects of the one influence are indistinguishably blended with those of the other.

XXXIII.

The emotions of the body are received, and with reason, as probable indications of the temperature of the mind. But they are far enough from conclusive. A man may exhibit, for instance, the exterior appearances of grief, without really grieving at all, or at least in any thing near the proportion in which he appears to grieve. Oliver Cromwell, whose conduct indicated a heart more than ordinarily callous, was as remarkably profuse in tears.‡ Many men can command the external appearances of sensibility with very little real feeling.‖ The female sex

* The characteristic circumstances whereby one man's frame of body or mind, considered at any given period, stands distinguished from that of another, have been comprised by metaphysicians and physiologists under the name *idiosyncrasy*, from ἴδιος, peculiar, and συνκρασις, composition.

† Those who maintain, that the mind and the body are one substance, may here object, that upon that supposition the distinction between frame of mind and frame of body is but nominal, and that accordingly there is no such thing as a frame of mind distinct from the frame of body. But granting, for argument-sake, the antecedent, we may dispute the consequence. For if the mind be but a part of the body, it is at any rate of a nature very different from the other parts of the body.

A man's frame of body cannot in any part of it undergo any considerable alteration without its being immediately indicated by phænomena discernible by the senses. A man's frame of mind may undergo very considerable alterations, his frame of body remaining the same to all appearance; that is, for any thing that is indicated to the contrary by phenomena cognizable to the senses: meaning those of other men.

‡ Hume's Hist.

‖ The quantity of the sort of pain, which is called grief, is indeed hardly to be measured by any external indications. It is neither to be measured, for instance, by the quantity of the tears, nor by the number of moments spent in crying. Indications rather less equivocal may,

commonly with greater facility than the male: hence the proverbial expression of a woman's tears. To have this kind of command over one's self, was the characteristic excellence of the orator of ancient times, and is still that of the player in our own.

XXXIV.

The remaining circumstances may, with reference to those already mentioned, be termed *secondary* influencing circumstances. These have an influence, it is true, on the quantum or bias of a man's sensibility, but it is only by means of the other primary ones. The manner in which these two sets of circumstances are concerned, is such that the primary ones do the business, while the secondary ones lie most open to observation. The secondary ones, therefore, are those which are most heard of; on which account it will be necessary to take notice of them: at the same time that it is only by means of the primary ones that their influence can be explained; whereas the influence of the primary ones will be apparent enough, without any mention of the secondary ones.

XXXV.

25. Among such of the primitive modifications of the corporeal frame as may appear to influence the quantum and bias of sensibility, the most obvious and conspicuous are those which constitute the *sex*. In point of quantity, the sensibility of the female sex appears in general to be greater than that of the male. The health of the female is more delicate than that of the male: in point of strength and hardiness of body, in point of quantity and quality of knowledge, in point of strength of intellectual powers, and firmness of mind, she is commonly inferior: moral, religious, sympathetic, and antipathetic sensibility are commonly stronger in her than in the male. The quality of her knowledge, and the bent of her inclinations, are commonly in many respects different. Her moral biases are also, in certain respects, remarkably different: chastity, modesty, and delicacy, for instance, are prized more than courage in a woman: courage, more than any of those qualities, in a man. The religious biases in the two sexes are not apt to be remarkably different: except that the female is rather more inclined than the male to superstition: that is, to observances not dictated by the principle of utility; a difference that may be pretty well accounted for by some of the before-mentioned circumstances. Her sympathetic biases are in many respects different: for her own offspring all their lives long, and for children in general while young, her affection is commonly stronger than that of the male. Her affections are apt to be less enlarged: seldom expanding themselves so much as to take in the welfare of her country in general, much less that of mankind, or the whole sensitive creation: seldom embracing any extensive class or division, even of her own countrymen, unless it be in virtue of her sympathy for some particular individuals that belong to it. In general, her antipathetic, as well as sympathetic biases, are apt to be less conformable to the principle of utility than those of the male; owing chiefly to some deficiency in point of knowledge, discernment, and comprehension. Her habitual occupations of the amusing kind are apt to be in many respects different from those of the male. With regard to her connexions in the way of sympathy, there can be no difference. In point of pecuniary circumstances, according to the customs of perhaps all countries, she is in general less independent.

XXXVI.

26. Age is of course divided into divers periods, of which the number and limits are by no means uniformly ascertained. One might distinguish it, for the present purpose, into, 1. Infancy. 2. Adolescence. 3. Youth. 4. Maturity. 5. Decline. 6. Decrepitude. It were lost time to stop on the present occasion to examine it at each period, and to observe the indications it gives, with respect to the several primary circumstances just reviewed. Infancy and decrepitude are commonly inferior to the other periods, in point of health, strength, hardiness, and so forth. In infancy on the part of the female, the imperfections of that sex are enhanced: on the part of the male, imperfections take place mostly similar in quality, but greater in quantity, to those attending the states of

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perhaps, be afforded by the pulse. A man has not the motions of his heart at command as he has those of the muscles of his face. But the particular significancy of these indications is still very uncertain. All they can express is, that the man is affected; they cannot express in what manner, nor from what cause. To an affection resulting in reality from such or such a cause, he may give an artificial colouring, and attribute it to such or such another cause. To an affection directed in reality to such or such a person as its object, he may give an artificial bias, and represent it as if directed to such or such another object. Tears of rage he may attribute to contrition. The concern he feels at the thoughts of a punishment that awaits him, he may impute to a sympathetic concern for the mischief produced by his offence.

A very tolerable judgment, however, may commonly be formed by a discerning mind, upon laying all the external indications exhibited by a man together, and at the same time comparing them with his actions.

A remarkable instance of the power of the will, over the external indications of sensibility, is to be found in Tacitus's story of the Roman soldier, who raised a mutiny in the camp, pretending to have lost a brother by the lawless cruelty of the General. The truth was, he never had had a brother.

adolescence, youth, and maturity in the female. In the stage of decrepitude both sexes relapse into many of the imperfections of infancy. The generality of these observations may easily be corrected upon a particular review.

XXXVII.

27. Station, or rank in life, is a circumstance, that, among a civilized people, will commonly undergo a multiplicity of variations. *Cæteris paribus*, the quantum of sensibility appears to be greater in the higher ranks of men than in the lower. The primary circumstances in respect of which this secondary circumstance is apt to induce or indicate a difference, seem principally to be as follows: 1. Quantity and quality of knowledge. 2. Strength of mind. 3. Bent of inclination. 4. Moral sensibility. 5. Moral biases. 6. Religious sensibility. 7. Religious biases. 8. Sympathetic sensibility. 9. Sympathetic biases. 10. Antipathetic sensibility. 11. Antipathetic biases. 12. Habitual occupations. 13. Nature and productiveness of a man's means of livelihood. 14. Connexions importing profit. 15. Habit of expense. 16. Connexions importing burthen. A man of a certain rank will frequently have a number of dependents besides those whose dependency is the result of natural relationship. As to health, strength, and hardiness, if rank has any influence on these circumstances, it is but in a remote way, chiefly by the influence it may have on his habitual occupations.

XXXVIII.

28. The influence of education is still more extensive. Education stands upon a footing somewhat different from that of the circumstances of age, sex, and rank. These words, though the influence of the circumstances they respectively denote exerts itself principally, if not entirely, through the medium of certain of the primary circumstances before mentioned, present, however, each of them a circumstance which has a separate existence of itself. This is not the case with the word education: which means nothing any farther than as it serves to call up to view some one or more of those primary circumstances. Education may be distinguished into physical and mental; the education of the body and that of the mind: mental, again, into intellectual and moral; the culture of the understanding, and the culture of the affections. The education a man receives, is given to him partly by others, partly by himself. By education, then, nothing more can be expressed than the condition a man is in in respect of those primary circumstances, as resulting partly from the management and contrivance of others, principally of those who, in the early periods of his life, have had dominion over him, partly from his own. To the physical part of his education, belong the circumstances of health, strength, and hardiness: sometimes, by accident, that of bodily imperfection; as where by intemperance or negligence an irreparable mischief happens to his person. To the intellectual parts, those of quantity and quality of knowledge, and in some measure perhaps those of firmness of mind and steadiness. To the moral part, the bent of his inclinations, the quantity and quality of his moral, religious, sympathetic, and antipathetic sensibility: to all three branches indiscriminately, but under the superior control of external occurrences, his habitual recreations, his property, his means of livelihood, his connexions in the way of profit and of burthen, and his habits of expense. With respect, indeed, to all these points, the influence of education is modified, in a manner more or less apparent, by that of exterior occurrences; and in a manner scarcely at all apparent, and altogether out of the reach of calculation, by the original texture and constitution as well of his body as of his mind.

XXXIX.

29. Among the external circumstances by which the influence of education is modified, the principal are those which come under the head of *climate*.* This circumstance places

* Upon reflection, I seem to have overlooked, in the chapter on circumstances influencing sensibility, the circumstance of the face, or rather texture of the country: that being a circumstance which the purpose for which I was then considering the subject did not necessarily bring to view: had I strictly pursued the exhaustive plan, this oversight would probably not have happened. The article which comes nearest is that of *climate;* but the word *climate* will scarcely with propriety serve to bring to view that of the texture of the country. The word climate denotes primarily the situation or inclination of the part of the earth in question, with reference to the part marked out by that planet in its orbit round the sun: and thence derivatively the degree of heat which, during a given period, is excited in that part. It may thence again serve to bring to view the state of the air in respect to density, purity, and dryness or moisture. But the evenness or unevenness of the surface of the earth, with its elevation or depression, the proportion between earth and water in any given spot, and the quality of each; these are particulars which can not properly be referable, any of them, to the head of *climate*.

It is evident that the circumstances comprehended under the head of *texture* of the earth, may have an influence on those which, in a secondary manner, are included under the head of *climate*. The density of the air, its dryness and moistness, and the temperature of the atmosphere and the earth together, in respect of heat and cold, depend for the most part on the elevation or depression of the earth's surface, the proportion between earth and water, and quality of both these elements. But the texture of the earth does not, except in as far as it influences the

itself in front, and demands a separate denomination, not merely on account of the magnitude of its influence, but also on account of its being conspicuous to every body, and of its applying indiscriminately to great numbers at a time. This circumstance depends for its *essence* upon the situation of that part of the earth which is in question, with respect to the course taken by the whole planet in its revolution round the sun: but for its *influence* it depends upon the condition of the bodies which compose the earth's surface at that part, principally upon the quantities of sensible heat at different periods, and upon the density, and purity, and dryness or moisture of the circumambient air. Of the so often mentioned primary circumstances, there are few of which the production is not influenced by this secondary one; partly by its manifest effects upon the body; partly by its less perceptible effects upon the mind. In hot climates, men's health is apt to be more precarious than in cold: their strength and hardiness less: their vigour, firmness, and steadiness of mind less: and thence indirectly their quantity of knowledge: the bent of their inclinations different: most remarkably so in respect of their superior propensity to sexual enjoyments, and in respect of the earliness of the period at which that propensity begins to manifest itself: their sensibilities of all kinds more intense: their habitual occupations savouring more of sloth than of activity: their radical frame of body less strong, probably, and less hardy: their radical frame of mind less vigorous, less firm, less steady.

XL.

30. Another article in the catalogue of secondary circumstances, is that of *race* or *lineage:* the national race or lineage a man issues from. This circumstance, independently of that of climate, will commonly make some difference in point of radical frame of mind and body. A man of negro race, born in France or England, is a very different being, in many respects, from a man of French or English race. A man of Spanish race, born in Mexico or Peru, is at the hour of his birth a different sort of being, in many respects, from a man of the original Mexican or Peruvian race. This circumstance, as far as it is distinct from climate, rank, and education, and from the two just mentioned, operates chiefly through the medium of moral, religious, sympathetic, and antipathetic biases.

XLI.

31. The last circumstance but one, is that of government: the government a man lives under at the time in question; or rather that under which he has been accustomed most to live. This circumstance operates principally through the medium of education: the magistrate operating in the character of a tutor upon all the members of the state, by the direction he gives to their hopes and to their fears. Indeed, under a solicitous and attentive government, the ordinary preceptor, nay even the parent himself, is but a deputy, as it were, to the magistrate: whose controlling influence, different in this respect from that of the ordinary preceptor, dwells with a man to his life's end. The effects of the peculiar power of the magistrate are seen more particularly in the influence it exerts over the quantum and bias of men's moral, religious, sympathetic, and antipapathetic sensibilities. Under a well-constituted, or even under a well-administered though ill-constituted government, men's moral sensibility is commonly stronger, and their moral biases more conformable to the dictates of utility: their religious sensibility frequently weaker, but their religious biases less unconformable to the dictates of utility: their sympathetic affections more enlarged, directed to the magistrate more than to small parties or to individuals, and more to the whole community than to either: their antipathetic sensibilities less violent, as being more obsequious to the influence of well-directed moral biases, and less apt to be excited by that of ill-directed religious ones: their antipathetic biases more conformable to well-directed moral ones, more apt (in proportion) to be grounded on enlarged and sympathetic than on narrow and self-regarding affections, and accordingly, upon the whole, more conformable to the dictates of utility.

XLII.

32. The last circumstance is that of religious profession: the religious profession a man is of: the religious fraternity of which he is a member. This circumstance operates principally through the medium of religious sensibility and religious biases. It operates, however, as an indication more or less conclusive, with respect to several other circumstances. With respect to some, scarcely but through the medium of the two just mentioned: this is the case with regard to the quantum and bias of a man's moral, sympathetic, and antipathetic sensibility: perhaps

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climate, exert any direct influence on the state and condition of the men themselves who are its inhabitants. It exerts, indeed, partly through the medium of climate, and partly by its own immediate efficacy, an influence over the vegetables and animals, which are of a nature to be either of use or detriment to man; and thence again, by another channel, over the state and condition of man himself. It was the remoteness of this latter influence which is exerted by the texture of the earth upon man, that was the reason of its being overlooked on the occasion before mentioned.

in some cases with regard to quantity and quality of knowledge, strength of intellectual powers, and bent of inclination. With respect to others, it may operate immediately of itself: this seems to be the case with regard to a man's habitual occupations, pecuniary circumstances, and connexions in the way of sympathy and antipathy. A man who pays very little inward regard to the dictates of the religion which he finds it necessary to profess, may find it difficult to avoid joining in the ceremonies of it, and bearing a part in the pecuniary burthens it imposes.* By the force of habit and example he may even be led to entertain a partiality for persons of the same profession, and a proportionable antipathy against those of a rival one. In particular, the antipathy against persons of different persuasions is one of the last points of religion which men part with. Lastly, it is obvious, that the religious profession a man is of cannot but have a considerable influence on his education. But, considering the import of the term education, to say this is perhaps no more than saying in other words what has been said already.

XLIII.

These circumstances, all or many of them, will need to be attended to as often as upon any occasion any account is taken of any quantity of pain or pleasure, as resulting from any cause. Has any person sustained an injury? they will need to be considered in estimating the mischief of the offence. Is satisfaction to be made to him? they will need to be attended to in adjusting the *quantum* of that satisfaction. Is the injurer to be punished? they will need to be attended to in estimating the force of the impression that will be made on him by any given punishment.

XLIV.

It is to be observed, that though they seem all of them, on some account or other, to merit a place in the catalogue, they are not all of equal use in practice. Different articles among them are applicable to different exciting causes. Of those that may influence the effect of the same exciting cause, some apply indiscriminately to whole classes of persons together; being applicable to all, without any remarkable difference in degree: these may be directly and pretty fully provided for by the legislator. This is the case, for instance, with the primary circumstances of bodily imperfection, and insanity: with the secondary circumstance of sex: perhaps with that of age: at any rate, with those of rank, of climate, of lineage, and of religious profession. Others, however they may apply to whole classes of persons, yet in their application to different individuals are susceptible of perhaps an indefinite variety of degrees. These cannot be fully provided for by the legislator; but, as the existence of them, in every sort of case, is capable of being ascertained, and the degree in which they take place is capable of being measured, provision may be made for them by the judge, or other executive magistrate, to whom the several individuals that happen to be concerned may be made known. This is the case, 1. With the circumstance of health. 2. In some sort with that of strength. 3. Scarcely with that of hardiness: still less with those of quantity and quality of knowledge, strength of intellectual powers, firmness or steadiness of mind; except in as far as a man's condition, in respect of those circumstances, may be indicated by the secondary circumstances of sex, age, or rank: hardly with that of bent of inclination, except in as far as that latent circumstance is indicated by the more manifest one of habitual occupations: hardly with that of a man's moral sensibility or biases, except in as far as they may be indicated by his sex, age, rank, and education: not at all with his religious sensibility and religious biases, except in as far as they may be indicated by the religious profession he belongs to: not at all with the quantity or quality of his sympathetic or antipathetic sensibilities, except in as far as they may be presumed from his sex, age, rank, education, lineage, or religious profession. It is the case, however, with his habitual occupations, with his pecuniary circumstances, and with his connexions in the way of sympathy. Of others, again, either the existence cannot be ascertained, or the degree cannot be measured. These, therefore, cannot be taken into account, either by the legislator or the executive magistrate. Accordingly, they would have no claim to be taken notice of, were it not for those secondary circumstances by which they are indicated, and whose influence could not well be understood without them. What these are, has been already mentioned.

XLV.

It has already been observed, that different articles in this list of circumstances apply to different exciting causes: the circumstance of bodily strength, for instance, has scarcely any influence of itself (whatever it may have in a roundabout way, and by accident) on the

* The ways in which a religion may lessen a man's means, or augment his wants, are various. Sometimes it will prevent him from making a profit of his money: sometimes from setting his hand to labour. Sometimes it will oblige him to buy dearer food instead of cheaper: sometimes to purchase useless labour: sometimes to pay men for not labouring: sometimes to purchase trinkets, on which imagination alone has set a value: sometimes to purchase exemptions from punishment, or titles to felicity in the world to come.

effect of an incident which should increase or diminish the quantum of a man's property. It remains to be considered, what the exciting causes are with which the legislator has to do. These may, by some accident or other, be any whatsoever: but those with which he has principally to do, are those of the painful or afflictive kind. With pleasurable ones he has little to do, except now and then by accident: the reasons of which may be easily enough perceived, at the same time that it would take up too much room to unfold them here. The exciting causes with which he has principally to do, are, on the one hand, the mischievous acts, which it is his business to prevent; on the other hand, the punishments, by the terror of which it is his endeavour to prevent them. Now of these two sets of exciting causes, the latter only is of his production: being produced partly by his own special appointment, partly in conformity to his general appointment, by the special appointment of the judge. For the legislator, therefore, as well as for the judge, it is necessary (if they would know what it is they are doing when they are appointing punishment) to have an eye to all these circumstances. For the legislator, lest, meaning to apply a certain quantity of punishment to all persons who shall put themselves in a given predicament, he should unawares apply to some of those persons much more or much less than he himself intended: for the judge, lest, in applying to a particular person a particular measure of punishment, he should apply much more or much less than was intended, perhaps by himself, and at any rate by the legislator. They ought each of them, therefore, to have before him, on the one hand, a list of the several circumstances by which sensibility may be influenced; on the other hand, a list of the several species and degrees of punishment which they purpose to make use of: and then, by making a comparison between the two, to form a detailed estimate of the influence of each of the circumstances in question, upon the effect of each species and degree of punishment.

There are two plans or orders of distribution, either of which might be pursued in the drawing up this estimate. The one is to make the name of the circumstance take the lead, and under it to represent the different influences it exerts over the effects of the several modes of punishment: the other is to make the name of the punishment take the lead, and under it to represent the different influences which are exerted over the effects of it by the several circumstances above mentioned. Now of these two sorts of objects, the punishment is that to which the intention of the legislator is directed in the first instance. This is of his own creation, and will be whatsoever he thinks fit to make it: the influencing circumstance exists independently of him, and is what it is whether he will or no. What he has occasion to do is to establish a certain species and degree of punishment: and it is only with reference to that punishment that he has occasion to make any inquiry concerning any of the circumstances here in question. The latter of the two plans therefore is that which appears by far the most useful and commodious. But neither upon the one or the other plan can any such estimate be delivered here.*

XLVI.

Of the several circumstances contained in this catalogue, it may be of use to give some sort of analytic view; in order that it may be the more easily discovered if any which ought to have been inserted are omitted; and that, with regard to those which are inserted, it may be seen how they differ and agree.

In the first place, they may be distinguished into *primary* and *secondary*: those may be termed primary, which operate immediately of themselves: those secondary, which operate not but by the medium of the former. To this latter head belong the circumstances of sex, age, station in life, education, climate, lineage, government, and religious profession: the rest are primary. These again are either *connate* or *adventitious*: those which are connate, are radical frame of body and radical frame of mind. Those which are adventitious, are either *personal*, or *exterior*. The personal, again, concern either a man's *dispositions*, or his *actions*. Those which concern his dispositions, concern either his *body* or his *mind*. Those which concern his body are health, strength, hardiness, and bodily imperfection. Those which concern his mind, again, concern either his *understanding* or his *affections*. To the former head belong the circumstances of quantity and quality of knowledge, strength of understanding, and insanity. To the latter belong the circumstances of firmness of mind, steadiness, bent

* This is far from being a visionary proposal, not reducible to practice. I speak from experience, having actually drawn up such an estimate, though upon the least commodious of the two plans, and before the several circumstances in question had been reduced to the precise number and order in which they are here enumerated. This is a part of the matter destined for another work. See ch. xv. [Cases unmeet] par. 2. Note. There are some of these circumstances that bestow particular denominations on the persons they relate to: thus, from the circumstance of bodily imperfections, persons are denominated deaf, dumb, blind, and so forth: from the circumstance of insanity, idiots, and maniacs: from the circumstance of age, infants: for all which classes of persons particular provision is made in the Code. See B. I. tit. [Exemptions.] Persons thus distinguished will form so many articles in the *catalogus personarum privilegiatarum*. See Appendix, tit. [Composition.]

of inclination, moral sensibility, moral biases, religious sensibility, religious biases, sympathetic sensibility, sympathetic biases, antipathetic sensibility, and antipathetic biases. Those which regard his actions, are his habitual occupations. Those which are exterior to him, regard either the *things* or the *persons* which he is concerned with: under the former head come his pecuniary circumstances;* under the latter, his connexions in the way of sympathy and antipathy.

USES OF THE PRECEDING OBSERVATIONS.†

As it is not possible to calculate the movement of a vessel, without knowing the circumstances which influence its speed; such as the force of the winds, the resistance of the water, the shape of the vessel, the weight of its burden, &c.; in the same manner, one cannot work with certainty in matters of legislation, without considering all the circumstances which influence sensibility.

I shall limit myself here, to what concerns the penal code: it requires in all its parts a scrupulous attention to this diversity.

1. *In estimating the evil of an offence.* In effect, the same nominal offence is not the same real offence, when the sensibility of the individual injured is not the same. A certain action, for example, would be a serious insult to a woman, whilst it is indifferent to a man. A certain corporal injury, if done to a sick person, would endanger his life, but would be of no consequence to a person in good health. An imputation which would ruin the fortune or the honour of a certain individual, would do no injury to another individual.

2. *In giving a suitable satisfaction to an injured person.* The same nominal satisfaction is not the same real satisfaction, when the sensibility materially differs. A pecuniary satisfaction for an affront may be agreeable or offensive, according to the rank, the fortune, or the prejudices of a person. Am I insulted? A pardon publicly asked would be a sufficient satisfaction on the part of my superior or my equal, but not on that of my inferior.

3. *In estimating the force and impression of punishment upon delinquents.* The same nominal punishment is not the same real punishment, when the sensibility is essentially different. Banishment would be a very unequable punishment in the case of a young and an old man; of a bachelor and the father of a family; for a workman who has not the means of subsistence out of his own country, and a rich man who need only change the scene of his pleasures. Imprisonment would be an unequable punishment for a man and a woman; for a sick person and a person in health; for a rich man, whose family would not suffer by his absence; and for a man who lives by his labour, and who would leave his family in poverty.

4. *In transplanting a law from one country to another.* The same law verbally would not be the same law really, when the sensibility of the two people is essentially different. A certain law in Europe produces the happiness of families; transported into Asia, it would become the scourge of society: women in Europe are accustomed to enjoy their liberty, and even to govern the house: women in Asia are prepared, by their education, for the seclusion of the seraglio, and even for slavery. Marriage in Europe and the East is not a contract of the same kind: if it were sought to subject it to the same rules, it would evidently cause unhappiness to all the parties interested.

The *same punishments* for the *same offences*, is often said. This adage has an appearance of justice and impartiality, which seduces superficial minds. To give it a reasonable meaning, it would be necessary to determine beforehand what is meant by the same punishments and the same offences. An inflexible law — a law which should regard neither sex, nor age, nor fortune, nor rank, nor education, nor the moral nor religious prejudices of individuals — would be doubly vicious, as inefficacious, or as tyrannical. Too severe for some, too lenient for others; always sinning by excess or defect; under an appearance of equality, it would hide the most monstrous inequality.

When a man of large fortune, and a man of moderate fortune, are condemned to the same fine, is the punishment the same? do they suffer the same evil? The manifest inequality of such treatment, is it not rendered more hateful by the derisory equality? Is not the design of the law missed, since the one may lose the means of his existence,

* As to a man's pecuniary circumstances, the causes on which those circumstances depend, do not come all of them under the same class. The absolute quantum of a man's property does indeed come under the same class with his pecuniary circumstances in general: so does the profit he makes from the occupation which furnishes him with the means of livelihood. But the occupation itself concerns his own person, and comes under the same head as his habitual amusements: as likewise his habits of expense: his connexions in the ways of profit and of burthen, under the same head as his connexions in the way of sympathy: and the circumstances of his present demand for money, and strength of expectation, come under the head of those circumstances relative to his person which regard his affections.

† The following paragraphs are inserted here from Dumont's "Traites de Legislation," in order to complete the exhibition of Bentham's principles as published in his lifetime.—ED.

whilst the other escapes with triumph? When a strong young man and a feeble old man are both condemned to be loaded with fetters for the same number of years, a sophist skilful in darkening the most evident truths, might contend for the equality of the punishment; but the unsophisticated populace, faithful to nature and just feeling, would murmur internally at beholding such injustice; and their indignation changing its object, would pass from the criminal to the judge, and from the judge to the legislature.

I am aware that specious objections may be urged. It may be asked, "How is it possible to take an account of all the circumstances which influence sensibility? How can internal and hidden dispositions be appreciated; such as strength of mind, degree of knowledge, inclinations, sympathies? How can the different qualities of all beings be measured? A father of a family may consult these internal dispositions, these diversities of character, in the treatment of his children; but a public instructor, charged with a limited number of pupils, could not. The legislator, who has in view a whole people, is by much stronger reason obliged to confine himself to general laws, and must fear lest he should render them complicated by descending to particular cases. If he leave to the judge the right of varying the application of the laws according to this infinite diversity of circumstances and characters, there will be no limits to the arbitrariness of his judgments: under pretence of seizing the true spirit of the legislator, the judges will make the laws the instruments of their whims and fancies. *Sed aliter leges aliter philosophi tollunt astutias: leges quatenus manu tenere possunt philosophi, quatenus ratione et intelligentia* — (De. Off. 3. 17.)"

It is not necessary to answer, but to explain: all such observations exhibit a difficulty, rather than an objection. The principle is not denied: it is only its application which is deemed impossible.

1. It is allowed that the greater part of these differences of sensibility are inappreciable: that it is impossible to prove their existence in individual cases, or to measure their force or degree; but fortunately these interior and hidden dispositions, if it may be so said, have external and manifest indications. These are the circumstances which have been called secondary: *sex*, *age*, *rank*, *race*, *climate*, *government*, *education*, *religious profession;* circumstances evident and palpable, which represent the interior dispositions. Here then the legislator is relieved from a part of his difficulty. He does not stop at metaphysical and moral qualities: he lays hold only of ostensible circumstances. He directs, for example, the modification of a certain punishment; not on account of the greater sensibility of the individual, or on account of his steadiness, strength of mind, or knowledge, but on account of his sex or age.

It is true, that presumptions drawn from these circumstances are liable to be defective. It may happen that a youth of fifteen years old is more enlightened than a man of thirty: it may happen that a certain woman has more courage and less modesty than a certain man; but these presumptions will have in general all the justice necessary to prevent the laws being tyrannical; and, above all, to conciliate to the legislator the suffrages of public opinion.

2. These secondary circumstances are not *only* easily seized: they are few in number; they form general classes. Grounds of justification, of extenuation or of aggravation, with regard to the different offences, may be drawn from them. Thus complexity disappears, and simplicity is easily restored throughout.

3. There is nothing arbitrary. It is not the judge, it is the law itself, which modifies a certain punishment, according to the sex, the age, the religious profession, &c. As to other circumstances, which must absolutely be left to the examination of the judge, as the greater or less derangement in the mind, the greater or less in point of strength, the greater or less in point of fortune; the legislator who can pronounce nothing as to individual cases, directs the tribunals by general rules, and leaves them a certain latitude, that they may proportion their judgment to the particular nature of the circumstance.

What is recommended here is not an Utopian idea. There never was a legislator so barbarous or so stupid as to neglect all the circumstances influencing sensibility. They have had a regard to them more or less confused, which has guided them in the establishment of civil and political rights: they have shown more or less regard to circumstances in the institution of punishments: hence arises the admitted differences with regard to women, children, freemen, slaves, soldiers, ecclesiastics, &c.

Draco appears alone to have rejected all these considerations, at least in penal matters. All offences appeared to him equal, because they were all violations of the law. He condemned all offenders to death, without distinction. He confounded, he overturned all the principles of human sensibility. His horrid work did not long endure; and it is doubtful if his laws were ever literally obeyed.

Without falling into this extreme, how many faults have not been committed of the same kind! There would be no end of citing examples. There have been sovereigns who have chosen to lose whole provinces, and to

shed floods of human blood, rather than to respect a particular sensibility of a people, or tolerate a custom indifferent in itself, or respect an ancient prejudice, a certain dress, a certain form of prayers.

A prince of our own times, active, enlightened, animated by the desire of glory and the happiness of his subjects, undertook to reform every thing in his states; and caused them all to revolt against him.* At the approach of death, recollecting all the vexations of his life, he desired that there should be engraven upon his tomb, that he had been unhappy in all his enterprises. He ought also to have had engraved there, for the instruction of posterity, that he had always been ignorant of the art of managing the desires, the inclinations, and the sensibilities of men.

When legislators shall study the human heart; when they shall show their attention to the different degrees and different kinds of sensibility, by limitations and modifications; these condescensions on the part of power will charm like paternal endearments. Conduct of this kind is the foundation of the approbation, which is sometimes bestowed upon the laws, under the vague terms of humanity, equity, suitableness, moderation, and wisdom.

In this respect, there is a striking analogy between the art of the legislator and that of the physician. The catalogue of circumstances influencing sensibility is necessary in both their sciences. What distinguishes the physician from the empiric is the attention which the first pays to every thing which constitutes the particular state of the individual. But it is especially in diseases which affect the mind; in those which concern morality; when hurtful habits are to be surmounted, and new ones formed, that it is necessary to study every thing which affects the dispositions of the invalid; since a single error in this respect may change all the results, and increase the evil, instead of remedying it.

CHAPTER VII.

OF HUMAN ACTIONS IN GENERAL.

I.

THE business of government is to promote the happiness of the society, by punishing and rewarding. That part of its business which consists in punishing, is more particularly the subject of penal law. In proportion as an act tends to disturb that happiness, in proportion as the tendency of it is pernicious, will be the demand it creates for punishment. What happiness consists of, we have already seen: enjoyment of pleasures, security from pains.

II.

The general tendency of an act is more or less pernicious, according to the sum total of its consequences: that is, according to the difference between the sum of such as are good, and the sum of such as are evil.

III.

It is to be observed, that here, as well as henceforward, wherever consequences are spoken of, such only are meant as are *material*. Of the consequences of any act, the multitude and variety must needs be infinite: but such of them only as are material are worth regarding. Now among the consequences of an act, be they what they may, such only, by one who views them in the capacity of a legislator, can be said to be material,† as either consist of pain or pleasure, or have an influence in the production of pain or pleasure.‡

IV.

It is also to be observed, that into the account of the consequences of the act, are to be taken not such only as might have ensued, were intention out of the question, but such also as depend upon the connexion there may be between these first-mentioned consequences and the intention. The connexion there is between the intention and certain consequences is, as we shall see hereafter,‖ a means of producing other consequences. In this lies the difference between rational agency and irrational.

V.

Now the intention, with regard to the consequences of an act, will depend upon two things: 1. The state of the will or intention, with respect to the act itself. And, 2. The state of the understanding, or perceptive faculties, with regard to the circumstances which it is, or may appear to be, accompanied with. Now with respect to these circumstances, the perceptive faculty is susceptible of three states: consciousness, unconsciousness, and false consciousness. Consciousness, when the party believes precisely those circumstances, and no others, to subsist, which really do subsist: uncon-

* Joseph II.

† Or *of importance*.

‡ In certain cases the consequences of an act may be material by serving as evidences indicating the existence of some other material fact, which is even *antecedent* to the act of which they are the consequences: but even here, they are material only because, in virtue of such their evidentiary quality, they have an influence, at a subsequent period of time, in the production of pain and pleasure: for example, by serving as grounds for conviction, and thence for punishment. See tit. [Simple Falsehoods], *verbo* [Material.]

‖ See B. I. tit. [Exemptions], and tit. [Extenuations.]

sciousness, when he fails of perceiving certain circumstances to subsist, which, however, do subsist: false consciousness, when he believes or imagines certain circumstances to subsist, which in truth do not subsist.

VI.

In every transaction, therefore, which is examined with a view to punishment, there are four articles to be considered: 1. The *act* itself, which is done. 2. The *circumstances* in which it is done. 3. The *intentionality* that may have accompanied it. 4. The *consciousness*, unconsciousness, or false consciousness, that may have accompanied it.

What regards the act and the circumstances will be the subject of the present chapter: what regards intention and consciousness, that of the two succeeding.

VII.

There are also two other articles on which the general tendency of an act depends: and on that, as well as on other accounts, the demand which it creates for punishment. These are, 1. The particular *motive* or motives which gave birth to it. 2. The general *disposition* which it indicates. These articles will be the subject of two other chapters.

VIII.

Acts may be distinguished in several ways, for several purposes.

They may be distinguished, in the first place, into *positive* and *negative*. By positive are meant such as consist in motion or exertion: by negative, such as consist in keeping at rest; that is, in forbearing to move or exert one's self in such and such circumstances. Thus, to strike is a positive act: not to strike on a certain occasion, a negative one. Positive acts are styled also acts of commission; negative, acts of omission or forbearance.*

IX.

Such acts, again, as are negative, may either be *absolutely* so, or *relatively:* absolutely, when they import the negation of all positive agency whatsoever; for instance, not to strike at all: relatively, when they import the negation of such or such a particular mode of agency; for instance, not to strike such a person or such a thing, or in such a direction.

X.

It is to be observed, that the nature of the act, whether positive or negative, is not to be determined immediately by the form of the discourse made use of to express it. An act which is positive in its nature may be characterized by a negative expression: thus, not to be at rest, is as much as to say to move. So also an act, which is negative in its nature, may be characterized by a positive expression: thus, to forbear or omit to bring food to a person in certain circumstances, is signified by the single and positive term *to starve.*

XI.

In the second place, acts may be distinguished into *external* and *internal.* By external, are meant corporal acts; acts of the body: by internal, mental acts; acts of the mind. Thus, to strike is an external or exterior† act: to intend to strike, an internal or interior one.

XII.

Acts of *discourse* are a sort of mixture of the two: external acts, which are no ways material, nor attended with any consequences, any farther than as they serve to express the existence of internal ones. To speak to another to strike, to write to him to strike, to make signs to him to strike, are all so many acts of discourse.

XIII.

Third, Acts that are external may be distinguished into *transitive* and *intransitive.* Acts may be called transitive, when the motion is communicated from the person of the agent to some foreign body: that is, to such a foreign body on which the effects of it are considered as being *material;* as where a man runs against you, or throws water in your face. Acts may be called intransitive, when the motion is communicated to no other body, on which the effects of it are regarded as material, than some part of the same person in whom it originated; as where a man runs, or washes himself.‡

* The distinction between positive and negative acts runs through the whole system of offences, and sometimes makes a material difference with regard to their consequences. To reconcile us the better to the extensive, and, as it may appear on some occasions, the inconsistent signification here given to the word *act*, it may be considered, 1. That in many cases, where no exterior or overt act is exercised, the state which the mind is in at the time when the supposed act is said to happen, is as truly and directly the result of the will, as any exterior act, how plain and conspicuous soever. The not revealing a conspiracy, for instance, may be as perfectly the act of the will, as the joining in it. In the next place, that even though the mind should never have had the incident in question in contemplation (insomuch that the event of its not happening should not have been so much as obliquely intentional), still the state the person's mind was in at the time when, if he *had* so willed, the incident might have happened, is in many cases productive of as material consequences; and not only as likely, but as fit to call for the interposition of other agents, as the opposite one. Thus, when a tax is imposed, your not paying it is an act which at any rate must be punished in a certain manner, whether you happened to think of paying it or not.

† [Exterior.] An exterior act is also called by lawyers *overt.*

‡ The distinction is well known to the later grammarians: it is with them indeed that it took

XIV.

An act of the transitive kind may be said to be in its *commencement*, or in the *first* stage of its progress, while the motion is confined to the person of the agent, and has not yet been communicated to any foreign body, on which the effects of it can be material. It may be said to be in its *termination*, or to be in the last stage of its progress, as soon as the motion or impulse has been communicated to some such foreign body. It may be said to be in the *middle* or intermediate stage or stages of its progress, while the motion, having passed from the person of the agent, has not yet been communicated to any such foreign body. Thus, as soon as a man has lifted up his hand to strike, the act he performs in striking you is in its commencement: as soon as his hand has reached you, it is in its termination. If the act be the motion of a body which is separated from the person of the agent before it reaches the object, it may be said, during that interval, to be in its intermediate progress,* or in *gradu mediativo:* as in the case where a man throws a stone or fires a bullet at you.

XV.

An act of the *in*transitive kind may be said to be in its commencement, when the motion or impulse is as yet confined to the member or organ in which it originated; and has not yet been communicated to any member or organ that is distinguishable from the former. It may be said to be in its termination, as soon as it has been applied to any other part of the same person. Thus, where a man poisons himself: while he is lifting up the poison to his mouth, the act is in its commencement; as soon as it has reached his lips, it is in its termination.†

XVI.

In the third place, acts may be distinguished into *transient* and *continued*. Thus, to strike is a transient act: to lean, a continued one. To buy, a transient act: to keep in one's possession, a continued one.

XVII.

In strictness of speech there is a difference between a *continued* act and a *repetition* of acts. It is a repetition of acts, when there are intervals filled up by acts of different natures: a continued act, when there are no such intervals. Thus, to lean, is one continued act: to keep striking, a repetition of acts.

XVIII.

There is a difference, again, between a *repetition* of acts, and a *habit* or *practice*. The term repetition of acts may be employed, let the acts in question be separated by ever such short intervals, and let the sum total of them occupy ever so short a space of time. The term habit is not employed but when the acts in question are supposed to be separated by long-continued intervals, and the sum total of them to occupy a considerable space of time. It is not (for instance) the drinking ever so many times, nor ever so much at a time, in the course of the same sitting, that will constitute a habit of drunkenness: it is necessary that such sittings themselves be frequently repeated. Every habit is a repetition of acts; or, to speak more strictly, when a man has frequently repeated such and such acts after considerable intervals, he is said to have persevered in or contracted a habit: but every repetition of acts is not a habit.‡

XIX.

Fourth, acts may be distinguished into *indivisible* and *divisible*. Indivisible acts are merely imaginary: they may be easily conceived, but can never be known to be exemplified. Such as are divisible may be so, with regard either to matter or to motion. An act indivisible with regard to matter, is the motion or rest of one single atom of matter. An act indivisible, with regard to motion, is the motion of any body, from one single atom of space to the next to it.

Fifth, acts may be distinguished into *simple* and *complex:* simple, such as the act of striking, the act of leaning, or the act of drinking, above instanced: complex, consisting each of a multitude of simple acts, which, though numerous and heterogeneous, derive a sort of unity from the relation they bear to some common design or end; such as the act of giving a dinner, the act of maintaining a child, the act of exhibiting a triumph, the act of bearing arms, the act of holding a court, and so forth.

XX.

It has been every now and then made a

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its rise; though by them it has been applied rather to the names than to the things themselves. To verbs, signifying transitive acts, as here described, they have given the name of transitive verbs: those significative of intransitive acts they have termed intransitive. These last are still more frequently called *neuter;* that is, *neither* active nor passive. The appellation seems improper: since, instead of their being *neither*, they are both in one.

To the class of acts that are here termed intransitive, belong those which constitute the third class in the system of offences. See ch. [Division], and B. I. tit. [Self-regarding Offences.]

* Or *in its migration*, or *in transitu*.

† These distinctions will be referred to in the next chapter: ch. viii. [Intentionality]: and applied to practice in B. I. tit. [Extenuations.]

‡ [Habit.] A habit, it should seem, can hardly in strictness be termed an aggregate of acts: acts being a sort of real archetypal entities, and habits a kind of fictitious entities or imaginary beings, supposed to be constituted by, or to result as it were out of, the former.

question, what it is in such a case that constitutes *one* act: where one act has ended, and another act has begun: whether what has happened has been one act or many.* These questions, it is now evident, may frequently be answered, with equal propriety, in opposite ways: and if there be any occasions on which they can be answered only in one way, the answer will depend upon the nature of the occasion, and the purpose for which the question is proposed. A man is wounded in two fingers at one stroke — Is it one wound or several? A man is beaten at 12 o'clock, and again at 8 minutes after 12 — Is it one beating or several? You beat one man, and instantly in the same breath you beat another — Is this one beating or several? In any of these cases it may be *one*, perhaps, as to some purposes, and *several* as to others. These examples are given, that men may be aware of the ambiguity of language: and neither harass themselves with unsolvable doubts, nor one another with interminable disputes.

XXI.

So much with regard to acts considered in themselves: we come now to speak of the *circumstances* with which they may have been accompanied. These must necessarily be taken into the account before any thing can be determined relative to the consequences. What the consequences of an act may be upon the whole can never otherwise be ascertained: it can never be known whether it is beneficial, or indifferent, or mischievous. In some circumstances, even to kill a man may be a beneficial act: in others, to set food before him may be a pernicious one.

XXII.

Now the circumstances of an act, are, what? Any objects† whatsoever. Take any act whatsoever, there is nothing in the nature of things that excludes any imaginable object from being a circumstance to it. Any given object may be a circumstance to any other.‡

XXIII.

We have already had occasion to make mention for a moment of the *consequences* of an act: these were distinguished into material and immaterial. In like manner may the circumstances of it be distinguished. Now *materiality* is a relative term: applied to the consequences of an act, it bore relation to pain and pleasure: applied to the circumstances, it bears relation to the consequences. A circumstance may be said to be material, when it bears a visible relation in point of causality to the consequences: immaterial, when it bears no such visible relation.

XXIV.

The consequences of an act are events.‖ A circumstance may be related to an event in point of causality in any one of four ways: 1. In the way of causation or production. 2. In the way of derivation. 3. In the way of collateral connexion. 4. In the way of conjunct influence. It may be said to be related to the event in the way of causation, when it is of the number of those that contribute to the production of such event: in the way of derivation, when it is of the number of the events to the production of which that in question has been contributory: in the way of collateral connexion, where the circumstance in question, and the event in question, without being either of them instrumental in the production of the other, are related, each of them, to some common object, which has been concerned in the production of them both: in the way of conjunct influence, when, whether related in any other way or not, they have both of them concurred in the production of some common consequence.

XXV.

An example may be of use. In the year 1628, Villiers, Duke of Buckingham, favourite and minister of Charles I. of England, received a wound and died. The man who gave it him was one Felton, who, exasperated at the mal-administration of which that minister was accused, went down from London to Portsmouth, where Buckingham happened then to be, made his way into his anti-chamber, and finding him busily engaged in conversation with a number of people round him, got close to him, drew a knife, and stabbed him. In the effort, the assassin's hat fell off, which was found soon after, and, upon searching him, the bloody knife. In the crown of the hat were found scraps of paper, with sentences expressive of the purpose he was come upon. Here then, suppose the event in question is the wound received by Buckingham: Felton's drawing out his knife, his making his way into the chamber,

* Distinctions like these come frequently in question in the course of Procedure.

† Or entities. See B. II. tit. [Evidence], § [Facts.]

‡ The etymology of the word circumstance is perfectly characteristic of its import: *circum stantia*, things standing round: objects standing round a given object. I forget what mathematician it was that defined God to be a circle, of which the centre is every where, but the circumference no where. In like manner, the field of circumstances belonging to any act may be defined a circle, of which the circumference is nowhere, but of which the act in question is the centre. Now then, as any act may, for the purpose of discourse, be considered as a centre, any other act or object whatsoever may be considered as of the number of those that are standing round it.

‖ See B. II. tit. [Evidence], § [Facts.]

his going down to Portsmouth, his conceiving an indignation at the idea of Buckingham's administration, that administration itself, Charles's appointing such a minister, and so on, higher and higher without end, are so many circumstances, related to the event of Buckingham's receiving the wound, in the way of causation or production: the bloodiness of the knife, a circumstance related to the same event in the way of derivation: the finding of the hat upon the ground, the finding the sentences in the hat, and the writing them, so many circumstances related to it in the way of collateral connexion: and the situation and conversations of the people about Buckingham, were circumstances related to the circumstances of Felton's making his way into the room, going down to Portsmouth, and so forth, in the way of conjunct influence; inasmuch as they contributed in common to the event of Buckingham's receiving the wound, by preventing him from putting himself upon his guard upon the first appearance of the intruder.*

XXVI.

These several relations do not all of them attach upon an event with equal certainty. In the first place, it is plain, indeed, that every event must have some circumstance or other, and in truth, an indefinite multitude of circumstances, related to it in the way of production: it must of course have a still greater multitude of circumstances related to it in the way of collateral connexion. But it does not appear necessary that every event should have circumstances related to it in the way of derivation: nor therefore that it should have any related to it in the way of conjunct influence. But of the circumstances of all kinds which actually do attach upon an event, it is only a very small number that can be discovered by the utmost exertion of the human faculties: it is a still smaller number that ever actually do attract our notice: when occasion happens, more or fewer of them will be discovered by a man in proportion to the strength, partly of his intellectual powers, partly of his inclination.† It appears therefore that the multitude and description of such of the circumstances belonging to an act, as may appear to be material, will be determined by two considerations: 1. By the nature of things themselves. 2. By the strength or weakness of the faculties of those who happen to consider them.

XXVII.

Thus much it seemed necessary to premise in general, concerning acts and their circumstances, previously to the consideration of the particular sorts of acts with their particular circumstances, with which we shall have to do in the body of the work. An act of some sort or other is necessarily included in the notion of every offence. Together with this act, under the notion of the same offence, are included certain circumstances: which circumstances enter into the essence of the offence, contribute by their conjunct influence to the production of its consequences, and in conjunction with the act are brought into view by the name by which it stands distinguished. These we shall have occasion to distinguish hereafter by the name of *criminative* circumstances.‡ Other circumstances again entering into combination with the act and the former set of circumstances, are productive of still farther consequences. These additional consequences if they are of the beneficial kind, bestow, according to the value they bear in that capacity, upon the circumstances to which they

* The division may be farther illustrated and confirmed by the more simple and particular case of animal generation. To production corresponds paternity: to derivation, filiation: to collateral connexion, collateral consanguinity: to conjunct influence, marriage and copulation.

If necessary, it might be again illustrated by the material image of a chain, such as that which, according to the ingenious fiction of the ancients, is attached to the throne of Jupiter. A section of this chain should then be exhibited by way of specimen, in the manner of the *diagram* of a pedigree. Such a figure I should accordingly have exhibited, had it not been for the apprehension that an exhibition of this sort, while it made the subject a small matter clearer to one man out of a hundred, might, like the mathematical formularies we see sometimes employed for the like purpose, make it more obscure and formidable for the other ninety-nine.

† The more remote a connexion of this sort is, of course the more obscure. It will often happen that a connexion, the idea of which would at first sight appear extravagant and absurd, shall be rendered highly probable, and indeed indisputable, merely by the suggestion of a few intermediate circumstances.

At Rome, 390 years before the Christian æra, a goose sets up a cackling: two thousand years afterwards a king of France is murdered. To consider these two events, and nothing more, what can appear more extravagant than the notion that the former of them should have had any influence on the production of the latter? Fill up the gap, bring to mind a few intermediate circumstances, and nothing can appear more probable. It was the cackling of a parcel of geese, at the time the Gauls had surprised the Capitol, that saved the Roman commonwealth: had it not been for the ascendancy that commonwealth acquired afterwards over most of the nations of Europe, amongst others over France, the Christian religion, humanly speaking, could not have established itself in the manner it did in that country. Grant then, that such a man as Henry IV. would have existed, no man, however, would have had those motives by which Ravaillac, misled by a mischievous notion concerning the dictates of that religion, was prompted to assassinate him.

‡ See B. I. tit. [Crim. Circumstances.]

owe their birth, the appellation of *exculpative** or *extenuative* circumstances:† if of the mischievous kind, they bestow on them the appellation of *aggravative* circumstances.‡ Of all these different sets of circumstances, the criminative are connected with the consequences of the original offence, in the way of production; with the act, and with one another, in the way of conjunct influence: the consequenses of the original offence with them, and with the act respectively, in the way of derivation: the consequences of the modified offence, with the criminative, exculpative, and extenuative circumstances respectively, in the way also of derivation: these different sets of circumstances, with the consequences of the modified act or offence, in the way of production: and with one another (in respect of the consequences of the modified act or offence) in the way of conjunct influence. Lastly, whatever circumstances can be seen to be connected with the consequences of the offence, whether directly in the way of derivation, or obliquely in the way of collateral affinity (to wit, in virtue of its being connected, in the way of derivation, with some of the circumstances with which they stand connected in the same manner) bear a *material* relation to the offence in the way of evidence, they may accordingly be styled *evidentiary* circumstances, and may become of use, by being held forth upon occasion as so many proofs, indications, or evidences of its having been committed. ‖ §

CHAPTER VIII.

OF INTENTIONALITY.

I.

So much with regard to the two first of the articles upon which the evil tendency of an action may depend: *viz.* the act itself, and the general assemblage of the circumstances with which it may have been accompanied. We come now to consider the ways in which the particular circumstance of *intention* may be concerned in it.

II.

First, then, the intention or will may regard either of two objects: 1. The act itself: or, 2. Its consequences. Of these objects, that which the intention regards may be styled *intentional*. If it regards the act, then the act may be said to be intentional:¶ if the consequences, so also then may the consequences. If it regards both the act and the consequences, the whole *action* may be said to be intentional. Whichever of those articles is not the object of the intention, may of course be said to be *unintentional*.

III.

The act may very easily be intentional without the consequences; and often is so. Thus, you may intend to touch a man, without intending to hurt him: and yet, as the consequences turn out, you may chance to hurt him.

IV.

The consequences of an act may also be intentional, without the act's being intentional throughout; that is, without its being intentional in every stage of it: but this is not so frequent a case as the former. You intend to hurt a man, suppose, by running against him, and pushing him down; and you run towards him accordingly: but a second man coming in on a sudden between you and the first man, before you can stop yourself, you run against the second man, and by him push down the first.

V.

But the consequences of an act cannot be intentional, without the act's being itself intentional in at least the first stage. If the act be not intentional in the first stage, it is no act of your's: there is accordingly no intention on your part to produce the consequences: that is to say, the individual consequences. All there can have been on your part is a distant intention to produce other consequences, of the same nature, by some act of your's, at a future time: or else, without any intention, a bare *wish* to see such event take place. The second man, suppose,

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* See B. I. tit. [Justifications.]

† See B. I. tit. [Extenuations.]

‡ See B. I. tit. [Aggravations.]

‖ See B. I. tit. [Accessory Offences], and B. II. tit. [Evidence.]

§ It is evident that this analysis is equally applicable to incidents of a purely physical nature, as to those in which moral agency is concerned. If therefore it be just and useful here, it might be found not impossible, perhaps, to find some use for it in natural philosophy.

¶ On this occasion the words *voluntary* and *involuntary* are commonly employed. These, however, I purposely abstain from, on account of the extreme ambiguity of their signification. By a voluntary act is meant, sometimes, any act in the performance of which the will has had any concern at all; in this sense it is synonymous to *intentional:* sometimes such acts only, in the production of which the will has been determined by motives not of a painful nature; in this sense it is synonymous to unconstrained, or *uncoerced:* sometimes such acts only, in the production of which the will has been determined by motives, which, whether of the pleasurable or painful kind, occurred to a man himself, without being suggested by any body else; in this sense it is synonymous to *spontaneous.* The sense of the word involuntary does not correspond completely to that of the word voluntary. Involuntary is used in opposition to intentional, and to unconstrained; but not to spontaneous. It might be of use to confine the signification of the words voluntary and involuntary to one single and very narrow case, which will be mentioned in the next note.

runs of his own accord against the first, and pushes him down. You had intentions of doing a thing of the same nature: *viz.* To run against him, and push him down yourself; but you had done nothing in pursuance of those intentions: the individual consequences therefore of the act, which the second man performed in pushing down the first, cannot be said to have been on your part intentional.*

VI.

Second. A consequence, when it is intentional, may either be *directly* so, or only *obliquely*. It may be said to be directly or lineally intentional, when the prospect of producing it constituted one of the links in the chain of causes by which the person was determined to do the act. It may be said to be obliquely or collaterally intentional, when, although the consequence was in contemplation, and appeared likely to ensue in case of the act's being performed, yet the prospect of producing such consequence did not constitute a link in the aforesaid chain.

VII.

Third. An incident, which is directly intentional, may either be *ultimately* so, or only *mediately*. It may be said to be ultimately intentional, when it stands last of all exterior events in the aforesaid chain of motives; insomuch that the prospect of the production of such incident, could there be a certainty of its taking place, would be sufficient to determine the will, without the prospect of its producing any other. It may be said to be mediately intentional, and no more, when there is some other incident, the prospect of producing which forms a subsequent link in the same chain: insomuch that the prospect of producing the former would not have operated as a motive, but for the tendency which it seemed to have towards the production of the latter.

VIII.

Fourth. When an incident is directly intentional, it may either be *exclusively* so, or *inexclusively*. It may be said to be exclusively intentional, when no other but that very individual incident would have answered the purpose, insomuch that no other incident had any share in determining the will to the act in question. It may be said to have been inexclusively† intentional, when there was some other incident, the prospect of which was acting upon the will at the same time.

IX.

Fifth. When an incident is inexclusively intentional, it may be either *con*junctively so, *dis*junctively, or *indiscriminately*. It may be said to be conjunctively intentional with regard to such other incident, when the intention is to produce both: disjunctively, when the intention is to produce either the one or the other indifferently, but not both: indiscriminately, when the intention is indifferently to produce either the one or the other, or both, as it may happen.

X.

Sixth. When two incidents are disjunctively intentional, they may be so with or without *preference*. They may be said to be so with preference, when the intention is, that one of them in particular should happen rather than the other: without preference, when the intention is equally fulfilled, whichever of them happens.‡

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* To render the analysis here given of the possible states of the mind in point of intentionality absolutely complete, it must be pushed to such a farther degree of minuteness, as to some eyes will be apt to appear trifling. On this account it seemed advisable to discard what follows, from the text to a place where any one who thinks proper may pass by it. An act of the body, when of the positive kind, is a motion: now in motion there are always three articles to be considered: 1. The quantity of matter that moves: 2. The direction in which it moves: and, 3. The velocity with which it moves. Correspondent to these three arictles, are so many modes of intentionality, with regard to an act, considered as being only in its first stage. To be completely unintentional, it must be unintentional with respect to every one of these three particulars. This is the case with those acts which alone are properly termed *involuntary:* acts, in the performance of which the will has no sort of share; such as the contraction of the heart and arteries.

Upon this principle, acts that are unintentional in their first stage, may be distinguished into such as are completely unintentional, and such as are incompletely unintentional: and these again may be unintentional, either in point of quantity of matter alone, in point of direction alone, in point of velocity alone, or in any two of these points together.

The example given further on may easily be extended to this part of the analysis, by any one who thinks it worth the while.

There seem to be occasions in which even these disquisitions, minute as they may appear, may not be without their use in practice. In the case of homicide, for example, and other corporal injuries, all the distinctions here specified may occur, and in the course of trial may, for some purpose or other, require to be brought to mind, and made the subject of discourse. What may contribute to render the mention of them pardonable, is the use that might possibly be made of them in natural philosophy. In the hands of an expert metaphysician, these, together with the foregoing chapter on human actions, and the section on facts in general, in title, *Evidence* of the Book of Procedure, might, perhaps, be made to contribute something towards an exhaustive analysis of the possible varieties of mechanical inventions.

† Or concurrently.

‡ There is a difference between the case where an incident is altogether unintentional, and that in which, it being disjunctively intentional with reference to another, the preference is in favour of that other. In the first case, it is not the in-

XI.

One example will make all this clear. William II. king of England, being out a stag-hunting, received from Sir Walter Tyrrel a wound, of which he died.* Let us take this case, and diversify it with a variety of suppositions, correspondent to the distinctions just laid down.

1. First, then, Tyrrel did not so much as entertain a thought of the king's death; or, if he did, looked upon it as an event of which there was no danger. In either of these cases, the incident of his killing the king was altogether unintentional.

2. He saw a stag running that way, and he saw the king riding that way at the same time: what he aimed at was to kill the stag: he did not wish to kill the king: at the same time he saw, that if he shot, it was as likely he should kill the king as the stag: yet for all that, he shot, and killed the king accordingly. In this case, the incident of his killing the king was intentional, but obliquely so.

3. He killed the king on account of the hatred he bore him, and for no other reason than the pleasure of destroying him. In this case, the incident of the king's death was not only directly but ultimately intentional.

4. He killed the king, intending fully so to do; not for any hatred he bore him, but for the sake of plundering him when dead. In this case, the incident of the king's death was directly intentional, but not ultimately: it was mediately intentional.

5. He intended neither more nor less than to kill the king. He had no other aim nor wish. In this case, it was exclusively as well as directly intentional: exclusively, to wit, with regard to every other material incident.

6. Sir Walter shot the king in the right leg, as he was plucking a thorn out of it with his left hand. His intention was, by shooting the arrow into his leg through his hand, to cripple him in both those limbs at the same time. In this case, the incident of the king's being shot in the leg was intentional: and that conjunctively with another which did not happen; viz. his being shot in the hand.

7. The intention of Tyrrel was to shoot the king either in the hand or in the leg, but not in both; and rather in the hand than in the leg. In this case, the intention of shooting in the hand was disjunctively concurrent, with regard to the other incident, and that with preference.

8. His intention was to shoot the king either in the leg or the hand, whichever might happen, but not in both. In this case, the intention was inexclusive, but disjunctively so: yet that, however, without preference.

9. His intention was to shoot the king either in the leg or the hand, or in both, as it might happen. In this case, the intention was indiscriminately concurrent, with respect to the two incidents.

XII.

It is to be observed, that an act may be unintentional in any stage or stages of it, though intentional in the preceding: and, on the other hand, it may be intentional in any stage or stages of it, and yet unintentional in the succeeding.† But whether it be intentional or no in any preceding stage, is immaterial, with respect to the consequences, so it be unintentional in the last. The only point, with respect to which it is material, is the proof. The more stages the act is unintentional in, the more apparent it will commonly be, that it was unintentional with respect to the last. If a man, intending to strike you on the cheek, strikes you in the eye, and puts it out, it will probably be difficult for him to prove that it was not his intention to strike you in the eye. It will probably be easier, if his intention was really not to strike you, or even not to strike at all.

XIII.

It is frequent to hear men speak of a good intention, of a bad intention; of the goodness and badness of a man's intention: a circumstance on which great stress is generally laid. It is indeed of no small importance, when properly understood: but the import of it is to the last degree ambiguous and obscure. Strictly speaking, nothing can be said to be good or bad, but either in itself; which is the case only with pain or pleasure: or on account of its effects; which is the case only with things that are the causes or preventives of pain and pleasure. But in a figurative and less proper way of speech, a thing may also be styled good or bad, in consideration of its cause. Now the effects of an intention to do such or such an act, are the same objects which we have been speaking of under the appellation of its *consequences:* and the causes of intention are called *motives.* A man's intention, then, on any occasion may be styled good or bad, with reference either to the consequences of the act, or with reference to his motives. If it be deemed good or bad in any sense, it must be either because it is deemed to be productive of good or of bad consequences, or because it is deemed to originate from a good or from a bad motive.

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tention of the party that the incident in question should happen at all: in the latter case, the intention is rather that the other should happen: but if that cannot be, then that this in question should happen, rather than that neither should, and that both, at any rate, should not happen.

All these are distinctions to be attended to in the use of the particle *or:* a particle of very ambiguous import, and of great importance in legislation. See Append. tit. [Composition.]

* Hume's Hist.

† See ch. vii. [Actions], par. 14.

But the goodness or badness of the consequences depend upon the circumstances. Now the circumstances are no objects of the intention. A man intends the act; and by his intention produces the act: but as to the circumstances, he does not intend *them:* he does not, inasmuch as they are circumstances of it, produce them. If by accident there be a few which he has been instrumental in producing, it has been by former intentions, directed to former acts, productive of those circumstances as the consequences: at the time in question, he takes them as he finds them. Acts, with their consequences, are objects of the will as well as of the understanding: circumstances, as such, are objects of the understanding only. All he can do with these, as such, is to know or not to know them: in other words, to be conscious of them, or not conscious. To the title of Consciousness belongs what is to be said of the goodness or badness of a man's intention, as resulting from the consequences of the act: and to the head of Motives, what is to be said of his intention, as resulting from the motive.

CHAPTER IX.

OF CONSCIOUSNESS.

I.

So far with regard to the ways in which the will or intention may be concerned in the production of any incident: we come now to consider the part which the understanding or perceptive faculty may have borne, with relation to such incident.

II.

A certain act has been done, and that intentionally: that act was attended with certain circumstances: upon these circumstances depended certain of its consequences; and amongst the rest, all those which were of a nature purely physical. Now then, take any one of these circumstances, it is plain, that a man, at the time of doing the act from whence such consequences ensued, may have been either conscious, with respect to this circumstance, or unconscious. In other words, he may either have been aware of the circumstance, or not aware: it may either have been present to his mind, or not present. In the first case, the act may be said to have been an *advised* act, with respect to that circumstance: in the other case, an *unadvised* one.

III.

There are two points, with regard to which an act may have been advised or unadvised: 1. The *existence* of the circumstance itself. 2. The *materiality* of it.*

IV.

It is manifest, that with reference to the time of the act, such circumstance may have been either *present*, *past*, or *future*.

V.

An act which is unadvised, is either *heedless*, or not heedless. It is termed heedless, when the case is thought to be such, that a person of ordinary prudence,† if prompted by an ordinary share of benevolence, would have been likely to have bestowed such and so much attention and reflection upon the material circumstances, as would have effectually disposed him to prevent the mischievous incident from taking place: not heedless, when the case is not thought to be such as above mentioned.‡

VI.

Again. Whether a man did or did not suppose the existence or materiality of a given circumstance, it may be that he *did* suppose the existence and materiality of some circumstance, which either did not exist, or which, though existing, was not material. In such case the act may be said to be *misadvised*, with respect to such imagined circumstance: and it may be said, that there has been an erroneous supposition, or a *mis-supposal* in the case.

VII.

Now a circumstance, the existence of which is thus erroneously supposed, may be material e ther, 1. In the way of prevention: or, 2. In that of compensation. It may be said to be material in the way of prevention, when its effect or tendency, had it existed, would have been to prevent the obnoxious consequences: in the way of compensation, when that effect or tendency would have been to produce other consequences, the beneficialness of which would have out-weighed the mischievousness of the others.

VIII.

It is manifest, that, with reference to the time of the act, such imaginary circumstance may in either case have been supposed either to be *present*, *past*, or *future*.

IX.

To return to the example exhibited in the preceding chapter.

10. Tyrrel intended to shoot in the direction in which he shot: but he did not know that the king was riding so near that way. In this case, the act he performed in shooting, the act of shooting, was unadvised, with respect to the *existence* of the circumstance of the king's being so near riding that way.

11. He knew that the king was riding that way: but at the distance at which the king was, he knew not of the probability there was that the arrow would reach him. In

* See ch. vii. [Actions], par. 3.

† See ch. vi. [Sensibility], par. 12.

‡ See B. I. tit. [Extenuations.]

this case, the act was unadvised, with respect to the *materiality* of the circumstance.

12. Somebody had dipped the arrow in poison, without Tyrrel's knowing of it. In this case, the act was unadvised, with respect to the existence of a *past* circumstance.

13. At the very instant that Tyrrel drew the bow, the king, being screened from his view by the foliage of some bushes, was riding furiously, in such manner as to meet the arrow in a direct line: which circumstance was also more than Tyrrel knew of. In this case, the act was unadvised, with respect to the existence of a *present* circumstance.

14. The king being at a distance from court, could get nobody to dress his wound till the next day; of which circumstance Tyrrel was not aware. In this case, the act was unadvised, with respect to what was then a *future* circumstance.

15. Tyrrel knew of the king's being riding that way, of his being so near, and so forth; but being deceived by the foliage of the bushes, he thought he saw a bank between the spot from which he shot, and that to which the king was riding. In this case the act was *misadvised*, proceeding on the *mis-supposal* of a *preventive* circumstance.

16. Tyrrel knew that every thing was as above, nor was he deceived by the supposition of any preventive circumstance. But he believed the king to be an usurper: and supposed he was coming up to attack a person whom Tyrrel believed to be the rightful king, and who was riding by Tyrrel's side. In this case, the act was also misadvised, but proceeded on the mis-supposal of a *compensative* circumstance.

X.

Let us observe the connexion there is between intentionality and consciousness. When the act itself is intentional, and with respect to the existence of all the circumstances *advised*, as also with respect to the materiality of those circumstances, in relation to a given consequence, and there is no mis-supposal with regard to any preventive circumstance, that consequence must also be intentional. in other words, advisedness, with respect to the circumstances, if clear from the mis-supposal of any preventive circumstance, extends the intentionality from the act to the consequences. Those consequences may be either directly intentional, or only obliquely so: but at any rate they cannot but be intentional.

XI.

To go on with the example. If Tyrrel intended to shoot in the direction in which the king was riding up, and knew that the king was coming to meet the arrow, and knew the probability there was of his being shot in that same part in which he was shot, or in another as dangerous, and with that same degree of force, and so forth, and was not misled by the erroneous supposition of a circumstance by which the shot would have been prevented from taking place, or any such other preventive circumstance, it is plain he could not but have intended the king's death. Perhaps he did not positively wish it; but for all that, in a certain sense he intended it.

XII.

What heedlessness is in the case of an unadvised act, rashness is in the case of a misadvised one. A misadvised act, then, may be either rash or not rash. It may be termed rash, when the case is thought to be such, that a person of ordinary prudence, if prompted by an ordinary share of benevolence, would have employed such and so much attention and reflection to the imagined circumstance, as, by discovering to him the non-existence, improbability, or immateriality of it, would have effectually disposed him to prevent the mischievous incident from taking place.

XIII.

In ordinary discourse, when a man does an act of which the consequences prove mischievous, it is a common thing to speak of him as having acted with a good intention or with a bad intention; of his intention being a good one or a bad one. The epithets good and bad are all this while applied, we see, to the intention: but the application of them is most commonly governed by a supposition formed with regard to the nature of the motive. The act, though eventually it prove mischievous, is said to be done with a good intention, when it is supposed to issue from a motive which is looked upon as a good motive: with a bad intention, when it is supposed to be the result of a motive which is looked upon as a bad motive. But the nature of the consequences intended, and the nature of the motive which gave birth to the intention, are objects which, though intimately connected, are perfectly distinguishable. The intention might therefore with perfect propriety be styled a good one, whatever were the motive. It might be styled a good one, when not only the consequences of the act *prove* mischievous, but the motive which gave birth to it *was* what is called a bad one. To warrant the speaking of the intention as being a good one, it is sufficient if the consequences of the act, had they proved what to the agent they seemed likely to be, *would* have been of a beneficial nature. And in the same manner the intention may be bad, when not only the consequences of the act prove beneficial, but the motive which gave birth to it was a good one.

XIV.

Now, when a man has a mind to speak of your *intention* as being good or bad, with reference to the consequences, if he speaks of it at all he must use the word intention, for there is no other. But if a man means to

speak of the *motive* from which your intention originated, as being a good or a bad one, he is certainly not obliged to use the word intention: it is at least as well to use the word motive. By the supposition he means the motive; and very likely he may *not* mean the intention. For what is true of the one is very often not true of the other. The motive may be good when the intention is bad: the intention may be good when the motive is bad: whether they are both good or both bad, or the one good and the other bad, makes, as we shall see hereafter, a very essential difference with regard to the consequences.* It is therefore much better, when motive is meant, never to say intention.

XV.

An example will make this clear. Out of malice a man prosecutes you for a crime of which he believes you to be guilty, but of which in fact you are not guilty. Here the *consequences* of his conduct are mischievous: for they are mischievous to you at any rate, in virtue of the shame and anxiety which you are made to suffer while the prosecution is depending: to which is to be added, in case of your being convicted, the evil of the punishment. To you therefore they are mischievous; nor is there any one to whom they are beneficial. The man's *motive* was also what is called a bad one: for malice will be allowed by every body to be a bad motive. However, the *consequences* of his conduct, had they proved such as he believed them likely to be, would have been good: for in them would have been included the punishment of a criminal, which is a benefit to all who are exposed to suffer by a crime of the like nature. The *intention*, therefore, in this case, though not, in a common way of speaking, the motive, might be styled a *good* one. But of motives more particularly in the next chapter.

XVI.

In the same sense, the intention, whether it be positively good or no, so long as it is not bad, may be termed innocent. Accordingly, let the consequences have proved mischievous, and let the motive have been what it will, the intention may be termed innocent in either of two cases: 1. In the case of *un*-advisedness with respect to any of the circumstances on which the mischievousness of the consequences depended: 2. In the case of *mis*-advisedness with respect to any circumstance, which, had it been what it appeared to be, would have served either to prevent or to outweigh the mischief.

XVII.

A few words for the purpose of applying what has been said to the Roman law. Unintentionality, and innocence of intention, seem both to be included in the case of *infortunium*, where there is neither *dolus* nor *culpa*. Unadvisedness coupled with heedlessness, and mis-advisedness coupled with rashness, correspond to the *culpa sine dolo*. Direct intentionality corresponds to *dolus*. Oblique intentionality seems hardly to have been distinguished from direct: were it to occur, it would probably be deemed also to correspond to *dolus*. The division into *culpa lata*, *levis*, and *levissima*, is such as nothing certain can correspond to. What is it that it expresses? A distinction, not in the case itself, but only in the sentiments which any person (a judge, for instance) may find himself disposed to entertain with relation to it; supposing it already distinguished into three subordinate cases by other means.

The word *dolus* seems ill enough contrived: the word *culpa* as indifferently. *Dolus*, upon any other occasion, would be understood to imply deceit, concealment,† clandestinity:‡ but here it is extended to open force. *Culpa*, upon any other occasion, would be understood to extend to blame of every kind: it would therefore include *dolus*.‖

XVIII.

The above-mentioned definitions and dis-

* See ch. xii. [Consequences.]

‡ See B. I. tit. [Theft], *verbo* [amenable.]

† Dolus, an virtus, quis in hoste requirat? VIRGIL.

—— δολῳ τε και αμφαδον. HOMER.

‖ I pretend not here to give any determinate explanation of a set of words, of which the great misfortune is, that the import of them is confused and indeterminate. I speak only by approximation. To attempt to determine the precise import that has been given them by a hundredth part of the authors that have used them, would be an endless task. Would any one talk intelligibly on this subject in Latin? let him throw out *dolus* altogether: let him keep *culpa*, for the purpose of expressing not the case itself, but the sentiment that is entertained concerning a case described by other means. For intentionality, let him coin a word boldly, and say *intentionalitas*: for unintentionality, *non-intentionalitas*. For unadvisedness, he has already the word *inscitia*; though the words *imprudentia*, *inobservantia*, were it not for the other senses they are used in, would do better: for unadvisedness coupled with heedlessness, let him say *inscitia culpabilis*: for unadvisedness without heedlessness, *inscitia inculpabilis*: for mis-advisedness coupled with rashness, *error culpabilis*, *error temerarius*, or *error cum temeritate*: for mis-advisedness without rashness, *error inculpabilis*, *error non-temerarius*, or *error sine temeritate*.

It is not unfrequent likewise to meet with the phrase, *malo animo*: a phrase still more indeterminate, if possible, than any of the former. It seems to have reference either to intentionality, or to consciousness, or to the motive, or to the disposition, or to any two or more of these taken together; nobody can tell which: these being objects which seem to have never hitherto been properly distinguished and defined.

tinctions are far from being mere matters of speculation. They are capable of the most extensive and constant application, as well to moral discourse as to legislative practice. Upon the degree and bias of a man's intention, upon the absence or presence of consciousness or mis-supposal, depend a great part of the good and bad, more especially of the bad consequences of an act; and on this, as well as other grounds, a great part of the demand for punishment.* The presence of intention with regard to such or such a consequence, and of consciousness with regard to such or such a circumstance, of the act, will form so many criminative circumstances,† or essential ingredients in the composition of this or that offence: applied to other circumstances, consciousness will form a ground of aggravation, annexable to the like offence. ‡ In almost all cases, the absence of intention with regard to certain consequences, and the absence of consciousness, or the presence of mis-supposal, with regard to certain circumstances, will constitute so many grounds of extenuation. §

CHAPTER X.

OF MOTIVES.

§ 1. *Different Senses of the word, Motive.* ‖

I.

IT is an acknowledged truth, that every kind of act whatever, and consequently every kind of offence, is apt to assume a different character, and be attended with different effects, according to the nature of the *motive* which gives birth to it. This makes it requisite to take a view of the several motives by which human conduct is liable to be influenced.

II.

By a motive, in the most extensive sense in which the word is ever used with reference to a thinking being, is meant any thing that can contribute to give birth to, or even to prevent, any kind of action. Now the action of a thinking being is the act either of the body, or only of the mind: and an act of the mind is an act either of the intellectual faculty, or of the will. Acts of the intellectual faculty will sometimes rest in the understanding merely, without exerting any influence in the production of any acts of the will. Motives, which are not of a nature to influence any other acts than those, may be styled purely *speculative* motives, or motives resting in speculation. But as to these acts, neither do they exercise any influence over external acts, or over their consequences, nor consequently over any pain or any pleasure that may be in the number of such consequences. Now it is only on acount of their tendency to produce either pain or pleasure. that any acts can be material. With acts, therefore, that rest purely in the understanding, we have not here any concern: nor therefore with any object, if any such there be, which, in the character of a motive, can have no influence on any other acts than those.

III.

The motives with which alone we have any concern, are such as are of a nature to act upon the will. By a motive, then, in this sense of the word, is to be understood any thing whatsoever, which, by influencing the will of a sensitive being, is supposed to serve as a means of determining him to act, or voluntarily to forbear to act,¶ upon any occasion. Motives of this sort, in contradistinction to the former, may be styled *practical* motives, or motives applying to practice.

IV.

Owing to the poverty and unsettled state of language, the word *motive* is employed indiscriminately to denote two kinds of objects, which, for the better understanding of the subject, it is necessary should be distinguished. On some occasions it is employed to denote any of those really existing incidents from whence the act in question is supposed to take its rise. The sense it bears on these occasions may be styled its literal or *unfigurative* sense. On other occasions it is employed to denote a certain fictitious entity, a passion, an affection of the mind, an ideal being, which upon the happening of any such incident is considered as operating upon

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* See ch. xv. [Cases unmeet.]

† See B. I. tit. [Circumstances influencing.]

‡ See B. I. tit. [Aggravations.]

§ See B. I. tit. [Extenuations.]

‖ Note by the Author, July 1822—

For a tabular simultaneous view of the whole list of MOTIVES, in conjunction with the corresponding *pleasures* and *pains*, *interests* and *desires*, see, by the same author, *Table of the Springs of Action*, &c. with Explanatory Notes and Observations. London, 1817, Hunter, St. Paul's Church Yard, 8vo, pp. 32.

The word *inducement* has of late presented itself, as being in its signification more comprehensive than the word *motive*, and on some occasions more apposite.

¶ When the effect or tendency of a motive is to determine a man to forbear to act, it may seem improper to make use of the term *motive:* since motive, properly speaking, means that which disposes an object to *move.* We must, however, use that improper term, or a term which, though proper enough, is scarce in use, the word *determinative.* By way of justification, or at least apology, for the popular usage in this behalf, it may be observed, that even forbearance to act, or the negation of motion (that is, of bodily motion), supposes an act done, when such forbearance is voluntary. It supposes, to wit, an act of the will, which is as much a positive act, as much a motion, as any other act of the thinking substance.

the mind, and prompting it to take that course, towards which it is impelled by the influence of such incident. Motives of this class are Avarice, Indolence, Benevolence, and so forth; as we shall see more particularly farther on. This latter may be styled the *figurative* sense of the term *motive*.

V.

As to the real incidents to which the name of motive is also given, these too are of two very different kinds. They may be either, 1. The *internal* perception of any individual lot of pleasure or pain, the expectation of which is looked upon as calculated to determine you to act in such or such a manner; as the pleasure of acquiring such a sum of money, the pain of exerting yourself on such an occasion, and so forth: Or, 2. Any *external* event, the happening whereof is regarded as having a tendency to bring about the perception of such pleasure or such pain: for instance, the coming up of a lottery ticket, by which the possession of the money devolves to you; or the breaking out of a fire in the house you are in, which makes it necessary for you to quit it. The former kind of motives may be termed interior, or internal: the latter exterior, or external.

VI.

Two other senses of the term *motive* need also to be distinguished. Motive refers necessarily to action. It is a pleasure, pain, or other event, that prompts to action. Motive, then, in one sense of the word, must be previous to such event. But, for a man to be governed by any motive, he must in every case look beyond that event which is called his action; he must look to the consequences of it: and it is only in this way that the idea of pleasure, of pain, or of any other event, can give birth to it. He must look, therefore, in every case, to some event posterior to the act in contemplation: an event which as yet exists not, but stands only in prospect. Now, as it is in all cases difficult, and in most cases unnecessary, to distinguish between objects so intimately connected, as the posterior possible object which is thus looked forward to, and the present existing object or event which takes place upon a man's looking forward to the other, they are both of them spoken of under the same appellation, *motive*. To distinguish them, the one first mentioned may be termed a motive in *prospect*, the other a motive in *esse:* and under each of these denominations will come as well exterior as internal motives. A fire breaks out in your neighbour's house: you are under apprehension of its extending to your own: you are apprehensive, that if you stay in it, you will be burnt: you accordingly run out of it. This then is the act: the others are all motives to it. The event of the fire's breaking out in your neighbour's house is an external motive, and that in *esse:* the idea or belief of the probability of the fire's extending to your own house, that of your being burnt if you continue, and the pain you feel at the thought of such a catastrophe, are all so many internal events, but still in *esse:* the event of the fire's actually extending to your own house, and that of your being actually burnt by it, external motives in prospect: the pain you would feel at seeing your house a-burning, and the pain you would feel while you yourself were burning, internal motives in prospect: which events, according as the matter turns out, may come to be in *esse:* but then of course they will cease to act as motives.

VII.

Of all these motives, which stand nearest to the act to the production of which they all contribute, is that internal motive in *esse* which consists in the expectation of the internal motive in prospect: the pain or uneasiness you feel at the thoughts of being burnt.* All other motives are more or less remote: the motives in prospect, in proportion as the period at which they are expected to happen is more distant from the period at which the act takes place, and consequently later in point of time: the motives in *esse*, in proportion as they also are more distant from that period, and consequently earlier in point of time.†

VIII.

It has already been observed, that with motives of which the influence terminates altogether in the understanding, we have nothing here to do. If, then, amongst objects that are spoken of as motives with reference to the understanding, there be any which concern us here, it is only in as far as such objects may, through the medium of the un-

* Whether it be the expectation of being burnt or the pain that accompanies that expectation, that is the immediate internal motive spoken of, may be difficult to determine. It may even be questioned, perhaps, whether they are distinct entities. Both questions, however, seem to be mere questions of words, and the solution of them altogether immaterial. Even the other kinds of motives, though for some purposes they demand a separate consideration, are, however, so intimately allied, that it will often be scarce practicable, and not always material, to avoid confounding them, as they have always hitherto been confounded.

† Under the term *esse* must be included as well *past* existence, with reference to a given period, as *present*. They are equally real, in comparison with what is as yet but future. Language is materially deficient, in not enabling us to distinguish with precision between *existence* as opposed to *unreality*, and *present* existence as opposed to past. The word existence in English, and *esse*, adopted by lawyers from the Latin, have the inconvenience of appearing to confine the existence in question to some single period considered as being present.

derstanding, exercise an influence over the will. It is in this way, and in this way only, that any objects, in virtue of any tendency they may have to influence the sentiment of belief, may in a practical sense act in the character of motives. Any objects, by tending to induce a belief concerning the existence, actual, or probable, of a practical motive; that is, concerning the probability of a motive in prospect, or the existence of a motive in *esse;* may exercise an influence on the will, and rank with those other motives that have been placed under the name of practical. The pointing out of motives such as these, is what we frequently mean when we talk of giving *reasons*. Your neighbour's house is on fire as before. I observe to you, that at the lower part of your neighbour's house is some wood-work, which joins on to your's; that the flames have caught this wood-work, and so forth; which I do in order to dispose you to believe as I believe, that if you stay in your house much longer you will be burnt. In doing this, then, I suggest motives to your understanding; which motives, by the tendency they have to give birth to or strengthen a pain, which operates upon you in the character of an internal motive in *esse*, join their force, and act as motives upon the will.

§ 2. *No Motives either constantly good, or constantly bad.*

IX.

In all this chain of motives, the principal or original link seems to be the last internal motive in prospect; it is to this that all the other motives in prospect owe their materiality: and the immediately acting motive its existence. This motive in prospect, we see, is always some pleasure, or some pain: some pleasure, which the act in question is expected to be a means of continuing or producing: some pain which it is expected to be a means of discontinuing or preventing. A motive is substantially nothing more than pleasure or pain, operating in a certain manner.

X.

Now, pleasure is in *itself* a good; nay, even setting aside immunity from pain, the only good: pain is in itself an evil; and, indeed, without exception, the only evil; or else the words good and evil have no meaning. And this is alike true of every sort of pain, and of every sort of pleasure. It follows, therefore, immediately and incontestibly, that *there is no such thing as any sort of motive that is in itself a bad one.**

XI.

It is common, however, to speak of actions as proceeding from *good* or *bad* motives: in which case the motives meant are such as are internal. The expression is far from being an accurate one; and as it is apt to occur in the consideration of almost every kind of offence, it will be requisite to settle the precise meaning of it, and observe how far it quadrates with the truth of things.

XII.

With respect to goodness and badness, as it is with every thing else that is not itself either pain or pleasure, so is it with motives. If they are good or bad, it is only on account of their effects: good, on account of their tendency to produce pleasure, or avert pain: bad, on account of their tendency to produce pain or avert pleasure. Now the case is, that from one and the same motive, and from every kind of motive, may proceed actions that are good, others that are bad, and others that are indifferent. This we shall proceed to shew with respect to all the different kinds of motives, as determined by the various kinds of pleasures and pains.

XIII.

Such an analysis, useful as it is, will be found to be a matter of no small difficulty; owing, in great measure, to a certain perversity of structure which prevails more or less throughout all languages. To speak of motives, as of any thing else, one must call them by their names. But the misfortune is, that it is rare to meet with a motive of which the name expresses that and nothing more. Commonly along with the very name of the motive, is tacitly involved a proposition imputing to it a certain quality; a quality which, in many cases, will appear to include that very goodness or badness, concerning which we are here inquiring whether, properly speaking, it be or be not imputable to motives. To use the common phrase, in most cases, the name of the motive is a word which is employed either only in a *good sense*, or else only in a *bad sense*. Now, when a word is spoken of as being used in a good sense, all that is necessarily meant is this: that in conjunction with the idea of the object it is put to signify, it conveys an idea of *approbation;* that is, of a pleasure or satisfaction, entertained by the person who employs the term, at the thoughts of such object. In like manner, when a word is spoken of as being used in a bad sense, all that is necessarily meant is this: that, in conjunction with the idea of the object it is put to signify, it conveys an idea of *disappro-*

* Let a man's motive be ill-will; call it even malice, envy, cruelty; it is still a kind of pleasure that is his motive: the pleasure he takes at the thought of the pain which he sees, or expects to see, his adversary undergo. Now even this wretched pleasure, taken by itself, is good: it may be faint; it may be short; it must at any rate be impure: yet while it lasts, and before any bad consequences arrive, it is as good as any other that is not more intense. See ch. iv. [Value.]

bation: that is, of a displeasure entertained by the person who employs the term at the thoughts of such object. Now, the circumstance on which such approbation is grounded will, as naturally as any other, be the opinion of the *goodness* of the object in question, as above explained: such, at least, it must be, upon the principle of utility: so, on the other hand, the circumstance on which any such disapprobation is grounded, will, as naturally as any other, be the opinion of the *badness* of the object: such, at least, it must be, in as far as the principle of utility is taken for the standard.

Now there are certain motives which, unless in a few particular cases, have scarcely any other name to be expressed by but such a word as is used only in a good sense. This is the case, for example, with the motives of piety and honour. The consequence of this is, that if, in speaking of such a motive, a man should have occasion to apply the epithet bad to any actions which he mentions as apt to result from it, he must appear to be guilty of a contradiction in terms. But the names of motives which have scarcely any other name to be expressed by, but such a word as is used only in a bad sense, are many more.* This is the case, for example, with the motives of lust and avarice. And accordingly, if, in speaking of any such motive, a man should have occasion to apply the epithets good or indifferent to any actions which he mentions as apt to result from it, he must here also appear to be guilty of a similar contradiction.†

This perverse association of ideas cannot, it is evident, but throw great difficulties in the way of the inquiry now before us. Confining himself to the language most in use, a man can scarce avoid running, in appearance, into perpetual contradictions. His propositions will appear, on the one hand, repugnant to truth; and on the other hand, adverse to utility. As paradoxes, they will excite contempt: as mischievous paradoxes, indignation. For the truths he labours to convey, however important, and however salutary, his reader is never the better: and he himself is much the worse. To obviate this inconvenience completely, he has but this one unpleasant remedy; to lay aside the old phraseology and invent a new one. Happy the man whose language is ductile enough to permit him this resource. To palliate the inconvenience, where that method of obviating it is impracticable, he has nothing left for it but to enter into a long discussion, to state the whole matter at large, to confess, that for the sake of promoting the purposes, he has violated the established laws of language, and to throw himself upon the mercy of his readers.‡

§ 3. *Catalogue of Motives corresponding to that of Pleasures and Pains.*

XIV.

From the pleasures of the senses, considered in the gross, results the motive which, in a neutral sense, may be termed physical desire: in a bad sense, it is termed sensuality. Name used in a good sense it has none. Of this, nothing can be determined, till it be considered separately, with reference to the several species of pleasures to which it corresponds.

XV.

In particular, then, to the pleasures of the taste or palate corresponds a motive, which in a neutral sense having received no name that can serve to express it in all cases, can only be termed, by circumlocution, the love of the pleasures of the palate. In particular cases it is styled hunger: in others, thirst.‖

* For the reason, see chap. xi. [Dispositions], par. 17, note.

† To this imperfection of language, and nothing more, are to be attributed, in great measure, the violent clamours that have from time to time been raised against those ingenious moralists, who, travelling out of the beaten tract of speculation, have found more or less difficulty in disentangling themselves from the shackles of ordinary language: such as Rochefoucault, Mandeville, and Helvetius. To the unsoundness of their opinions, and, with still greater injustice, to the corruption of their hearts, was often imputed, what was most commonly owing either to a want of skill in matters of language on the part of the author, or a want of discernment, possibly now and then in some instances a want of probity, on the part of the commentator.

‡ Happily, language is not always so intractable, but that by making use of two words instead of one, a man may avoid the inconvenience of fabricating words that are absolutely new. Thus instead of the word lust, by putting together two words in common use, he may frame the neutral expression, sexual desire: instead of the word avarice, by putting together two other words also in common use, he may frame the neutral expression, pecuniary interest. This, accordingly, is the course which I have taken. In these instances, indeed, even the combination is not novel: the only novelty there is consists in the steady adherence to the one neutral expression, rejecting altogether the terms, of which the import is infected by adventitious and unsuitable ideas.

In the catalogue of motives, corresponding to the several sorts of pains and pleasures, I have inserted such as have occurred to me. I cannot pretend to warrant it complete. To make sure of rendering it so, the only way would be, to turn over the dictionary from beginning to end: an operation which, in a view to perfection, would be necessary for more purposes than this. See B. I. tit. [Defamation], and Append. tit. [Composition.]

‖ Hunger and thirst, considered in the light of motives, import not so much the desire of a particular kind of pleasure, as the desire of removing a positive kind of pain. They do not extend to the desire of that kind of pleasure which depends on the choice of foods and liquors.

The love of good cheer expresses this motive, but seems to go beyond: intimating, that the pleasure is to be partaken of in company, and involving a kind of sympathy. In a bad sense, it is styled in some cases greediness, voraciousness, gluttony: in others, principally when applied to children, lickerishness. It may in some cases also be represented by the word daintiness. Name used in a good sense it has none. 1. A boy, who does not want for victuals, steals a cake out of a pastry-cook's shop, and eats it. In this case his motive will be universally deemed a bad one: and if it be asked what it is, it may be answered, perhaps, lickerishness. 2. A boy buys a cake out of a pastry-cook's shop, and eats it. In this case his motive can scarcely be looked upon as either good or bad, unless his master should be out of humour with him; and then perhaps he may call it lickerishness, as before. In both cases, however, his motive is the same. It is neither more nor less than the motive corresponding to the pleasures of the palate.*

XVI.

To the pleasures of the sexual sense corresponds the motive which, in a neutral sense, may be termed sexual desire. In a bad sense, it is spoken of under the name of lasciviousness, and a variety of other names of reprobation. Name used in a good sense, it has none.†

1. A man ravishes a virgin. In this case the motive is, without scruple, termed by the name of lust, lasciviousness, and so forth; and is universally looked upon as a bad one. 2. The same man, at another time, exercises the rights of marriage with his wife. In this case the motive is accounted, perhaps, a good one, or at least indifferent: and here people would scruple to call it by any of those names. In both cases, however, the motive may be precisely the same. In both cases it may be neither more nor less than sexual desire.

XVII.

To the pleasures of curiosity corresponds the motive known by the same name: and which may be otherwise called the love of novelty, or the love of experiment; and, on particular occasions, sport, and sometimes play.

1. A boy, in order to divert himself, reads an improving book: the motive is accounted, perhaps, a good one: at any rate, not a bad one. 2. He sets his top a-spinning: the motive is deemed, at any rate, not a bad one. 3. He sets loose a mad ox among a crowd: his motive is now, perhaps, termed an abominable one. Yet in all three cases the motive may be the very same: it may be neither more nor less than curiosity.

XVIII.

As to the other pleasures of sense, they are of too little consequence to have given any separate denominations to the corresponding motives.

XIX.

To the pleasures of wealth corresponds the sort of motive which, in a neutral sense, may be termed pecuniary interest. In a bad sense, it is termed, in some cases, avarice, covetousness, rapacity, or lucre: in other cases, niggardliness: in a good sense, but only in particular cases, economy and frugality; and in some cases the word industry may be applied to it: in a sense nearly indifferent, but rather bad than otherwise, it is styled, though only in particular cases, parsimony.

1. For money you gratify a man's hatred, by putting his adversary to death. 2. For money you plough his field for him. In the first case your motive is termed lucre, and is accounted corrupt and abominable: and in the second, for want of a proper appellation, it is styled industry; and is looked upon as innocent at least, if not meritorious. Yet the motive is in both cases precisely the same; it is neither more nor less than pecuniary interest.

XX.

The pleasures of skill are neither distinct enough, nor of consequence enough, to have given any name to the corresponding motive.

XXI.

To the pleasures of amity corresponds a motive which, in a neutral sense, may be termed the desire of ingratiating one's self. In a bad sense, it is in certain cases styled servility: in a good sense it has no name that is peculiar to it: in the cases in which it has been looked on with a favourable eye, it has seldom been distinguished from the motive of sympathy or benevolence, with which, in such cases, it is commonly associated.

1. To acquire the affections of a woman before marriage, to preserve them afterwards, you do every thing, that is consistent with other duties, to make her happy: in this case your motive is looked upon as laudable, though there is no name for it. 2. For the

* It will not be worth while, in every case, to give an instance in which the action may be indifferent: if good as well as bad actions may result from the same motive, it is easy to conceive, that also may be indifferent.

† Love indeed includes sometimes this idea: but then it can never answer the purpose of exhibiting it separately: since there are three motives, at least, that may all of them be included in it, besides this: the love of beauty corresponding to the pleasures of the eye, and the motives corresponding to those of amity and benevolence. We speak of the love of children, of the love of parents, of the love of God. These pious uses protect the appellation, and preserve it from the ignominy poured forth upon its profane associates. Even sensual love would not answer the purpose; since that would include the love of beauty.

same purpose, you poison a woman with whom she is at enmity: in this case, your motive is looked upon as abominable, though still there is no name for it. 3. To acquire or preserve the favour of a man who is richer or more powerful than yourself, you make yourself subservient to his pleasures. Let them even be lawful pleasures, if people choose to attribute your behaviour to this motive, you will not get them to find any other name for it than servility. Yet in all three cases the motive is the same: it is neither more nor less than the desire of ingratiating yourself.

XXII.

To the pleasures of the moral sanction, or, as they may otherwise be called, the pleasures of a good name, corresponds a motive which, in a neutral sense, has scarcely yet obtained any adequate appellative. It may be styled the love of reputation. It is nearly related to the motive last preceding: being neither more nor less than the desire of ingratiating one's self with, or, as in this case we should rather say, of recommending one's self to, the world at large. In a good sense, it is termed honour, or the sense of honour; or rather, the word honour is introduced somehow or other upon the occasion of its being brought to view: for in strictness the word honour is put rather to signify that imaginary object, which a man is spoken of as possessing upon the occasion of his obtaining a conspicuous share of the pleasures that are in question. In particular cases, it is styled the love of glory. In a bad sense, it is styled, in some cases, false honour; in others, pride; in others, vanity. In a sense not decidedly bad, but rather bad than otherwise, ambition. In an indifferent sense, in some cases, the love of fame; in others, the sense of shame. And, as the pleasures belonging to the moral sanction run undistinguishably into the pains derived from the same source,* it may also be styled, in some cases, the fear of dishonour, the fear of disgrace, the fear of infamy, the fear of ignominy, or the fear of shame.

1. You have received an affront from a man: according to the custom of the country, in order, on the one hand, to save yourself from the shame of being thought to bear it patiently;† on the other hand, to obtain the reputation of courage; you challenge him to fight with mortal weapons. In this case your motive will by some people be accounted laudable, and styled honour: by others it will be accounted blameable, and these, if they call it honour, will prefix an epithet of improbation to it, and call it false honour. 2. In order to obtain a post of rank and dignity, and thereby to increase the respect paid you by the public, you bribe the electors who are to confer it, or the judge before whom the title to it is in dispute. In this case your motive is commonly accounted corrupt and abominable, and is styled, perhaps, by some such name as dishonest or corrupt ambition, as there is no single name for it. 3. In order to obtain the good-will of the public, you bestow a large sum in works of private charity or public utility. In this case people will be apt not to agree about your motive. Your enemies will put a bad colour

* See chap. vi. [Pleasures and Pains], par. 24, note.

† A man's bearing an affront patiently, that is, without taking this method of doing what is called wiping it off, is thought to import one or other of two things: either that he does not possess that sensibility to the pleasures and pains of the moral sanction, which, in order to render himself a respectable member of society, a man ought to possess: or, that he does not possess courage enough to stake his life for the chance of gratifying that resentment which a proper sense of the value of those pleasures and those pains it is thought would not fail to inspire. True it is, that there are divers other motives, by any of which the same conduct might equally be produced: the motives corresponding to the religious sanction, and the motives that come under the head of benevolence. Piety towards God, the practice in question being generally looked upon as repugnant to the dictates of the religious sanction: sympathy for your antagonist himself, whose life would be put to hazard at the same time with your own: sympathy for his connexions; the persons who are dependent on him in the way of support, or connected with him in the way of sympathy: sympathy for your own connexions: and even sympathy for the public, in cases where the man is such that the public appears to have a material interest in his life. But in comparison with the love of life, the influence of the religious sanction is known to be in general but weak; especially among people of those classes who are here in question: a sure proof of which is the prevalence of this very custom. Where it is so strong as to preponderate, it is so rare, that, perhaps, it gives a man a place in the calendar: and, at any rate, exalts him to the rank of martyr. Moreover, the instances in which either private benevolence or public spirit predominate over the love of life, will also naturally be but rare: and, owing to the general propensity to detraction, it will also be much rarer for them to be thought to do so. Now, when three or more motives, any one of them capable of producing a given mode of conduct, apply at once, that which appears to be the most powerful is that which will of course be deemed to have actually done the *most*: and, as the bulk of mankind, on this as on other occasions, are disposed to decide peremptorily upon superficial estimates, it will generally be looked upon as having done the whole.

The consequence is, that when a man of a certain rank forbears to take this chance of revenging an affront, his conduct will, by most people, be imputed to the love of life: which, when it predominates over the love of reputation, is, by a not unsalutary association of ideas, stigmatized with the reproachful name of cowardice.

upon it, and call it ostentation: your friends, to save you from this reproach, will choose to impute your conduct not to this motive but to some other; such as that of charity (the denomination in this case given to private sympathy), or that of public spirit. 4. A king, for the sake of gaining the admiration annexed to the name of conqueror (we will suppose power and resentment out of the question), engages his kingdom in a bloody war. His motive, by the multitude (whose sympathy for millions is easily overborne by the pleasure which their imagination finds in gaping at any novelty they observe in the conduct of a single person), is deemed an admirable one. Men of feeling and reflection, who disapprove of the dominion exercised by this motive on this occasion, without always perceiving that it is the same motive which in other instances meets with their approbation, deem it an abominable one; and because the multitude, who are the manufacturers of language, have not given them a simple name to call it by, they will call it by some such compound name as the love of false glory or false ambition. Yet in all four cases the motive is the same: it is neither more nor less than the love of reputation.

XXIII.

To the pleasures of power corresponds the motive which, in a neutral sense, may be termed the love of power. People, who are out of humour with it, sometimes call it the lust of power. In a good sense, it is scarcely provided with a name. In certain cases this motive, as well as the love of reputation, are confounded under the same name, ambition. This is not to be wondered at, considering the intimate connexion there is between the two motives in many cases: since it commonly happens, that the same object which affords the one sort of pleasure, affords the other sort at the same time; for instance, offices, which are at once posts of honour and places of trust: and since at any rate reputation is the road to power.

1. If, in order to gain a place in administration, you poison the man who occupies it. 2. If, in the same view, you propose a salutary plan for the advancement of the public welfare; your motive is in both cases the same. Yet in the first case it is accounted criminal and abominable: in the second case allowable, and even laudable.

XXIV.

To the pleasures as well as to the pains of the religious sanction corresponds a motive which has, strictly speaking, no perfectly neutral name applicable to all cases, unless the word religion be admitted in this character: though the word religion, strictly speaking, seems to mean not so much the motive itself, as a kind of fictitious personage, by whom the motive is supposed to be created, or an assemblage of acts, supposed to be dictated by that personage: nor does it seem to be completely settled into a neutral sense. In the same sense it is also, in some cases, styled religious zeal: in other cases, the fear of God. The love of God, though commonly contrasted with the fear of God, does not come strictly under this head. It coincides properly with a motive of a different denomination; viz. a kind of sympathy or good-will, which has the Deity for its object. In a good sense, it is styled devotion, piety, and pious zeal. In a bad sense, it is styled, in some cases, superstition, or superstitious zeal; in other cases, fanaticism, or fanatic zeal: in a sense not decidedly bad, because not appropriated to this motive, enthusiasm, or enthusiastic zeal.

1. In order to obtain the favour of the Supreme Being, a man assassinates his lawful sovereign. In this case the motive is now almost universally looked upon as abominable, and is termed fanaticism: formerly it was by great numbers accounted laudable, and was by them called pious zeal. 2. In the same view, a man lashes himself with thongs. In this case, in yonder house, the motive is accounted laudable, and is called pious zeal: in the next house it is deemed contemptible, and called superstition. 3. In the same view, a man eats a piece of bread (or at least what to external appearance is a piece of bread) with certain ceremonies. In this case, in yonder house, his motive is looked upon as laudable, and is styled piety and devotion: in the next house it is deemed abominable, and styled superstition, as before: perhaps even it is absurdly styled impiety. 4. In the same view, a man holds a cow by the tail while he is dying. On the Thames the motive would in this case be deemed contemptible, and called superstition: on the Ganges it is deemed meritorious, and called piety. 5. In the same view, a man bestows a large sum in works of charity, or public utility. In this case the motive is styled laudable, by those at least to whom the works in question appear to come under this description; and by these at least it would be styled piety. Yet in all these cases the motive is precisely the same: it is neither more nor less than the motive belonging to the religious sanction.*

XXV.

To the pleasures of sympathy corresponds

* I am aware, or at least I hope, that people in general, when they see the matter thus stated, will be ready to acknowledge, that the motive in these cases, whatever be the tendency of the acts which it produces, is not a bad one: but this will not render it the less true, that hitherto, in popular discourse, it has been common for men to speak of acts, which they could not but acknowledge to have originated from this source, as proceeding from a bad motive. The same observation will apply to many of the other cases.

the motive which, in a neutral sense, is termed good-will. The word sympathy may also be used on this occasion; though the sense of it seems to be rather more extensive. In a good sense, it is styled benevolence: and in certain cases, philanthropy: and, in a figurative way, brotherly love; in others, humanity; in others, charity; in others, pity and compassion; in others, mercy; in others, gratitude; in others, tenderness; in others, patriotism; in others, public spirit. Love is also employed in this as in so many other senses. In a bad sense, it has no name applicable to it in all cases: in particular cases it is styled partiality. The word zeal, with certain epithets prefixed to it, might also be employed sometimes on this occasion, though the sense of it be more extensive; applying sometimes to ill as well as to good will. It is thus we speak of party zeal, national zeal, and public zeal. The word attachment is also used with the like epithets: we also say family-attachment. The French expression, *esprit de corps*, for which as yet there seems to be scarcely any name in English, might be rendered, in some cases, though rather inadequately, by the terms corporation-spirit, corporation-attachment, or corporation-zeal.

1. A man who has set a town on fire is apprehended and committed: out of regard or compassion for him, you help him to break prison. In this case the generality of people will probably scarcely know whether to condemn your motive or to applaud it: those who condemn your conduct, will be disposed rather to impute it to some other motive: if they style it benevolence or compassion, they will be for prefixing an epithet, and calling it false benevolence or false compassion.* 2. The man is taken again, and is put upon his trial; to save him, you swear falsely in his favour. People, who would not call your motive a bad one before, will perhaps call it so now. 3. A man is at law with you about an estate: he has no right to it: the judge knows this, yet, having an esteem or affection for your adversary, adjudges it to him. In this case the motive is by every body deemed abominable, and is termed injustice and partiality. 4. You detect a statesman in receiving bribes: out of regard to the public interest, you give information of it, and prosecute him. In this case, by all who acknowledge your conduct to have originated from this motive, your motive will be deemed a laudable one, and styled public spirit. But his friends and adherents will not choose to account for your conduct in any such manner: they will rather attribute it to party enmity. 5. You find a man on the point of starving: you relieve him; and save his life. In this case your motive will by every body be accounted laudable, and it will be termed compassion, pity, charity, benevolence. Yet in all these cases the motive is the same: it is neither more nor less than the motive of good-will.

XXVI.

To the pleasures of malevolence, or antipathy, corresponds the motive which, in a neutral sense, is termed antipathy or displeasure: and, in particular cases, dislike, aversion, abhorrence, and indignation: in a neutral sense, or perhaps a sense leaning a little to the bad side, ill-will: and, in particular cases, anger, wrath, and enmity. In a bad sense, it is styled, in different cases, wrath, spleen, ill-humour, animosity, hatred, malice, rancour, rage, fury, cruelty, tyranny, envy, jealousy, revenge, misanthropy, and by other names, which it is hardly worth while to endeavour to collect.† Like good-will, it is used with epithets expressive of the persons who are the objects of the affection. Hence we hear of party enmity, party rage, and so forth. In a good sense, there seems to be no single name for it. In compound expressions it may be spoken of in such a sense, by epithets, such as *just* and *laudable*, prefixed to words that are used in a neutral or nearly neutral sense.

1. You rob a man: he prosecutes you, and gets you punished: out of resentment you set upon him, and hang him with your own hands. In this case your motive will universally be deemed detestable, and will be called malice, cruelty, revenge, and so forth. 2. A man has stolen a little money from you: out of resentment you prosecute him, and get him hanged by course of law. In this case people will probably be a little divided

* Among the Greeks, perhaps the motive, and the conduct it gave birth to, would, in such a case, have been rather approved than disapproved of. It seems to have been deemed an act of heroism on the part of Hercules, to have delivered his friend Theseus from hell: though divine justice, which held him there, should naturally have been regarded as being at least upon a footing with human justice. But to divine justice, even when acknowledged under that character, the respect paid at that time of day does not seem to have been very profound, or well-settled: at present, the respect paid to it is profound and settled enough, though the name of it is but too often applied to dictates which could have had no other origin than the worst sort of human caprice.

† Here, as elsewhere, it may be observed, that the same words which are mentioned as names of motives, are also many of them names of passions, appetites, and affections: fictitious entities, which are framed only by considering pleasures or pains in some particular point of view. Some of them are also names of moral qualities. This branch of nomenclature is remarkably entangled: to unravel it completely would take up a whole volume; not a syllable of which would belong properly to the present design.

in their opinions about your motive: your friends will deem it a laudable one, and call it a just or laudable resentment: your enemies will perhaps be disposed to deem it blameable, and call it cruelty, malice, revenge, and so forth: to obviate which, your friends will try perhaps to change the motive, and call it public spirit. 3. A man has murdered your father: out of resentment you prosecute him, and get him put to death in course of law. In this case your motive will be universally deemed a laudable one, and styled, as before, a just or laudable resentment: and your friends, in order to bring forward the more amiable principle from which the malevolent one, which was your immediate motive, took it srise, will be for keeping the latter out of sight, speaking of the former only, under some such name as filial piety. Yet in all these cases the motive is the same: it is neither more nor less than the motive of ill-will.

XXVII.

To the several sorts of pains, or at least to all such of them as are conceived to subsist in an intense degree, and to death, which, as far as we can perceive, is the termination of all the pleasures, as well as all the pains we are acquainted with, corresponds the motive which, in a neutral sense, is styled, in general, self-preservation; the desire of preserving one's self from the pain or evil in question. Now in many instances the desire of pleasure, and the sense of pain, run into one another undistinguishably. Self-preservation, therefore, where the degree of the pain which it corresponds to is but slight, will scarcely be distinguishable, by any precise line, from the motives corresponding to the several sorts of pleasures. Thus in the case of the pains of hunger and thirst: physical want will in many cases be scarcely distinguishable from physical desire. In some cases it is styled, still in a neutral sense, self-defence. Between the pleasures and the pains of the moral and religious sanctions, and consequently of the motives that correspond to them, as likewise between the pleasures of amity, and the pains of enmity, this want of boundaries has already been taken notice of.* The case is the same between the pleasures of wealth, and the pains of privation corresponding to those pleasures. There are many cases, therefore, in which it will be difficult to distinguish the motive of self-preservation from pecuniary interest, from the desire of ingratiating one's self, from the love of reputation, and from religious hope: in which cases, those more specific and explicit names will naturally be preferred to this general and inexplicit one. There are also a multitude of compound names, which either are already in use, or might be devised, to distinguish the specific branches of the motive of self-preservation from those several motives of a pleasurable origin: such as the fear of poverty, the fear of losing such or such a man's regard, the fear of shame, and the fear of God. Moreover, to the evil of death corresponds, in a neutral sense, the love of life; in a bad sense, cowardice: which corresponds also to the pains of the senses, at least when considered as subsisting in an acute degree. There seems to be no name for the love of life that has a good sense; unless it be the vague and general name of prudence.

1. To save yourself from being hanged, pilloried, imprisoned, or fined, you poison the only person who can give evidence against you. In this case your motive will universally be styled abominable: but as the term self-preservation has no bad sense, people will not care to make this use of it: they will be apt rather to change the motive, and call it malice. 2. A woman, having been just delivered of an illegitimate child, in order to save herself from shame, destroys the child, or abandons it. In this case, also, people will call the motive a bad one; and, not caring to speak of it under a neutral name, they will be apt to change the motive, and to call it by some such name as cruelty. 3. To save the expense of a half-penny, you suffer a man, whom you could preserve at that expense, to perish with want, before your eyes. In this case your motive will be universally deemed an abominable one; and, to avoid calling it by so indulgent a name as self-preservation, people will be apt to call it avarice and niggardliness, with which indeed in this case it indistinguishably coincides: for the sake of finding a more reproachful appellation, they will be apt likewise to change the motive, and term it cruelty. 4. To put an end to the pain of hunger, you steal a loaf of bread. In this case your motive will scarcely, perhaps, be deemed a very bad one; and, in to order express more indulgence for it, people will be apt to find a stronger name for it than self-preservation, terming it *necessity*. 5. To save yourself from drowning, you beat off an innocent man who has got hold of the same plank. In this case your motive will in general be deemed neither good nor bad; and it will be termed self-preservation, or necessity, or the love of life. 6. To save your life from a gang of robbers, you kill them in the conflict. In this case the motive may, perhaps, be deemed rather laudable than otherwise; and, besides self-preservation, is styled also self-defence. 7. A soldier is sent out upon a party against a weaker party of the enemy: before he gets up with them, to save his life, he runs away. In this case the mo-

* See ch. v. [Pleasures and Pains], par. 24, 25.

tive will universally be deemed a contemptible one, and will be called cowardice. Yet in all these various cases, the motive is still the same: it is neither more nor less than self-preservation.

XXVIII.

In particular, to the pains of exertion corresponds the motive which, in a neutral sense, may be termed the love of ease, or by a longer circumlocution, the desire of avoiding trouble. In a bad sense, it is termed indolence.* It seems to have no name that carries with it a good sense.

1. To save the trouble of taking care of it, a parent leaves his child to perish. In this case the motive will be deemed an abominable one, and because indolence will seem too mild a name for it, the motive will, perhaps, be changed, and spoken of under some such term as cruelty. 2. To save yourself from an illegal slavery, you make your escape. In this case the motive will be deemed certainly not a bad one; and, because indolence, or even the love of ease, will be thought too unfavourable a name for it, it will, perhaps, be styled the love of liberty. 3. A mechanic, in order to save his labour, makes an improvement in his machinery. In this case, people will look upon his motive as a good one; and finding no name for it that carries a good sense, they will be disposed to keep the motive out of sight: they will speak rather of his ingenuity, than of the motive which was the means of his manifesting that quality. Yet in all these cases the motive is the same: it is neither more nor less than the love of ease.

XXIX.

It appears, then, that there is no such thing as any sort of motive which is a bad one in itself: nor, consequently, any such thing as a sort of motive, which in itself is exclusively a good one. And as to their effects, it appears too that these are sometimes bad, at other times either indifferent or good: and this appears to be the case with every sort of motive. *If any sort of motive, then, is either good or bad on the score of its effects, this is the case only on individual occasions, and with individual motives;* and this is the case with one sort of motive as well as with another. *If any sort of motive, then, can, in consideration of its effects, be termed with any propriety a bad one,* it can only be with reference to the balance of all the effects it may have had of both kinds within a given period, that is, of its most usual tendency.

XXX.

What then? (it will be said) are not lust, cruelty, avarice, bad motives? Is there so much as any one individual occasion, in which motives like these can be otherwise than bad? No, certainly: and yet the proposition, that there is no one *sort* of motive but what will on many occasions be a good one, is nevertheless true. The fact is, that these are names which, if properly applied, are never applied but in the cases where the motives they signify happen to be bad. The names of these motives, considered apart from their effects, are sexual desire, displeasure, and pecuniary interest. To sexual desire, when the effects of it are looked upon as bad, is given the name of lust. Now lust is always a bad motive. Why? Because if the case be such that the effects of the motive are not bad, it does not go, or at least ought not to go, by the name of lust. The case is, then, that when I say, "Lust is a bad motive," it is a proposition that merely concerns the import of the word lust; and which would be false if transferred to the other word used for the same motive, sexual desire. Hence we see the emptiness of all those rhapsodies of common-place morality, which consist in the taking of such names as lust, cruelty, and avarice, and branding them with marks of reprobation: applied to the *thing*, they are false; applied to the *name*, they are true, indeed, but nugatory. Would you do a real service to mankind, show them the cases in which sexual desire *merits* the name of lust; displeasure, that of cruelty; and pecuniary interest, that of avarice.

XXXI.

If it were necessary to apply such denominations as good, bad, and indifferent, to motives, they might be classed in the following manner, in consideration of the most frequent complexion of their effects. In the class of good motives might be placed the articles of, 1. Goodwill. 2. Love of reputation. 3. Desire of amity. And, 4. Religion. In the class of bad motives, 5. Displeasure. In the class of neutral or indifferent motives, 6. Physical desire. 7. Pecuniary interest. 8. Love of power. 9. Self-preservation; as including the fear of the pains of the senses, the love of ease, and the love of life.

XXXII.

This method of arrangement, however, cannot but be imperfect; and the nomenclature belonging to it is in danger of being fallacious. For by what method of investigation can a man be assured, that with regard to the motives ranked under the name of good, the good effects they have had, from the beginning of the world, have, in each of the four species comprised under this name, been superior to the bad? Still more difficulty would a man find in assuring himself, that with regard to those which are ranked under the name of neutral or indifferent, the effects

* It may seem odd at first sight to speak of the love of ease as giving birth to action: but exertion is as natural an effect of the love of ease as inaction is, when a smaller degree of exertion promises to exempt a man from a greater.

they have had have exactly balanced each other, the value of the good being neither greater nor less than that of the bad. It is to be considered, that the interests of the person himself can no more be left out of the estimate, than those of the rest of the community. For what would become of the species, if it were not for the motives of hunger and thirst, sexual desire, the fear of pain, and the love of life? Nor in the actual constitution of human nature is the motive of displeasure less necessary, perhaps, than any of the others: although a system, in which the business of life might be carried on without it, might possibly be conceived. It seems, therefore, that they could scarcely, without great danger of mistakes, be distinguished in this manner, even with reference to each other.

XXXIII.

The only way, it should seem, in which a motive can with safety and propriety be styled good or bad, is with reference to its effects in each individual instance; and principally from the intention it gives birth to: from which arise, as will be shown hereafter, the most material part of its effects. A motive is good, when the intention it gives birth to is a good one; bad, when the intention is a bad one: and an intention is good or bad, according to the material consequences that are the objects of it. So far is it from the goodness of the intention's being to be known only from the species of the motive. But from one and the same motive, as we have seen, may result intentions of every sort of complexion whatsoever. This circumstance, therefore, can afford no clue for the arrangement of the several sorts of motives.

XXXIV.

A more commodious method, therefore, it should seem, would be to distribute them according to the influence which they appear to have on the interests of the other members of the community, laying those of the party himself out of the question; to wit, according to the tendency which they appear to have to unite, or disunite, his interests and theirs. On this plan they may be distinguished into *social*, *dissocial*, and *self-regarding*. In the social class may be reckoned, 1. Good-will. 2. Love of reputation. 3. Desire of amity. 4. Religion. In the dissocial may be placed, 5. Displeasure. In the self-regarding class, 6. Physical desire. 7. Pecuniary interest. 8. Love of power. 9. Self-preservation; as including the fear of the pains of the senses, the love of ease, and the love of life.

XXXV.

With respect to the motives that have been termed social, if any farther distinction should be of use, to that of good-will alone may be applied the epithet of *purely-social*; while the love of reputation, the desire of amity, and the motive of religion, may together be comprised under the division of *semi-social*: the social tendency being much more constant and unequivocal in the former than in any of the three latter. Indeed these last, social as they may be termed, are self-regarding at the same time.*

§ 4. *Order of Pre-eminence among Motives.*

XXXVI.

Of all these sorts of motives, good-will is that of which the dictates,† taken in a general view, are surest of coinciding with those of the principle of utility. For the dictates of utility are neither more nor less than the dictates of the most extensive‡ and enlightened (that is *well-advised*)‖ benevolence. The dictates of the other motives may be conformable to those of utility, or repugnant, as it may happen.

XXXVII.

In this, however, it is taken for granted, that in the case in question the dictates of benevolence are not contradicted by those of a more extensive, that is enlarged, benevolence. Now when the dictates of benevolence, as respecting the interests of a certain set of persons, are repugnant to the dictates of the same motive, as respecting the more important§ interests of another set of persons, the former dictates, it is evident, are repealed, as it were, by the latter: and a man, were he to be governed by the former, could scarcely, with propriety, be said to be governed by the dictates of benevolence. On this account, were the motives on both sides sure to be alike present to a man's mind, the case of such a repugnancy would hardly be worth distinguishing, since the partial benevolence might be considered as swallowed up in the more extensive: if the former prevailed, and governed the action, it must be considered as not owing its birth to benevolence, but to some other motive: if the latter prevailed, the former might be considered as having no effect. But the case is, that a partial benevolence may govern the action, without entering into any direct competition with the more extensive benevolence which would forbid it; because the interests of the less numerous assemblage of persons

* "Religion," says the pious Addison, somewhere in the Spectator, "is the highest species of self-love."

† When a man is supposed to be prompted by any motive to engage, or not to engage, in such or such an action, it may be of use, for the convenience of discourse, to speak of such motive as giving birth to an imaginary kind of *law* or *dictate*, enjoining him to engage, or not to engage, in it. (See ch. i.)

‡ See ch. iv. [Value], and ch. vi. [Sensibility], par. 21.

‖ See ch. ix. [Consciousness.]

§ Or valuable. See ch. iv. [Value.]

may be present to a man's mind, at a time when those of the more numerous are either not present, or, if present, make no impression. It is in this way that the dictates of this motive may be repugnant to utility, yet still be the dictates of benevolence. What makes those of private benevolence conformable upon the whole to the principle of utility, is, that in general they stand unopposed by those of public: if they are repugnant to them, it is only by accident. What makes them the more conformable, is, that in a civilized society, in most of the cases in which they would of themselves be apt to run counter to those of public benevolence, they find themselves opposed by stronger motives of the self-regarding class, which are played off against them by the laws; and that it is only in cases where they stand unopposed by the other more salutary dictates, that they are left free. An act of injustice or cruelty, committed by a man for the sake of his father or his son, is punished, and with reason, as much as if it were committed for his own.

XXXVIII.

After good-will, the motive of which the dictates seem to have the next best chance for coinciding with those of utility, is that of the love of reputation. There is but one circumstance which prevents the dictates of this motive from coinciding in all cases with those of the former. This is, that men in their likings and dislikings, in the dispositions they manifest to annex to any mode of conduct their approbation or their disapprobation, and in consequence to the person who appears to practise it, their good or their ill will, do not govern themselves exclusively by the principle of utility. Sometimes it is the principle of asceticism they are guided by: sometimes the principle of sympathy and antipathy. There is another circumstance, which diminishes, not their conformity to the principle of utility, but only their efficacy in comparison with the dictates of the motive of benevolence. The dictates of this motive will operate as strongly in secret as in public: whether it appears likely that the conduct which they recommend will be known or not: those of the love of reputation will coincide with those of benevolence only in proportion as a man's conduct seems likely to be known. This circumstance, however, does not make so much difference as at first sight might appear. Acts, in proportion as they are material, are apt to become known:* and in point of reputation, the slightest suspicion often serves for proof. Besides, if an act be a disreputable one, it is not any assurance a man can have of the secrecy of the particular act in question, that will of course surmount the objections he may have against engaging in it. Though the act in question should remain secret, it will go towards forming a habit, which may give birth to other acts, that may not meet with the same good fortune. There is no human being, perhaps, who is at years of discretion, on whom considerations of this sort have not some weight: and they have the more weight upon a man, in proportion to the strength of his intellectual powers, and the firmness of his mind.† Add to this, the influence which habit itself, when once formed, has in restraining a man from acts towards which, from the view of the disrepute annexed to them, as well as from any other cause, he has contracted an aversion. The influence of habit, in such cases, is a matter of fact, which, though not readily accounted for, is acknowledged and indubitable.‡

XXXIX.

After the dictates of the love of reputation come, as it should seem, those of the desire of amity. The former are disposed to coincide with those of utility, inasmuch as they are disposed to coincide with those of benevolence. Now those of the desire of amity are apt also to coincide, in a certain sort, with those of benevolence. But the sort of benevolence, with the dictates of which the love of reputation coincides, is the more extensive; that with which those of the desire of amity coincide, the less extensive. Those of the love of amity have still, however, the advantage of those of the self-regarding motives. The former, at one period or other of his life, dispose a man to contribute to the happiness of a considerable number of persons: the latter, from the beginning of life to the end of it, confine themselves to the care of that single individual. The dictates of the desire of amity, it is plain, will approach nearer to a coincidence with those of the love of reputation, and thence with those of utility, in proportion, *cæteris paribus*, to the number of the persons whose amity a man has occasion to desire: and hence it is, for example, that an English member of parliament, with all his own weaknesses, and all the follies of the people whose amity he has to cultivate, is probably, in general, a better character than the secretary of a vizier at Constantinople, or of a naïb in Indostan.

* See B. II. tit. [Evidence.]

† See ch. vi. [Sensibility], par. 12, 13.

‡ Strictly speaking, habit, being but a fictitious entity, and not really any thing distinct from the acts or perceptions by which it is said to be formed, cannot be the cause of any thing. The enigma, however, may be satisfactorily solved upon the principle of association, of the nature and force of which a very satisfactory account may be seen in Dr. Priestley's edition of Hartley on Man.

XL.

The dictates of religion are, under the infinite diversity of religions, so extremely variable, that it is difficult to know what general account to give of them, or in what rank to place the motive they belong to. Upon the mention of religion, people's first thoughts turn naturally to the religion they themselves profess. This is a great source of miscalculation, and has a tendency to place this sort of motive in a higher rank than it deserves. The dictates of religion would coincide, in all cases, with those of utility, were the Being, who is the object of religion, universally supposed to be as benevolent as he is supposed to be wise and powerful; and were the notions entertained of his benevolence, at the same time, as correct as those which are entertained of his wisdom and his power. Unhappily, however, neither of these is the case, He is universally supposed to be all-powerful: for by the Deity, what else does any man mean than the Being, whatever he be, by whom every thing is done? And as to knowledge, by the same rule that he should know one thing, he should know another. These notions seem to be as correct, for all material purposes, as they are universal. But among the votaries of religion (of which number the multifarious fraternity of Christians is but a small part) there seem to be but few (I will not say how few) who are real believers in his benevolence. They call him benevolent in words, but they do not mean that he is so in reality. They do not mean that he is benevolent as man is conceived to be benevolent: they do not mean that he is benevolent in the only sense in which benevolence has a meaning. For if they did, they would recognise that the dictates of religion could be neither more nor less than the dictates of utility: not a tittle different: not a tittle less or more. But the case is, that on a thousand occasions they turn their backs on the principle of utility. They go astray after the strange principles its antagonists: sometimes it is the principle of asceticism: sometimes the principle of sympathy and antipathy.* Accordingly, the idea they bear in their minds, on such occasions, is but too often the idea of malevolence; to which idea, stripping it of its own proper name, they bestow the specious appellation of the social motive.† The dictates of religion, in short, are no other than the dictates of that principle which has been already mentioned under the name of the theological principle.‡ These, as has been observed, are just as it may happen, according to the biases of the person in question, copies of the dictates of one or other of the three original principles: sometimes, indeed, of the dictates of utility; but frequently of those of asceticism, or those of sympathy and antipathy. In this respect they are only on a par with the dictates of the love of reputation: in another they are below it. The dictates of religion are in all places intermixed more or less with dictates unconformable to those of utility, deduced from texts, well or ill interpreted, of the writings held for sacred by each sect: unconformable, by imposing practices sometimes inconvenient to a man's self, sometimes pernicious to the rest of the community. The sufferings of uncalled martyrs, the calamities of holy wars and religious persecutions, the mischiefs of intolerant laws, (objects which can here only be glanced at, not detailed), are so many additional mischiefs over and above the number of those which were ever brought into the world by the love of reputation. On the other hand, it is manifest, that with respect to the power of operating in secret, the dictates of religion have the same advantage over those of the love of reputation and the desire of amity, as is possessed by the dictates of benevolence.

XLI.

Happily, the dictates of religion seem to approach nearer and nearer to a coincidence with those of utility every day. But why? Because the dictates of the moral sanction do so: and those coincide with or are influenced by these. Men of the worst religions, influenced by the voice and practice of the surrounding world, borrow continually a new and a new leaf out of the book of utility: and with these, in order not to break with their religion, they endeavour, sometimes with violence enough, to patch together and adorn the repositories of their faith.

XLII.

As to the self-regarding and dissocial motives, the order that takes place among these, and the preceding one, in point of extra-regarding influence, is too evident to need insisting on. As to the order that takes place among the motives of the self-regarding class,

* Ch. ii. [Principles Adverse], par. 18.

† Sometimes, in order the better to conceal the cheat (from their own eyes doubtless as well as from others) they set up a phantom of their own, which they call Justice: whose dictates are to modify (which being explained, means to oppose) the dictates of benevolence. But justice, in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility, applied to certain particular cases. Justice, then, is nothing more than an imaginary instrument, employed to forward, on certain occasions, and by certain means, the purposes of benevolence. The dictates of justice are nothing more than a part of the dictates of benevolence, which, on certain occasions, are applied to certain subjects; to wit, to certain actions.

‡ See ch. ii. [Principles Adverse, &c.]

considered in comparison with one another, there seems to be no difference which on this occasion would be worth mentioning. With respect to the dissocial motive, it makes a difference (with regard to its extra-regarding effects) from which of two sources it originates; whether from self-regarding or from social considerations. The displeasure you conceive against a man may be founded either on some act which offends you in the first instance, or on an act which offends you no otherwise than because you look upon it as being prejudicial to some other party on whose behalf you interest yourself; which other party may be, of course, either a determinate individual, or any assemblage of individuals, determinate or indeterminate.* It is obvious enough, that a motive, though in itself dissocial, may, by issuing from a social origin, possess a social tendency; and that its tendency, in this case, is likely to be the more social, the more enlarged the description is of the persons whose interests you espouse. Displeasure, venting itself against a man, on account of a mischief supposed to be done by him to the public, may be more social in its effects than any good-will, the exertions of which are confined to an individual.†

§ 5. *Conflict among Motives.*

XLIII.

When a man has it in contemplation to engage in any action, he is frequently acted upon at the same time by the force of divers motives: one motive, or set of motives, acting in one direction; another motive, or set of motives, acting as it were in an opposite direction: the motives on one side disposing him to engage in the action; those on the other, disposing him not to engage in it. Now, any motive the influence of which tends to dispose him to engage in the action in question, may be termed an *impelling* motive: any motive, the influence of which tends to dispose him not to engage in it, a *restraining* motive. But these appellations may of course be interchanged, according as the act is of the positive kind, or the negative.‡

XLIV.

It has been shown, that there is no sort of motive but may give birth to any sort of action. It follows, therefore, that there are no two motives but may come to be opposed to one another. Where the tendency of the act is bad, the most common case is for it to have been dictated by a motive either of the self-regarding, or of the dissocial class. In such case the motive of benevolence has commonly been acting, though ineffectually, in the character of a restraining motive.

XLV.

An example may be of use, to show the variety of contending motives, by which a man may be acted upon at the same time. Crillon, a Catholic (at a time when it was generally thought meritorious among Catholics to extirpate Protestants), was ordered by his king, Charles IX. of France, to fall privately upon Coligny, a Protestant, and assassinate him: his answer was, "Excuse me, Sire: but I'll fight him with all my heart."‖ Here, then, were all the three forces above mentioned, including that of the political sanction, acting upon him at once. By the political sanction, or at least so much of the force of it as such a mandate, from such a sovereign, issued on such an occasion, might be supposed to carry with it, he was enjoined to put Coligny to death in the way of assassination: by the religious sanction, that is, by the dictates of religious zeal, he was enjoined to put him to death in any way: by the moral sanction, or in other words, by the dictates of honour, that is, of the love of reputation, he was permitted (which permission, when coupled with the mandates of his sovereign, operated, he conceived, as an injunction) to fight the adversary upon equal terms: by the dictates of enlarged benevolence (supposing the mandate to be unjustifiable) he was enjoined not to attempt his life in any way, but to remain at peace with him: supposing the mandate to be unjustifiable, by the dictates of private benevolence he was enjoined not to meddle with him at any rate. Among this confusion of repugnant dictates, Crillon, it seems, gave the preference, in the first place, to those of honour: in the next place, to those of benevolence. He would have fought, had his offer been accepted: as it was not, he remained at peace.

Here a multitude of questions might arise. Supposing the dictates of the political sanction to follow the mandate of the sovereign, of what kind were the motives which they afforded him for compliance? The answer is, of the self-regarding kind at any rate: inasmuch as, by the supposition, it was in the power of the sovereign to punish him for non-compliance, or reward him for compliance. Did they afford him the motive of religion? (I mean independently of the circumstance of heresy above mentioned.) The answer is, Yes, if his notion was, that it was God's pleasure he should comply with them: No, if it was not. Did they afford him the motive of the love of reputation? Yes, if it was his notion that the world would expect and require that he should comply with them. No, if it was not. Did they afford him that of benevolence? Yes, if it was his notion

* See ch. vi. [Sensibility], par. 21.
† See *supra*, par. 37.
‡ See ch. vii. [Actions], par. 8.

‖ The idea of the case here supposed is taken from an anecdote in real history, but varies from it in several particulars.

that the community would, upon the whole be the better for his complying with them: No, if it was not. But did the dictates of the political sanction, in the case in question, actually follow the mandates of the sovereign; in other words, was such a mandate legal? This, we see, is a mere question of local jurisprudence, altogether foreign to the present purpose.

XLVI.

What is here said about the goodness and badness of motives, is far from being a mere matter of words. There will be occasion to make use of it hereafter for various important purposes. I shall have need of it for the sake of dissipating various prejudices, which are of disservice to the community, sometimes by cherishing the flame of civil dissensions,* at other times by obstructing the course of justice. It will be shown, that in the case of many offences,† the consideration of the motive is a most material one: for that, in the first place, it makes a very material difference in the magnitude of the mischief:‡ in the next place, that it is easy to be ascertained; and thence may be made a ground for a difference in the demand for punishment: but that in other cases it is altogether incapable of being ascertained; and that, were it capable of being ever so well ascertained, good or bad, it could make no difference in the demand for punishment: that in all cases, the motive that may happen to govern a prosecutor is a consideration totally immaterial: whence may be seen the mischievousness of the prejudice that is so apt to be entertained against informers; and the consequence it is of that the judge, in particular, should be proof against the influence of such delusions.

Lastly, the subject of motives is one with which it is necessary to be acquainted, in order to pass a judgment on any means that may be proposed for combating offences in their source.‖

But before the theoretical foundation for these practical observations can be completely laid, it is necessary we should say something on the subject of *disposition:* which, accordingly, will furnish matter for the ensuing chapter.

CHAPTER XI.

OF HUMAN DISPOSITIONS IN GENERAL.

I.

IN the foregoing chapter it has been shown at large, that goodness or badness cannot, with any propriety, be predicated of motives. Is there nothing, then, about a man that can properly be termed good or bad, when, on such or such an occasion, he suffers himself to be governed by such or such a motive? Yes, certainly: his *disposition.* Now disposition is a kind of fictitious entity, feigned for the convenience of discourse, in order to express what there is supposed to be *permanent* in a man's frame of mind, where, on such or such an occasion, he has been influenced by such or such a motive, to engage in an act, which, as it appeared to him, was of such or such a tendency.

II.

It is with disposition as with every thing else: it will be good or bad according to its effects; according to the effects it has in augmenting or diminishing the happiness of the community. A man's disposition may accordingly be considered in two points of view: according to the influence it has, either, 1. On his own happiness: or, 2. On the happiness of others. Viewed in both these lights together, or in either of them indiscriminately, it may be termed, on the one hand, good; on the other, bad; or, in flagrant cases, depraved.§ Viewed in the former of these lights, it has scarcely any peculiar name which has as yet been appropriated to it. It might be termed, though but inexpressively, frail or infirm, on the one hand: sound or firm, on the other. Viewed in the other light, it might be termed beneficent or meritorious, on the one hand: pernicious or mischievous, on the other. Now of that branch of a man's disposition, the effects of which regard in the first instance only himself, there needs not much to be said here. To reform it when bad, is the business rather of the moralist than the legislator: nor is it susceptible of those various modifications which make so material a difference in the effects of the other. Again, with respect to that part of it, the effects whereof regard others in the first instance, it is only in as far as it is of a mischievous nature that the penal branch of law has any immediate concern with it: in as far

* See B. I. tit. [Rebellion.]
† Ib. tit. [Simp. Corp. Injuries], [Homicide.]
‡ See ch. xi. [Dispositions.]
‖ See Essay on Indirect Methods of Preventing Offences.

§ It might also be termed virtuous, or vicious. The only objection to the use of those terms on the present occasion is, the great quantity of good and bad repute that respectively stand annexed to them. The inconvenience of this is, their being apt to annex an ill-proportioned measure of disrepute to dispositions which are ill-constituted only with respect to the party himself: involving them in such a degree of ignominy as should be appropriated to such dispositions only as are mischievous with regard to others. To exalt weaknesses to a level with crimes, is a way to diminish the abhorrence which ought to be reserved for crimes. To exalt small evils to a level with great ones, is the way to diminish the share of attention which ought to be paid to great ones.

as it may be of a beneficent nature, it belongs to a hitherto but little cultivated, and as yet unnamed branch of law, which might be styled the remuneratory.

III.

A man, then, is said to be of a mischievous disposition, when, by the influence of no matter what motives, he is *presumed* to be more apt to engage, or form intentions of engaging, in acts which are *apparently* of a pernicious tendency, than in such as are apparently of a beneficial tendency: of a meritorious or beneficent disposition, in the opposite case.

IV.

I say presumed: for, by the supposition, all that appears is one single action, attended with one single train of circumstances: but from that degree of consistency and uniformity which experience has shown to be observable in the different actions of the same person, the probable existence (past or future) of a number of acts of a similar nature is naturally and justly inferred from the observation of one single one. Under such circumstances, such as the motive proves to be in one instance, such is the disposition to be presumed to be in others.

V.

I say *apparently* mischievous; that is, apparently with regard to him; such as to him appear to possess that tendency: for from the mere event, independent of what to him it appears beforehand likely to be, nothing can be inferred on either side. If to him it appears likely to be mischievous, in such case, though in the upshot it should prove innocent, or even beneficial, it makes no difference; there is not the less reason for presuming his disposition to be a bad one: if to him it appears likely to be beneficial or innocent, in such case, though in the upshot it should prove pernicious, there is not the more reason on that account for presuming his disposition to be a good one. And here we see the importance of the circumstances of intentionality,* consciousness,† unconsciousness,† and mis-supposal.†

VI.

The truth of these positions depends upon two others, both of them sufficiently verified by experience: The one is, that in the ordinary course of things the consequences of actions commonly turn out conformable to intentions. A man who sets up a butcher's shop, and deals in beef, when he intends to knock down an ox, commonly does knock down an ox; though by some unlucky accident he may chance to miss his blow and knock down a man: he who sets up a grocer's shop, and deals in sugar, when he intends to sell sugar, commonly does sell sugar; though by some unlucky accident he may chance to sell arsenic in the room of it.

VII.

The other is, that a man who entertains intentions of doing mischief at one time is apt to entertain the like intentions at another.‡

VIII.

There are two circumstances upon which the nature of the disposition, as indicated by any act, is liable to depend: 1. The apparent tendency of the act: 2. The nature of the motive which gave birth to it. This dependency is subject to different rules, according to the nature of the motive. In stating them, I suppose all along the apparent tendency of the act to be, as it commonly is, the same as the real.

IX.

1. Where the tendency of the act is *good*, and the motive is of the *self-regarding* kind. In this case, the motive affords no inference on either side. It affords no indication of a good disposition: but neither does it afford any indication of a bad one.

A baker sells his bread to a hungry man who asks for it. This, we see, is one of those acts of which, in ordinary cases, the tendency is unquestionably good. The baker's motive is the ordinary commercial motive of pecuniary interest. It is plain, that there is nothing in the transaction, thus stated, that can afford the least ground for presuming that the baker is a better or a worse man than any of his neighbours.

X.

2. Where the tendency of the act is *bad*, and the motive, as before, is of the *self-regarding* kind. In this case, the disposition indicated is a mischievous one.

A man steals bread out of a baker's shop: this is one of those acts of which the tendency will readily be acknowledged to be bad. Why, and in what respects it is so, will be stated farther on.‖ His motive, we will say, is that of pecuniary interest; the desire of getting the value of the bread for nothing. His disposition, accordingly, appears to be a bad one: for every one will allow a thievish disposition to be a bad one.

* See ch. viii. † See ch. ix.

‡ To suppose a man to be of a good disposition, and at the same time likely, in virtue of that very disposition, to engage in an habitual train of mischievous actions, is a contradiction in terms: nor could such a proposition ever be advanced, but from the giving, to the thing which the word disposition is put for, a reality which does *not* belong to it. If, then, for example, a man of religious disposition should, in virtue of that very disposition, be in the habit of doing mischief, for instance by persecuting his neighbours, the case must be, either that his disposition, though good in certain respects, is not good upon the whole; or that a religious disposition is not in general a good one.

‖ See ch. xii. [Consequences], and Code, B. I. tit. [Theft.]

XI.

3. Where the tendency of the act is *good*, and the motive is the purely social one of *good-will*. In this case the disposition indicated is a beneficent one.

A baker gives a poor man a loaf of bread. His motive is compassion; a name given to the motive of benevolence, in particular cases of its operation. The disposition indicated by the baker, in this case, is such as every man will be ready enough to acknowledge to be a good one.

XII.

4. Where the tendency of the act is *bad*, and the motive is the purely social one of good-will. Even in this case, the disposition which the motive indicates is dubious: it may be a mischievous or a meritorious one, as it happens; according as the mischievousness of the act is more or less apparent.

XIII.

It may be thought, that a case of this sort cannot exist; and that to suppose it, is a contradiction in terms. For the act is one which, by the supposition, the agent knows to be a mischievous one. How, then, can it be, that good-will, that is, the desire of doing good, could have been the motive that led him into it? To reconcile this, we must advert to the distinction between enlarged benevolence and confined.* The motive that led him into it, was that of confined benevolence. Had he followed the dictates of enlarged benevolence, he would not have done what he did. Now, although he followed the dictates of that branch of benevolence, which in any single instance of its exertion is mischievous, when opposed to the other, yet, as the cases which call for the exertion of the former are, beyond comparison, more numerous than those which call for the exertion of the latter, the disposition indicated by him, in following the impulse of the former, will often be such as in a man, of the common run of men, may be allowed to be a good one upon the whole.

XIV.

A man with a numerous family of children, on the point of starving, goes into a baker's shop, steals a loaf, divides it all among the children, reserving none of it for himself. It will be hard to infer that that man's disposition is a mischievous one upon the whole. Alter the case: give him but one child, and that hungry perhaps, but in no imminent danger of starving: and now let the man set fire to a house full of people, for the sake of stealing money out of it to buy the bread with. The disposition here indicated will hardly be looked upon as a good one.

XV.

Another case will appear more difficult to decide than either. Ravaillac assassinated one of the best and wisest of sovereigns, at a time when a good and wise sovereign, a blessing at all times so valuable to a state, was particularly precious; and that to the inhabitants of a populous and extensive empire. He is taken, and doomed to the most excruciating tortures. His son, well persuaded of his being a sincere penitent, and that mankind, in case of his being at large, would have nothing more to fear from him, effectuates his escape: Is this, then, a sign of a good disposition in the son, or of a bad one? Perhaps some will answer, of a bad one; for, besides the interest which the nation has in the sufferings of such a criminal, on the score of the example, the future good behaviour of such a criminal is more than any one can have sufficient ground to be persuaded of.

XVI.

Well, then, let Ravaillac, the son, not facilitate his father's escape; but content himself with conveying poison to him, that at the price of an easier death he may escape his torments. The decision will now, perhaps, be more difficult. The *act* is a wrong one, let it be allowed, and such as ought by all means to be punished: but is the *disposition* manifested by it a bad one? Because the young man breaks the laws in this one instance, is it probable, that if let alone, he would break the laws in ordinary instances, for the satisfaction of any inordidate desires of his own? The answer of most men would probably be in the negative.

XVII.

5. Where the tendency of the act is *good*, and the motive is a semi-social one, the *love of reputation*. In this case, the disposition indicated is a good one.

In a time of scarcity, a baker, for the sake of gaining the esteem of the neighbourhood, distributes bread *gratis* among the industrious poor. Let this be taken for granted: and let it be allowed to be a matter of uncertainty, whether he had any real feeling for the sufferings of those whom he has relieved, or no. His disposition, for all that, cannot, with any pretence of reason, be termed otherwise than a good and beneficent one. It can only be in consequence of some very idle prejudice, if it receives a different name.†

* See ch. x. [Motives.]

† The bulk of mankind, ever ready to depreciate the character of their neighbours, in order indirectly to exalt their own, will take occasion to refer a motive to the class of bad ones as often as they can find one still better, to which the act might have owed its birth. Conscious that his own motives are not of the best class, or persuaded that if they be, they will not be referred to that class by others; afraid of being taken for a dupe, and anxious to show the reach of his penetration; each man takes care, in the first place, to impute the conduct of every other man to the least laudable of the motives

XVIII.

6. Where the tendency of the act is *bad*, and the motive, as before, is a semi-social one, the love of reputation. In this case, the disposition which it indicates is more or less good or bad: in the first place, according as the tendency of the act is more or less mischievous: in the next place, according as the dictates of the moral sanction, in the society in question, approach more or less to a coincidence with those of utility. It does not seem probable, that in any nation, which is in a state of tolerable civilization, in short, in any nation in which such rules as these can come to be consulted, the dictates of the moral sanction will so far recede from a coincidence with those of utility (that is, of enlightened benevolence) that the disposition indicated in this case can be otherwise than a good one upon the whole.

XIX.

An Indian receives an injury, real or imaginary, from an Indian of another tribe. He revenges it upon the person of his antagonist with the most excruciating torments: the case being, that cruelties inflicted on such an occasion gain him reputation in his own tribe. The disposition manifested in such a case can never be deemed a good one, among a people ever so few degrees advanced, in point of civilization, above the Indians.

XX.

A nobleman (to come back to Europe) contracts a debt with a poor tradesman. The same nobleman, presently afterwards, contracts a debt, to the same amount, to another nobleman, at play. He is unable to pay both: he pays the whole debt to the companion of his amusements, and no part of it to the tradesman. The disposition manifested in this case can scarcely be termed otherwise than a bad one. It is certainly, however, not so bad as if he had paid neither. The principle of love of reputation, or (as it is called in the case of this partial application of it) honour, is here opposed to the worthier principle of benevolence, and gets the better of it. But it gets the better also of the self-regarding principle of pecuniary interest. The disposition, therefore, which it indicates, although not so good a one as that in which the principle of benevolence predominates, is better than one in which the principle of self-interest predominates. He would be the better for having more benevolence: but would he be the better for having no honour? This seems to admit of great dispute.*

XXI.

7. Where the tendency of the act is *good*, and the motive is the semi-social one of *religion*. In this case, the disposition indicated by it (considered with respect to the influence of it on the man's conduct towards others) is manifestly a beneficent and meritorious one.

A baker distributes bread *gratis* among the industrious poor. It is not that he feels for their distresses: nor is it for the sake of gaining reputation among his neighbours. It is for the sake of gaining the favour of the Deity; to whom, he takes for granted, such conduct will be acceptable. The disposition manifested by such conduct is plainly what every man would call a good one.

XXII.

8. Where the tendency of the act is *bad*, and the motive is that of religion, as before. In this case the disposition is dubious. It is good or bad, and more or less good or bad, in the first place, as the tendency of the act is more or less mischievous; in the next place, according as the religious tenets of the person in question approach more or less to a coincidence with the dictates of utility.

XXIII.

It should seem from history, that even in nations in a tolerable state of civilization in other respects, the dictates of religion have been found so far to recede from a coincidence with those of utility; in other words, from those of enlightened benevolence; that the disposition indicated in this case may even be a bad one upon the whole. This, however, is no objection to the inference which it affords of a good disposition in those countries (such as perhaps are most of the countries of Europe at present) in which its dictates respecting the conduct of a man towards other men approach very nearly to a coincidence with those of utility. The dictates of religion, in their application to the conduct of a man in what concerns himself alone, seem in most European nations to savour a good

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that can account for it: in the next place, when he has gone as far that way as he can, and cannot drive down the individual motive to any lower class, he changes his battery, and attacks the very class itself. To the love of reputation he will accordingly give a bad name upon every occasion, calling it ostentation, vanity, or vainglory.

Partly to the same spirit of detraction, the natural consequence of the sensibility of men to the force of the moral sanction, partly to the influence of the principle of asceticism, may, perhaps, be imputed the great abundance of bad names of motives, in comparison of such as are good or neutral: and, in particular, the total want of neutral names for the motives of sexual desire, physical desire in general, and pecuniary interest. The superior abundance, even of good names, in comparison of neutral ones, would, if examined, be found rather to confirm than disprove the above remark. The language of a people on these points may, perhaps, serve in some measure as a key to their moral sentiments. But such speculative disquisitions are foreign to the purpose of the present work.

* See the case of Duels discussed in B. I. tit. [Homicide.]

deal of the ascetic principle: but the obedience to such mistaken dictates indicates not any such disposition as is likely to break out into acts of pernicious tendency with respect to others. Instances in which the dictates of religion lead a man into acts which are pernicious in this latter view, seem at present to be but rare: unless it be acts of persecution, or impolitic measures on the part of government, where the law itself is either the principal actor, or an accomplice in the mischief. Ravaillac, instigated by no other motive than this, gave his country one of the most fatal stabs that a country ever received from a single hand: but happily the Ravaillacs are but rare. They have been more frequent, however, in France, than in any other country during the same period: and it is remarkable, that in every instance it is this motive that has produced them. When they do appear, however, nobody, I suppose, but such as themselves, will be for terming a disposition, such as they manifest, a good one. It seems hardly to be denied, but that they are just so much the worse for their notions of religion; and that had they been left to the sole guidance of benevolence, and the love of reputation, without any religion at all, it would have been but so much the better for mankind. One may say nearly the same thing, perhaps, of those persons who, without any particular obligation, have taken an active part in the execution of laws made for the punishment of those who have the misfortune to differ with the magistrate in matters of religion, much more of the legislator himself, who has put it in their power. If Louis XIV. had had no religion, France would not have lost 800,000 of its most valuable subjects. The same thing may be said of the authors of the wars called holy ones; whether waged against persons called Infidels, or persons branded with the still more odious name of Heretics. In Denmark, not a great many years ago, a a sect is said to have arisen, who by a strange perversion of reason took it into their heads, that, by leading to repentance, murder, or any other horrid crime, might be made the road to heaven. It should all along, however, be observed, that instances of this latter kind were always rare; and that, in almost all the countries of Europe, instances of the former kind, though once abundantly frequent, have for some time ceased. In certain countries, however, persecution at home (or what produces a degree of restraint, which is one part of the mischiefs of persecution; I mean the *disposition* to persecute whensoever occasion happens) is not yet at an end: insomuch that if there is no *actual* persecution, it is only because there are no heretics; and if there are no heretics, it is only because there are no thinkers.*

* See B. I. tit. [Offences against Religion.]

XXIV.

9. Where the tendency of the act is *good*, and the motive (as before) is the dissocial one of ill-will. In this case, the motive seems not to afford any indication on either side: it is no indication of a good disposition; but neither is it any indication of a bad one.

You have detected a baker in selling short weight: you prosecute him for the cheat. It is not for the sake of gain that you engaged in the prosecution; for there is nothing to be got by it: it is not from public spirit: it is not for the sake of reputation; for there is no reputation to be got by it: it is not in the view of pleasing the Deity: it is merely on account of a quarrel you have with the man you prosecute. From the transaction, as thus stated, there does not seem to be any thing to be said either in favour of your disposition or against it. The tendency of the act is good: but you would not have engaged in it, had it not been from a motive which there seems no particular reason to conclude will ever prompt you to engage in an act of the same kind again. Your motive is of that sort which may, with least impropriety, be termed a bad one: but the act is of that sort, which, were it engaged in ever so often, could never have any evil tendency; nor indeed any other tendency than a good one. By the supposition, the motive it happened to be dictated by was that of ill-will: but the act itself is of such a nature as to have wanted nothing but sufficient discernment on your part in order to have been dictated by the most enlarged benevolence. Now, from a man's having suffered himself to be induced to gratify his resentment by means of an act of which the tendency is good, it by no means follows that he would be ready on another occasion, through the influence of the same sort of motive, to engage in any act of which the tendency is a bad one. The motive that impelled you was a dissocial one: but what social motive could there have been to restrain you? None, but what might have been outweighed by a more enlarged motive of the same kind. Now, because the dissocial motive prevailed when it stood alone, it by no means follows that it would prevail when it had a social one to combat it.

XXV.

10. Where the tendency of the act is *bad*, and the motive is the dissocial one of malevolence. In this case, the disposition it indicates is of course a mischievous one.

The man who stole the bread from the baker, as before, did it with no other view than merely to impoverish and afflict him: accordingly, when he had got the bread, he did not eat, or sell it; but destroyed it. That the disposition, evidenced by such a transaction, is a bad one, is what every body must perceive immediately.

XXVI.

Thus much with respect to the circumstances from which the mischievousness or meritoriousness of a man's disposition is to be inferred in the gross: we come now to the *measure* of that mischievousness or meritoriousness, as resulting from those circumstances. Now with meritorious acts and dispositions we have no direct concern in the present work. All that penal law is concerned to do, is to measure the depravity of the disposition where the act is mischievous. To this object, therefore, we shall here confine ourselves.

XXVII.

It is evident, that the nature of a man's disposition must depend upon the nature of the motives he is apt to be influenced by; in other words, upon the degree of his sensibility to the force of such and such motives. For his disposition is, as it were, the sum of his intentions: the disposition he is of during a certain period, the sum or result of his intentions during that period. If, of the acts he has been intending to engage in during the supposed period, those which are apparently of a mischievous tendency bear a large proportion to those which appear to him to be of the contrary tendency, his disposition will be of the mischievous cast: if but a small proportion, of the innocent or upright.

XXVIII.

Now intentions, like every thing else, are produced by the things that are their causes: and the causes of intentions are motives. If, on any occasion, a man forms either a good or a bad intention, it must be by the influence of some motive.

XXIX.

When the act, which a motive prompts a man to engage in, is of a mischievous nature, it may, for distinction's sake, be termed a *seducing* or corrupting motive: in which case also any motive which, in opposition to the former, acts in the character of a restraining motive, may be styled a *tutelary*, conservatory, preservatory, or preserving motive.

XXX.

Tutelary motives may again be distinguished into *standing* or constant, and *occasional*. By standing tutelary motives, I mean such as act with more or less force in all, or at least in most cases, tending to restrain a man from *any* mischievous acts he may be prompted to engage in; and that with a force which depends upon the general nature of the act, rather than upon any accidental circumstance with which any individual act of that sort may happen to be accompanied. By occasional tutelary motives, I mean such motives as may chance to act in this direction or not, according to the nature of the act, and of the particular occasion on which the engaging in it is brought into contemplation.

XXXI.

Now it has been shown, that there is no sort of motive by which a man may not be prompted to engage in acts that are of a mischievous nature; that is, which may not come to act in the capacity of a seducing motive. It has been shown, on the other hand, that there are some motives which are remarkably less likely to operate in this way than others. It has also been shown, that the least likely of all is that of benevolence or good-will: the most common tendency of which, it has been shown, is to act in the character of a tutelary motive. It has also been shown, that even when by accident it acts in one way in the character of a seducing motive, still in another way it acts in the opposite character of a tutelary one. The motive of good-will, in as far as it respects the interests of one set of persons, may prompt a man to engage in acts which are productive of mischief to another and more extensive set: but this is only because his good-will is imperfect and confined; not taking into contemplation the interests of all the persons whose interests are at stake. The same motive, were the affection it issued from more enlarged, would operate effectually, in the character of a constraining motive, against that very act to which, by the supposition, it gives birth. This same sort of motive may therefore, without any real contradiction or deviation from truth, be ranked in the number of standing tutelary motives, notwithstanding the occasions in which it may act at the same time in the character of a seducing one.

XXXII.

The same observation, nearly, may be applied to the semi-social motive of love of reputation. The force of this, like that of the former, is liable to be divided against itself. As in the case of good-will, the interests of some of the persons, who may be the objects of that sentiment, are liable to be at variance with those of others: so in the case of love of reputation, the sentiments of some of the persons, whose good opinion is desired, may be at variance with the sentiments of other persons of that number. Now in the case of an act, which is really of a mischievous nature, it can scarcely happen that there shall be no persons whatever who will look upon it with an eye of disapprobation. It can scarcely ever happen, therefore, that an act really mischievous shall not have some part at least, if not the whole, of the force of this motive to oppose it; nor, therefore, that this motive should not act with some degree of force in the character of a tutelary motive.

This, therefore, may be set down as another article in the catalogue of standing tutelary motives.

XXXIII.

The same observation may be applied to the desire of amity, though not in altogether equal measure. For, notwithstanding the mischievousness of an act, it may happen, without much difficulty, that all the persons for whose amity a man entertains any particular present desire which is accompanied with expectation, may concur in regarding it with an eye rather of approbation than the contrary. This is but too apt to be the case among such fraternities as those of thieves, smugglers, and many other denominations of offenders. This, however, is not constantly, nor indeed most commonly the case; insomuch that the desire of amity may still be regarded, upon the whole, as a tutelary motive, were it only from the closeness of its connexion with the love of reputation. And it may be ranked among standing tutelary motives, since, where it does apply, the force with which it acts depends not upon the occasional circumstances of the act which it opposes, but upon principles as general as those upon which depend the action of the other semi-social motives.

XXXIV.

The motive of religion is not altogether in the same case with the three former. The force of it is not, like theirs, liable to be divided against itself; I mean in the civilized nations of modern times, among whom the notion of the unity of the Godhead is universal. In times of classical antiquity it was otherwise. If a man got Venus on his side, Pallas was on the other: if Æolus was for him, Neptune was against him. Æneas, with all his piety, had but a partial interest at the court of heaven. That matter stands upon a different footing now-a-days. In any given person, the force of religion, whatever it be, is now all of it on one side. It may balance, indeed, on which side it shall declare itself: and it may declare itself, as we have seen already in but too many instances, on the wrong as well as on the right. It has been, at least till lately, perhaps is still accustomed so much to declare itself on the wrong side, and that in such material instances, that on that account it seemed not proper to place it, in point of social tendency, on a level altogether with the motive of benevolence Where it does act, however, as it does in by far the greatest number of cases, in opposition to the ordinary seducing motives, it acts, like the motive of benevolence, in an uniform manner, not depending upon the particular circumstances that may attend the commission of the act; but tending to oppose it, merely on account of its mischievousness, and therefore with equal force, in whatsoever circumstances it may be proposed to be committed. This, therefore, may also be added to the catalogue of standing tutelary motives.

XXXV.

As to the motives which may operate occasionally in the character of tutelary motives, these, it has been already intimated, are of various sorts, and various degrees of strength in various offences: depending not only upon the nature of the offence, but upon the accidental circumstances in which the idea of engaging in it may come in contemplation. Nor is there any sort of motive which may not come to operate in this character; as may be easily conceived. A thief, for instance, may be prevented from engaging in a projected scheme of house-breaking, by sitting too long over his bottle,* by a visit from his doxy, by the occasion he may have to go elsewhere, in order to receive his dividend of a former booty;† and so on.

XXXVI.

There are some motives, however, which seem more apt to act in this character than others; especially as things are now constituted, now that the law has every where opposed to the force of the principal seducing motives, artificial tutelary motives of its own creation. Of the motives here meant it will be necessary to take a general view. They seem to be reducible to two heads, viz. 1. The love of ease; a motive put into action by the prospect of the trouble of the attempt; that is, the trouble which it may be necessary to bestow in overcoming the physical difficulties that may accompany it. 2. Self-preservation, as opposed to the dangers to which a man may be exposed in the prosecution of it.

XXXVII.

These dangers may be either, 1. Of a purely physical nature: or, 2. Dangers resulting from moral agency; in other words, from the conduct of any such persons to whom the act, if known, may be expected to prove obnoxious. But moral agency supposes knowledge with respect to the circumstances that are to have the effect of external motives in giving birth to it. Now the obtaining such knowledge, with respect to the commission of any obnoxious act, on the part of any persons who may be disposed to make the agent suffer for it, is called *detection*, and the agent concerning whom such knowledge is obtained, is said to be detected. The dangers, therefore, which may threaten an offender from this quarter, depend, whatever they be, on the event of his detection; and may, therefore, be all of them comprised under the article of the *danger of detection*.

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* Love of the pleasures of the palate.

† Pecuniary interest.

XXXVIII.

The danger depending upon detection may be divided again into two branches: 1. That which may result from any opposition that may be made to the enterprise by persons on the spot; that is, at the very time the enterprise is carrying on: 2. That which respects the legal punishment, or other suffering, that may await at a distance upon the issue of the enterprise.

XXXIX.

It may be worth calling to mind on this occasion, that among the tutelary motives, which have been styled constant ones, there are two, of which the force depends (though not so entirely as the force of the occasional ones which have been just mentioned, yet in a great measure) upon the circumstance of detection. These, it may be remembered, are, the love of reputation, and the desire of amity. In proportion, therefore, as the chance of being detected appears greater, these motives will apply with the greater force: with the less force, as it appears less. This is not the case with the two other standing tutelary motives, that of benevolence, and that of religion.

XL.

We are now in a condition to determine, with some degree of precision, what is to be understood by the *strength of a temptation*, and what indication it may give of the degree of mischievousness in a man's disposition in the case of any offence. When a man is prompted to engage in any mischievous act, we will say, for shortness, in an offence, the strength of the temptation depends upon the ratio between the force of the seducing motives on the one hand, and such of the occasional tutelary ones, as the circumstances of the case call forth into action, on the other. The temptation, then, may be said to be strong, when the pleasure or advantage to be got from the crime is such as in the eyes of the offender must appear great in comparison of the trouble and danger that appear to him to accompany the enterprise: slight or weak, when that pleasure or advantage is such as must appear small in comparison of such trouble and such danger. It is plain, the strength of the temptation depends not upon the force of the impelling (that is, of the seducing) motives altogether: for let the opportunity be more favourable, that is, let the trouble, or any branch of the danger, be made less than before, it will be acknowledged, that the temptation is made so much the stronger: and on the other hand, let the opportunity become less favourable, or, in other words, let the trouble, or any branch of the danger, be made greater than before, the temptation will be so much the weaker.

Now, after taking account of such tutelary motives as have been styled occasional, the only tutelary motives that can remain are those which have been termed standing ones. But those which have been termed the standing tutelary motives, are the same that we have been styling social. It follows, therefore, that the strength of the temptation, in any case, after deducting the force of the social motives, is as the sum of the forces of the seducing, to the sum of the forces of the occasional tutelary motives.

XLI.

It remains to be inquired, what indication concerning the mischievousness or depravity of a man's disposition is afforded by the strength of the temptation, in the case where any offence happens to have been committed. It appears, then, that the weaker the temptation is, by which a man has been overcome, the more depraved and mischievous it shows his disposition to have been. For the goodness of his disposition is measured by the degree of his sensibility to the action of the social motives:* in other words, by the strength of the influence which those motives have over him. Now, the less considerable the force is by which their influence on him has been overcome, the more convincing is the proof that has been given of the weakness of that influence.

Again, the degree of a man's sensibility to the force of the social motives being given, it is plain that the force with which those motives tend to restrain him from engaging in any mischievous enterprise will be as the apparent mischievousness of such enterprise, that is, as the degree of mischief with which it appears to *him* likely to be attended. In other words, the less mischievous the offence appears to him to be, the less averse he will be, as far as he is guided by social considerations, to engage in it: the more mischievous, the more averse. If, then, the nature of the offence is such as must appear to him highly mischievous, and yet he engages in it notwithstanding, it shows, that the degree of his sensibility to the force of the social motives is but slight; and consequently that his disposition is proportionably depraved. Moreover, the less the strength of the temptation was, the more pernicious and depraved does it show his disposition to have been. For the less the strength of the temptation was, the less was the force which the influence of those motives had to overcome: the clearer, therefore, is the proof that has been given of the weakness of that influence.

XLII.

From what has been said, it seems that, for judging of the indication that is afforded concerning the depravity of a man's disposition by the strength of the temptation, compared with the mischievousness of the enterprise, the following rules may be laid down:

* *Supra*, par. 27, 28.

Rule 1. *The strength of the temptation being given, the mischievousness of the disposition manifested by the enterprise, is as the apparent mischievousness of the act.*

Thus, it would show a more depraved disposition, to murder a man for a reward of a guinea, or falsely to charge him with a robbery for the same reward, than to obtain the same sum from him by simple theft: the trouble he would have to take, and the risk he would have to run, being supposed to stand on the same footing in the one case as in the other.

Rule 2. *The apparent mischievousness of the act being given, a man's disposition is the more depraved, the slighter the temptation is by which he has been overcome.*

Thus, it shows a more depraved and dangerous disposition, if a man kill another out of mere sport, as the Emperor of Morocco, Muley Mahomet, is said to have done great numbers; than out of revenge, as Sylla and Marius did thousands; or in the view of self-preservation, as Augustus killed many; or even for lucre, as the same Emperor is said to have killed some. And the effects of such a depravity, on that part of the public which is apprized of it, run in the same proportion. From Augustus, some persons only had to fear, under some particular circumstances: from Muley Mahomet, every man had to fear at all times.

Rule 3. *The apparent mischievousness of the act being given, the evidence which it affords of the depravity of a man's disposition is the less conclusive, the stronger the temptation is by which he has been overcome.*

Thus, if a poor man, who is ready to die with hunger, steal a loaf of bread, it is a less explicit sign of depravity, than if a rich man were to commit a theft to the same amount. It will be observed, that in this rule all that is said is, that the evidence of depravity is in this case the less conclusive: it is not said that the depravity is positively the less. For in this case it is possible, for any thing that appears to the contrary, that the theft might have been committed, even had the temptation been not so strong. In this case, the alleviating circumstance is only a matter of presumption; in the former, the aggravating circumstance is a matter of certainty.

Rule 4. *Where the motive is of the dissocial kind, the apparent mischievousness of the act, and the strength of the temptation, being given, the depravity is as the degree of deliberation with which it is accompanied.*

For in every man, be his disposition ever so depraved, the social motives are those which, wherever the self-regarding ones stand neuter, regulate and determine the general tenor of his life. If the dissocial motives are put in action, it is only in particular circumstances, and on particular occasions; the gentle but constant force of the social motives being for a while subdued. The general and standing bias of every man's nature is, therefore, towards that side to which the force of the social motives would determine him to adhere. This being the case, the force of the social motives tends continually to put an end to that of the dissocial ones; as, in natural bodies, the force of friction tends to put an end to that which is generated by impulse. Time, then, which wears away the force of the dissocial motives, adds to that of the social. The longer, therefore, a man continues, on a given occasion, under the dominion of the dissocial motives, the more convincing is the proof that has been given of his insensibility to the force of the social ones.

Thus, it shows a worse disposition, where a man lays a deliberate plan for beating his antagonist, and beats him accordingly, than if he were to beat him upon the spot, in consequence of a sudden quarrel: and worse again, if, after having had him a long while together in his power, he beats him at intervals, and at his leisure.*

XLIII.

The depravity of disposition indicated by an act is a material consideration in several respects. Any mark of extraordinary depravity, by adding to the terror already inspired by the crime, and by holding up the offender as a person from whom there may be more mischief to be apprehended in future, adds in that way to the demand for punishment. By indicating a general want of sensibility on the part of the offender, it may add in another way also to the demand for punishment. The article of disposition is of the more importance, inasmuch as, in measuring out the quantum of punishment, the principle of sympathy and antipathy is apt to look at nothing else. A man who punishes because he hates, and only because he hates, such a man, when he does not find any thing odious in the disposition, is not for punishing at all; and when he does, he is not for carrying the punishment further than his hatred carries him. Hence the aversion we find so frequently expressed against the maxim, that the punishment must rise with the strength of the temptation; a maxim, the contrary of which, as we shall see, would be as cruel to offenders themselves, as it would be subversive of the purposes of punishment.

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* See B. I. tit. [Confinement.]

CHAPTER XII.

OF THE CONSEQUENCES OF A MISCHIEVOUS ACT.

§ 1. *Shapes in which the Mischief of an Act may show itself.*

I.

Hitherto we have been speaking of the various articles or objects on which the consequences or tendency of an act may depend: of the bare *act* itself: of the *circumstances* it may have been, or may have been supposed to be, accompanied with: of the *consciousness* a man may have had with respect to any such circumstances: of the *intentions* that may have preceded the act: of the *motives* that may have given birth to those intentions: and of the *disposition* that may have been indicated by the connexion between such intentions and such motives. We now come to speak of *consequences* or tendency: an article which forms the concluding link in all this chain of causes and effects, involving in it the materiality of the whole. Now, such part of this tendency as is of a mischievous nature, is all that we have any direct concern with; to that, therefore, we shall here confine ourselves.

II.

The tendency of an act is mischievous when the consequences of it are mischievous; that is to say, either the certain consequences or the probable. The consequences, how many and whatsoever they may be, of an act, of which the tendency is mischievous, may, such of them as are mischievous, be conceived to constitute one aggregate body, which may be termed the mischief of the act.

III.

This mischief may frequently be distinguished, as it were, into two shares or parcels: the one containing what may be called the primary mischief; the other, what may be called the secondary. That share may be termed the *primary*, which is sustained by an assignable individual, or a multitude of assignable individuals. That share may be termed the *secondary*, which, taking its origin from the former, extends itself either over the whole community, or over some other multitude of unassignable individuals.

IV.

The primary mischief of an act may again be distinguished into two branches: 1. The *original:* and, 2. The *derivative*. By the original branch, I mean that which alights upon and is confined to any person who is a sufferer in the first instance, and on his own account; the person, for instance, who is beaten, robbed, or murdered. By the derivative branch, I mean any share of mischief which may befal any other assignable persons in consequence of his being a sufferer, and no otherwise. These persons must, of course, be persons who, in some way or other, are connected with him. Now, the ways in which one person may be connected with another, have been already seen: they may be connected in the way of *interest* (meaning self-regarding interest) or merely in the way of *sympathy*. And again, persons connected with a given person, in the way of interest, may be connected with him either by affording *support* to him, or by deriving it from him.*

V.

The secondary mischief, again, may frequently be seen to consist of two other shares or parcels: the first consisting of *pain;* the other of *danger*. The pain which it produces is a pain of apprehension; a pain grounded on the apprehension of suffering such mischiefs or inconveniences, whatever they may be, as it is the nature of the primary mischief to produce. It may be styled, in one word, the *alarm*. The danger is the *chance*, whatever it may be, which the multitude it concerns may, in consequence of the primary mischief, stand exposed to, of suffering such mischiefs or inconveniences. For danger is nothing but the chance of pain, or, what comes to the same thing, of loss of pleasure.

VI.

An example may serve to make this clear. A man attacks you on the road, and robs you. You suffer a pain on the occasion of losing so much money:† you also suffered a pain at the thoughts of the personal ill-treatment you apprehended he might give you, in case of your not happening to satisfy his demands.‡ These together constitute the original branch of the primary mischief, resulting from the act of robbery. A creditor of your's, who expected you to pay him with part of that money, and a son of your's, who expected you to have given him another part, are in consequence disappointed. You are obliged to have recourse to the bounty of your father, to make good part of the deficiency. These mischiefs together make up the derivative branch. The report of this robbery circulates from hand to hand, and spreads itself in the neighbourhood. It finds its way into the newspapers, and is propagated over the whole country. Various people, on this occasion, call to mind the danger which they and their friends, as it appears from this example, stand exposed to in travelling; especially such as may have occasion to travel the same road. On this occasion they naturally feel a certain degree of pain: slighter

* See ch. vi. [Sensibility.]

† Viz. a *pain of privation*. See ch. v. [Pleasures and Pains], par. 17.

‡ Viz. a *pain of apprehension*, grounded on the prospect of organical pain, or whatever other mischiefs might have ensued from the ill treatment. Ib. par. 30.

or heavier, according to the degree of ill-treatment they may understand you to have received; the frequency of the occasion each person may have to travel in that same road, or its neighbourhood; the vicinity of each person to the spot; his personal courage; the quantity of money he may have occasion to carry about with him; and a variety of other circumstances. This constitutes the first part of the secondary mischief, resulting from the act of robbery; viz. the alarm. But people of one description or other, not only are disposed to conceive themselves to incur a chance of being robbed, in consequence of the robbery committed upon you, but (as will be shown presently) they do really incur such a chance. And it is this chance which constitutes the remaining part of the secondary mischief of the act of robbery; viz. the danger.

VII.

Let us see what this chance amounts to; and whence it comes. How is it, for instance, that one robbery can contribute to produce another? In the first place, it is certain that it cannot create any direct motive. A motive must be the prospect of some pleasure, or other advantage, to be enjoyed in future: but the robbery in question is past: nor would it furnish any such prospect were it to come; for it is not one robbery that will furnish pleasure to him who may be about to commit another robbery. The consideration that is to operate upon a man, as a motive or inducement to commit a robbery, must be the idea of the pleasure he expects to derive from the fruits of that very robbery: but this pleasure exists independently of any other robbery.

VIII.

The means, then, by which one robbery tends, as it should seem, to produce another robbery, are two: 1. By suggesting to a person exposed to the temptation, the idea of committing such another robbery (accompanied, perhaps, with the belief of its facility.) In this case the influence it exerts applies itself, in the first place, to the understanding. 2. By weakening the force of the tutelary motives which tend to restrain him from such an action, and thereby adding to the strength of the temptation.* In this case the influence applies itself to the will. These forces are, 1. The motive of benevolence, which acts as a branch of the physical sanction.† 2. The motive of self-preservation, as against the punishment that may stand provided by the political sanction. 3. The fear of shame; a motive belonging to the moral sanction. 4. The fear of the divine displeasure; a motive belonging to the religious sanction. On the first and last of these forces it has, perhaps, no influence worth insisting on; but it has on the other two.

IX.

The way in which a past robbery may weaken the force with which the *political* sanction tends to prevent a future robbery, may be thus conceived. The way in which this sanction tends to prevent a robbery, is by denouncing some particular kind of punishment against any who shall be guilty of it: the *real* value of which punishment will of course be diminished by the *real* uncertainty: as also, if there be any difference, the *apparent* value by the *apparent* uncertainty. Now this uncertainty is proportionably increased by every instance in which a man is known to commit the offence, without undergoing the punishment. This, of course, will be the case with every offence for a certain time; in short, until the punishment allotted to it takes place. If punishment takes place at last, this branch of the mischief of the offence is then at last, but not till then, put a stop to.

X.

The way in which a past robbery may weaken the force with which the *moral* sanction tends to prevent a future robbery, may be thus conceived. The way in which the moral sanction tends to prevent a robbery is by holding forth the indignation of mankind as ready to fall upon him who shall be guilty of it. Now this indignation will be the more formidable, according to the number of those who join in it: it will be the less so, the fewer they are who join in it. But there cannot be a stronger way of showing that a man does not join in whatever indignation may be entertained against a practice, than the engaging in it himself. It shows not only that he himself feels no indignation against it, but that it seems to him there is no sufficient reason for apprehending what indignation may be felt against it by others. Accordingly, where robberies are frequent, and unpunished, robberies are committed without shame. It was thus amongst the Grecians formerly.‡ It is thus among the Arabs still.

XI.

In whichever way, then, a past offence tends to pave the way for the commission of a future offence, whether by suggesting the idea of committing it, or by adding to the strength of the temptation, in both cases it

* See ch. xi. [Dispositions], par. 40.

† To wit, in virtue of the pain it may give a man to be a witness to, or otherwise conscious of, the sufferings of a fellow-creature: especially when he is himself the cause of them: in a word, the pain of sympathy. See ch. v. [Pleasures and Pains], par. 26.

‡ See Hom. Odyss. L. xix. l. 395. Ib. L. iii. l. 71. Plato de Rep. L. i. p. 576, edit. Ficin. Thucyd. L. i. And see B. I. tit. [Offences against External Security.]

may be said to operate by the force or *influence of example.*

XII.

The two branches of the secondary mischief of an act, the alarm and the danger, must not be confounded: though intimately connected, they are perfectly distinct: either may subsist without the other. The neighbourhood may be alarmed with the report of a robbery, when, in fact, no robbery either has been committed, or is in a way to be committed: a neighbourhood may be on the point of being disturbed by robberies, without knowing any thing of the matter. Accordingly, we shall soon perceive, that some acts produce alarm without danger: others, danger without alarm.

XIII.

As well the danger as the alarm may again be divided, each of them, into two branches: the first, consisting of so much of the alarm or danger as may be apt to result from the future behaviour of the same agent: the second, consisting of so much as may be apt to result from the behaviour of other persons: such others, to wit, as may come to engage in acts of the same sort and tendency.*

XIV.

The distinction between the primary and the secondary consequences of an act, must be carefully attended to. It is so just, that the latter may often be of a directly opposite nature to the former. In some cases, where the primary consequences of the act are attended with a mischief, the secondary consequences may be beneficial, and that to such a degree, as even greatly to outweigh the mischief of the primary. This is the case, for instance, with all acts of punishment, when properly applied. Of these, the primary mischief being never intended to fall but upon such persons as may happen to have committed some act which it is expedient to prevent; the secondary mischief, that is, the alarm and the danger, extends no farther than to such persons as are under temptation to commit it: in which case, in as far as it tends to restrain them from committing such acts, it is of a beneficial nature.

XV.

Thus much with regard to acts that produce positive pain, and that immediately. This case, by reason of its simplicity, seemed the fittest to take the lead. But acts may produce mischief in various other ways, which, together with those already specified, may all be comprised by the following abridged analysis.

Mischief may admit of a division in any one of three points of view: 1. According to its own *nature.* 2. According to its *cause.* 3. According to the person, or other party, who is the *object* of it.† With regard to its nature, it may be either *simple* or *complex:*‡ when simple, it may either be *positive* or *negative:* positive, consisting of actual pain: negative, consisting of the loss of pleasure. Whether simple or complex, and whether positive or negative, it may be either *certain* or *contingent.* When it is negative, it consists of the loss of some benefit or advantage: this benefit may be material in both or either of two ways: 1. By affording actual pleasure: or, 2. By averting pain or *danger*, which is the chance of pain; that is, by affording *security.* In as far, then, as the benefit which a mischief tends to avert is productive of security, the tendency of such mischief is to produce *insecurity.* 2. With regard to its *cause*, mischief may be produced either by one *single* action, or not without the *concurrence* of other actions: if not without the concurrence of other actions, these others may be the actions either of the *same person*, or of *other* persons: in either case, they may be either acts of the *same kind* as that in question, or of *other* kinds. 3. Lastly, with regard to the party who is the *object* of the mischief, or, in other words, who is in a way to be affected by it, such party may be either an *assignable*‖ individual, or assemblage of individuals, or else a multitude of *unassignable* individuals. When the object is an assignable individual, this individual may either be the person *himself*, who is the author of the mischief, or some *other* person. When the individuals, who are the objects of it, are an unassignable multitude, this multitude may be either the *whole* political community or state, or some *subordinate* division of it. Now, when the object of the mischief is the author himself, it may be styled *self-regarding:* when any other party is the object, *extra-regarding:* when such other party is an individual, it may be styled *private:* when a subordinate branch of the community, *semi-public:* when the whole community, *public.* Here, for the present, we must stop. To pursue the subject through its inferior distinctions, will be the business

* To the former of these branches is opposed so much of the force of any punishment, as is said to operate in the way of *reformation:* to the latter, so such as is said to operate in the way of *example.* See ch. xv. [Cases unmeet], par. 2, note.

† There may be other points of view, according to which mischief might be divided, besides these: but this does not prevent the division here given from being an exhaustive one. A line may be divided in any one of an infinity of ways, and yet without leaving in any one of those cases any remainder. See ch. xviii. [Division], par. 1, note.

‡ Ch. v. [Pleasures and Pains], par. 1.

‖ See ch. xviii. [Division], par. 4, note.

of the chapter which exhibits the division of offences.*

The cases which have been already illustrated, are those in which the primary mischief is not necessarily otherwise than a simple one, and that positive: present, and therefore certain: producible by a single action, without any necessity of the concurrence of any other action, either on the part of the same agent, or of others: and having for its object an assignable individual, or, by accident, an assemblage of assignable individuals: extra-regarding, therefore, and private. This primary mischief is accompanied by a secondary; the first branch of which is sometimes contingent and sometimes certain, the other never otherwise than contingent: both extra-regarding and semi-public: in other respects, pretty much upon a par with the primary mischief; except that the first branch, viz. the alarm, though inferior in magnitude to the primary, is, in point of extent, and therefore, upon the whole, in point of magnitude, much superior.

XVI.

Two instances more will be sufficient to illustrate the most material of the modifications above exhibited.

A man drinks a certain quantity of liquor, and intoxicates himself. The intoxication in this particular instance does him no sort of harm: or, what comes to the same thing, none that is perceptible. But it is probable, and, indeed, next to certain, that a given number of acts of the same kind would do him a very considerable degree of harm; more or less according to his constitution and other circumstances; for this is no more than what experience manifests every day. It is also certain, that one act of this sort, by one means or other, tends considerably to increase the disposition a man may be in to practise other acts of the same sort; for this also is verified by experience. This, therefore, is one instance where the mischief producible by the act is contingent: in other words, in which the tendency of the act is no otherwise mischievous than in virtue of its producing a *chance* of mischief. This chance depends upon the concurrence of other acts of the same kind; and those such as must be practised by the same person. The object of the mischief is that very person himself who is the author of it, and he only, unless by accident. The mischief is, therefore, private and self-regarding.

As to its secondary mischief, alarm, it produces none: it produces, indeed, a certain quantity of danger by the influence of example; but it is not often that this danger will amount to a quantity worth regarding.

* Ch. xviii.

XVII.

Again. A man omits paying his share to a public tax. This, we see, is an act of the negative kind.† Is this, then, to be placed upon the list of mischievous acts? Yes, certainly. Upon what grounds? Upon the following. To defend the community against its external as well as its internal adversaries, are tasks, not to mention others of a less indispensable nature, which cannot be fulfilled but at a considerable expense. But whence is the money for defraying this expense to come? It can be obtained in no other manner than by contributions to be collected from individuals: in a word, by taxes. The produce, then, of these taxes is to be looked upon as a kind of *benefit* which it is necessary the governing part of the community should receive for the use of the whole. This produce, before it can be applied to its destination, requires that there should be certain persons commissioned to receive and to apply it. Now, if these persons, had they received it, would have applied it to its proper destination, it would have been a benefit: the not putting them in a way to receive it, is then a mischief. But it is possible, that if received, it might not have been applied to its proper destination; or that the services, in consideration of which it was bestowed, might not have been performed. It is possible, that the under-officer, who collected the produce of the tax, might not have paid it over to his principal: it is possible that the principal might not have forwarded it on according to its farther destination; to the judge, for instance, who is to protect the community against its clandestine enemies from within, or the soldier, who is to protect it against its open enemies from without: it is possible that the judge, or the soldier, had they received it, would not, however, been induced by it to fulfil their respective duties: it is possible that the judge would not have sat for the punishment of criminals, and the decision of controversies: it is possible that the soldier would not have drawn his sword in the defence of the community. These, together with an infinity of other intermediate acts, which for the sake of brevity I pass over, form a connected chain of duties, the discharge of which is necessary to the preservation of the community. They must every one of them be discharged, ere the benefit to which they are contributory can be produced. If they are all discharged, in that case the benefit subsists, and any act, by tending to intercept that benefit, may produce a mischief. But if any of them are not, the benefit fails: it fails of itself: it would not have subsisted, although the act in question (the act of non-payment) had not been committed.

* See ch vii. [Actions], par. 8.

The benefit is therefore contingent; and, accordingly, upon a certain supposition, the act which consists in the averting of it is not a mischievous one. But this supposition, in any tolerably-ordered government, will rarely indeed be verified. In the very worst-ordered government that exists, the greatest part of the duties that are levied are paid over according to their destination: and, with regard to any particular sum that is attempted to be levied upon any particular person upon any particular occasion, it is therefore manifest, that, unless it be certain that it will not be so disposed of, the act of withholding it is a mischievous one.

The act of payment, when referable to any particular sum, especially if it be a small one, might also have failed of proving beneficial on another ground: and, consequently, the act of non-payment, of proving mischievous. It is possible that the same services, precisely, might have been rendered without the money as with it. If, then, speaking of any small limited sum, such as the greatest which any one person is called upon to pay at a time, a man were to say, that the non-payment of it would be attended with mischievous consequences; this would be far from certain: but what comes to the same thing as if it were, it is perfectly certain when applied to the whole. It is certain, that if all of a sudden the payment of all taxes was to cease, there would no longer be any thing effectual done, either for the maintenance of justice, or for the defence of the community against its foreign adversaries: that therefore the weak would presently be oppressed and injured in all manner of ways, by the strong at home, and both together overwhelmed by oppressors from abroad. Upon the whole, therefore, it is manifest, that in this case, though the mischief is remote and contingent, though in its first appearance it consists of nothing more than the interception of a *benefit*, and though the individuals, in whose favour that benefit would have been reduced into the explicit form of pleasure or security, are altogether unassignable, yet the mischievous tendency of the act is not on all these accounts the less indisputable. The mischief, in point of *intensity* and *duration*, is indeed unknown: it is *uncertain:* it is *remote*. But in point of *extent* it is immense: and in point of *fecundity*, pregnant to a degree that baffles calculation.

XVIII.

It may now be time to observe, that it is only in the case where the mischief is extra-regarding, and has an assignable person or persons for its object, that so much of the secondary branch of it as consists in *alarm* can have place. When the individuals it affects are uncertain, and altogether out of sight, no alarm can be produced: as there is nobody whose sufferings you can see, there is nobody whose sufferings you can be alarmed at. No alarm, for instance, is produced by non-payment to a tax. If, at any distant and uncertain period of time, such offence should chance to be productive of any kind of alarm, it would appear to proceed, as indeed immediately it would proceed, from a very different cause. It might be immediately referable, for example, to the act of a legislator, who should deem it necessary to lay on a new tax, in order to make up for the deficiency occasioned in the produce of the old one: or it might be referable to the act of an enemy, who, under favour of a deficiency thus created in the fund allotted for defence, might invade the country, and exact from it much heavier contributions than those which had been thus withholden from the sovereign.*

As to any alarm which such an offence might raise among the few who might chance to regard the matter with the eyes of statesmen, it is of too slight and uncertain a nature to be worth taking into the account.

§ 2. *How Intentionality, &c. may influence the Mischief of an Act.*

XIX.

We have seen the nature of the secondary mischief, which is apt to be reflected, as it were, from the primary, in the cases where the individuals who are the objects of the mischief are assignable. It is now time to examine into the circumstances upon which the production of such secondary mischief depends. These circumstances are no others than the four articles which have formed the subjects of the four last preceding chapters. viz. 1. The intentionality. 2. The consciousness. 3. The motive. 4. The disposition. It is to be observed all along, that it is only the *danger* that is immediately governed by the *real* state of the mind in respect to those articles: it is by the *apparent* state of it that

* The investigation might, by a process rendered obvious by analogy, be extended to the consequences of an act of a beneficial nature. In both instances, a *third* order of consequences may be reckoned to have taken place, when the influence of the act, through the medium of the passive faculty of the patient, has come to affect his active faculty. In this way, 1. Evil may flow out of *evil:*—instance; the exertions of industry put a stop to by the extinction of inducement, resulting from a continued chain of acts of robbery or extortion. 2. *Good out of evil:*—instance; habits of depredation put a stop to by a steady course of punishment. 3. *Evil out of good:*—instance; habits of industry put a stop to by an excessive course of gratuitous bounty. 4. *Good out of good:*—instance; a constant and increasing course of industry, excited and kept up by the rewards afforded by a regular and increasing market for the fruits of it.

the *alarm* is governed. It is governed by the real only in as far as the apparent happens, as in most cases it may be expected to do, to quadrate with the real. The different influences of the articles of intentionality and consciousness may be represented in the several cases following.

XX.

Case 1. Where the act is so completely unintentional, as to be altogether *involuntary*. In this case it is attended with no secondary mischief at all.

A bricklayer is at work upon a house: a passenger is walking in the street below. A fellow-workman comes and gives the bricklayer a violent push, in consequence of which he falls upon the passenger, and hurts him. It is plain there is nothing in this event that can give other people, who may happen to be in the street, the least reason to apprehend any thing in future on the part of the man who fell, whatever there may be with regard to the man who pushed him.

XXI.

Case 2. Where the act, though not unintentional, is *unadvised*, insomuch that the mischievous part of the consequences is unintentional, but the unadvisedness is attended with *heedlessness*. In this case the act is attended with some small degree of secondary mischief, in proportion to the degree of heedlessness.

A groom being on horseback, and riding through a frequented street, turns a corner at full pace, and rides over a passenger, who happens to be going by. It is plain, by this behaviour of the groom, some degree of alarm may be produced, less or greater, according to the degree of heedlessness betrayed by him: according to the quickness of his pace, the fulness of the street, and so forth. He has done mischief, it may be said, by his carelessness, already: who knows but that on other occasions the like cause may produce the like effect?

XXII.

Case 3. Where the act is *misadvised* with respect to a circumstance which, had it existed, would *fully* have excluded or (what comes to the same thing) outweighed the primary mischief: and there is no rashness in the case. In this case the act is attended with no secondary mischief at all.

It is needless to multiply examples any farther.

XXIII.

Case 4. Where the act is misadvised with respect to a circumstance which would have excluded or counterbalanced the primary mischief *in part*, but not entirely: and still there is no rashness. In this case the act is attended with some degree of secondary mischief, in proportion to that part of the primary which remains unexcluded or uncounterbalanced.

XXIV.

Case 5. Where the act is misadvised with respect to a circumstance which, had it existed, would have excluded or counterbalanced the primary mischief entirely, or in part: and there is a degree of *rashness* in the supposal. In this case the act is also attended with a farther degree of secondary mischief, in proportion to the degree of rashness.

XXV.

Case 6. Where the consequences are *completely* intentional, and there is no missupposal in the case. In this case the secondary mischief is at the highest.

XXVI.

Thus much with regard to intentionality and consciousness. We now come to consider in what manner the secondary mischief is affected by the nature of the *motive*.

Where an act is pernicious in its primary consequences, the secondary mischief is not obliterated by the *goodness* of the motive; though the motive be of the best kind. For, notwithstanding the goodness of the motive, an act, of which the primary consequences are pernicious, is produced by it in the instance in question, by the supposition. It may, therefore, in other instances: although this is not so likely to happen from a good motive as from a bad one.*

XXVII.

An act which, though pernicious in its primary consequences, is rendered in other respects beneficial upon the whole, by virtue of its secondary consequences, is not changed back again, and rendered pernicious upon the whole by the *badness* of the motive: although the motive be of the worst kind.†

* An act of homicide, for instance, is not rendered innocent, much less beneficial, merely by its proceeding from a principle of religion, of honour (that is, of love of reputation), or even of benevolence. When Ravaillac assassinated Henry IV. it was from a principle of religion. But this did not so much as abate from the mischief of the act: it even rendered the act still more mischievous, for a reason that we shall see presently, than if it had originated from a principle of revenge. When the conspirators against the late king of Portugal attempted to assassinate him, it is said to have been from a principle of honour. But this, whether it abated or no, will certainly not be thought to have outweighed, the mischief of the act. Had a son of Ravaillac's, as in the case before supposed,[a] merely on the score of filial affection, and not in consequence of any participation in his crime, put him to death in order to rescue him from the severer hands of justice, the motive, although it should not be thought to afford any proof of a mischievous disposition, and should, even in case of punishment, have made such rescuer an object of pity, would hardly have made the act of rescue a beneficial one.

† The prosecution of offences, for instance,

[a] Ch. xi. [Dispositions], par. 15.

XXVIII.

But when not only the primary consequences of an act are pernicious, but, in other respects, the secondary likewise, the secondary mischief may be *aggravated* by the nature of the motive: so much of that mischief, to wit, as respects the future behaviour of the same person.

XXIX.

It is not from the worst kind of motive, however, that the secondary mischief of an act receives its greatest aggravation.

XXX.

The aggravation which the secondary mischief of an act, in as far as it respects the future behaviour of the same person, receives from the nature of a motive in an individual case, is as the tendency of the motive to produce, on the part of the same person, acts of the like bad tendency with that of the act in question.

XXXI.

The tendency of a motive to produce acts of the like kind, on the part of any given person, is as the *strength* and *constancy* of its influence on that person, as applied to the production of such effects.

XXXII.

The tendency of a species of motive to give birth to acts of any kind, among persons in general, is as the *strength*, *constancy*, and *extensiveness** of its influence, as applied to the production of such effects.

XXXIII.

Now the motives, whereof the influence is at once most powerful, most constant, and most extensive, are the motives of physical desire, the love of wealth, the love of ease, the love of life, and the fear of pain: all of them self-regarding motives. The motive of displeasure, whatever it may be in point of strength and extensiveness, is not near so constant in its influence (the case of mere antipathy excepted) as any of the other three. A pernicious act, therefore, when committed through vengeance, or otherwise through displeasure, is not nearly so mischievous as the same pernicious act, when committed by force of any one of those other motives. †

XXXIV.

As to the motive of religion, whatever it may sometimes prove to be in point of strength and constancy, it is not in point of extent so universal, especially in its application to acts of a mischievous nature, as any of the three preceding motives. It may, however, be as universal in a particular state, or in a particular district of a particular state. It is liable indeed to be very irregular in its operations. It is apt, however, to be frequently as powerful as the motive of vengeance, or indeed any other motive whatsoever. It will sometimes even be more powerful than any other motive. It is at any rate much more constant.‡ A pernicious act, therefore, when

proceeds most commonly from one or other, or both together, of two motives, the one of which is of the self-regarding, the other of the dissocial kind: viz. pecuniary interest, and ill-will: from pecuniary interest, for instance, whenever the obtaining pecuniary amends for damage suffered is one end of the prosecution. It is common enough indeed to hear men speak of prosecutions undertaken from *public spirit;* which is a branch, as we have seen,[a] of the principle of benevolence. Far be it from me to deny but that such a principle may very frequently be an ingredient in the sum of motives, by which men are engaged in a proceeding of this nature. But whenever such a proceeding is engaged in from the sole influence of public spirit, uncombined with the least tincture of self-interest or ill-will, it must be acknowledged to be a proceeding of the heroic kind. Now acts of heroism are, in the very essence of them, but rare: for if they were common, they would not be acts of heroism. But prosecutions for crimes are very frequent, and yet, unless in very particular circumstances indeed, they are never otherwise than beneficial.

* Ch. iv. [Value.]

[a] See ch. x. [Motives], par. 25.

† It is for this reason that a threat, or other personal outrage, when committed on a stranger, in pursuance of a scheme of robbery, is productive of more mischief in society, and accordingly is, perhaps, every where more severely punished, than an outrage of the same kind offered to an acquaintance, in prosecution of a scheme of vengeance. No man is always in a rage. But, at all times, every man, more or less, loves money. Accordingly, although a man by his quarrelsomeness should for once have been engaged in a bad action, he may nevertheless remain a long while, or even his whole lifetime, without engaging in another bad action of the same kind: for he may very well remain his whole lifetime without engaging in so violent a quarrel: nor at any rate will he quarrel with more than one, or a few people at a time. But if a man, by his love of money, has once been engaged in a bad action, such as a scheme of robbery, he may at any time, by the influence of the same motive, be engaged in acts of the same degree of enormity. For take men throughout, if a man loves money to a certain degree to-day, it is probable that he will love it, at least in equal degree, to-morrow. And if a man is disposed to acquire it in that way, he will find inducement to rob, wheresoever and whensoever there are people to be robbed.

‡ If a man happen to take it into his head to assassinate with his own hands, or with the sword of justice, those whom he calls heretics, that is, people who think, or perhaps only speak, differently upon a subject which neither party understands, he will be as much inclined to do this at one time as at another. Fanaticism never sleeps: it is never glutted: it is never stopped by philanthrophy; for it makes a merit of trampling on philantrophy: it is never stopped by conscience; for it has pressed conscience into its service. Avarice, lust, and vengeance, have piety, benevolence, honour; fanaticism has nothing to oppose it.

committed through the motive of religion, is more mischievous than when committed through the motive of ill-will.

XXXV.

Lastly, The secondary mischief, to wit, so much of it as hath respect to the future behaviour of the same person, is aggravated or lessened by the apparent depravity or beneficence of his disposition: and that in the proportion of such apparent depravity or beneficence.

XXXVI.

The consequences we have hitherto been speaking of are the *natural* consequences of which the act, and the other articles we have been considering, are the causes: consequences that result from the behaviour of the individual, who is the offending agent, without the interference of political authority. We now come to speak of *punishment:* which, in the sense in which it is here considered, is an *artificial* consequence, annexed by political authority to an offensive act, in one instance; in the view of putting a stop to the production of events similar to the obnoxious part of its natural consequences, in other instances.

CHAPTER XIII.*

OF CIRCUMSTANCES INFLUENCING THE DEGREE OF ALARM.

I. *The Situation of the Offender.*

THERE are some offences which all the world can commit: there are others, the commission of which depends upon a particular situation; that is to say, it is this particular situation which gives the individual the opportunity of offending.

What is the effect of this circumstance upon alarm? It tends generally to diminish it, by restricting its sphere.

A theft produces a general alarm: an act of peculation by a guardian against his ward produces hardly any.

Some alarm is inspired by an act of extortion on the part of an officer of police: a contribution levied by robbers upon the highway would inspire much more. Why is this? It is because it is well known, that the most determined extortioner in office has some bridle and some restraint. He requires opportunities and pretexts for abusing his power; whilst the highway robbers menace all the world at all times, and are not at all restrained by public opinion.

This circumstance operates in the same manner upon other classes of offences, such as seduction, adultery, &c. The first woman who is met cannot be seduced in the same manner as she may be robbed. Such an enterprise requires a continued acquaintance, a certain association of rank and fortune; in a word, the advantages of a particular position.

Of two murders, the one committed in order to succeed to an estate, the other in a course of robbery: the first exhibits the most atrocious character, but the second excites the most alarm. The man who believes himself secure from the evil designs of his heirs, experiences no sensible alarm from the first event; but what security can he have against robbers? Add to this, that the miscreant who would commit murder that he might succeed to an inheritance, will not transform himself into a murderer on the highway. He would risk much for an estate, which he would not risk for a few shillings.

This observation extends to all offences implying violation of trust, and abuse of confidence or power, public or private. Such offences cause so much the less alarm, inasmuch as the situation of the offender is the more particular; that there are a smaller number of persons in a similar situation; and hence, that the sphere of the offence is more restricted.

An important exception is found in those cases in which the individual is clothed with great powers; when he can extend the sphere of his actions over a great number of persons. Though his situation be particular, it increases the alarm, instead of restricting it. When the object of a judge is to pillage, to murder, to tyrannize; when the object of a military officer is to steal, to vex, to shed blood; the alarm which they excite is proportioned to the extent of their powers, and may surpass that of the most atrocious robberies.

In these elevated situations it is not necessary to be criminal: a simple fault, free from evil intention, may cause a lively alarm. Is an innocent person sentenced to death by an upright but ignorant judge? As soon as the fault is known, public confidence is wounded, the shock makes itself felt, and the alarm produced rises to a high degree.

Happily, this species of alarm may be at once arrested by displacing the incapable subject of it.

II. *The Ease or Difficulty of preventing the Crime.*

The mind at once is led to compare the means of attack and defence; and accordingly, as the crime is considered more or less easy of commission, the alarm is more or less lively. This is one of the reasons which raise the mischief of an act of robbery so far above the mischief of a simple theft. Force can accomplish many things which would be

* The chapter here numbered xiii. is inserted from Dumont's Traités de Legislation, Vol. II. chapters vii. ix. x. xi. xii. and xiii., in order to complete the exhibition of Bentham's principles as published in his lifetime. — ED.

beyond the reach of cunning. With respect to robbery, that which attacks the dwelling-house is more alarming than that which takes place upon the highway: that which is committed at night, than that which is executed in open day: that which is combined with incendiarism, than that which is limited to the ordinary methods.

On the other hand, the greater the apparent ease of opposing a crime, the less alarming it appears. The alarm will not be so lively when the offence cannot be completed without the consent of the party suffering. It is easy to apply this principle to fraudulent acquisition, seduction, duels, self-regarding offences, and particularly to suicide.

The rigour of the laws against domestic theft has been founded, without doubt, upon the difficulty of opposing this offence. But the aggravation which results from this circumstance is not equal to the effect of another circumstance which tends to diminish the alarm; namely, the peculiarity of the situation which furnishes the opportunity for the theft. The domestic thief, once discovered, is no longer dangerous. He requires my consent, in order to rob me: I must introduce him into my house, and give him my confidence. With so much facility for securing myself, he can only inspire me with a very feeble alarm.*

III. *The greater or less Facility with which the Offender can be concealed.*

The alarm is greater, when, by the nature or the circumstances of the crime, it is more difficult to discover or to recognise its author. If the delinquent remain unknown, the success of his crime is an encouragement to him and to others: no limits can be discovered to those crimes which remain unknown, whilst the party injured loses all hope of indemnification.

There are some crimes which admit of precautions particularly adapted for concealment: such as the disguising of the person; the choice of night for the period of action; the sending of anonymous threatening letters for the purpose of extorting undue concessions.

There are also separate crimes, to which recourse may be had, in order to render the discovery of other offences more difficult. An individual may be confined or conveyed away, or destroyed, in order that the criminal may free himself from the danger to be apprehended from his testimony.

In those cases where, from the nature of the crime, the criminal is necessarily known, the alarm is considerably diminished. Hence personal injuries, resulting from a momentary transport of passion excited by the presence of an adversary, inspire less alarm than a theft which affects concealment; although the evil of the first class may be greater, or may chance to be so, in the first case.

IV. *The Character of the Offender.*

The character of an offender is judged of from the nature of his offence, and especially from the extent of its mischief: from the evil of the first class; which is the part most apparent in it. But his character may be also judged of from circumstances; from the particulars of his conduct whilst committing the crime itself. Thus, the character of a man will appear more or less dangerous, according as the tutelary motives appear to have more or less influence over him, when compared with the force of the seductive motives.

Character ought on two accounts to be regarded, in the choice of, and the quantity of a punishment: first, because it either increases or diminishes the alarm; secondly, because it furnishes an indication of the sensibility of the subject. It is not necessary to employ such strong measures to repress a weak, but naturally good character, as are required for an opposite temperament.

Let us examine the grounds of *aggravation* which may be drawn from this source.

1. The less the party injured was in a condition to defend himself, the more strongly the sentiment of natural compassion ought to act. The laws of honour come to the support of this instinct of pity, and make it an imperious duty to succour the weak, and to spare him who is no longer able to resist. First indication of a dangerous character — *Weakness oppressed.*

2. If weakness alone ought to awaken compassion, the appearance of a suffering individual ought to act in this direction with a double force. The simple refusal of relief to the distressed, raises a presumption little favourable to the character of an individual: but what must his character be, who seizes the moment of calamity for the purpose of increasing the anxiety of an afflicted mind; the moment of disgrace, in order to render it more bitter by a new affront; the moment of indigence, for the purpose of entirely stripping its victims? Second indication of a dangerous character — *Distress aggravated.*

3. It is an essential branch of moral policy, that those who have been accustomed to reflection, and who may be presumed to possess wisdom and experience, should be treated with respect by those who have not acquired the same habits, or possessed the same advantages of education. This species of superiority is generally received by the more elevated ranks from those below them; by old persons from younger persons of the same

* The principal reason against the severity of punishment in this case is, that it renders masters disinclined to prosecute the offence, and consequently favours impunity.

rank; and by certain professions set apart for the public instruction. There exists among the mass of the people certain sentiments of deference and respect, in relation to these distinctions; and this respect, greatly useful in repressing without effort the seductive passions, is one of the best foundations for manners and laws. Third indication of a dangerous character — *Respect towards superiors disregarded.**

4. When the motives which have led to the commission of an offence have been comparatively light and frivolous, the sentiments of honour and benevolence must have had but little force. If the man who is urged by an imperious desire of vengeance to transgress the laws of humanity is esteemed dangerous, what should be thought of him who gives way to acts of ferocity, from a simple motive of curiosity, of imitation, or of amusement? Fourth indication of a dangerous character — *Gratuitous cruelty.*

5. Time is particularly favourable to the development of the tutelary motives. During the first assault of passion, as under a thunder-stroke, the sentiments of virtue may yield for a moment: but if the heart is not perverted, reflection will soon restore them to their first force, and establish their triumph. If a sufficiently long time elapse between the conception of a crime and its accomplishment, it is an unequivocal proof of matured and consolidated wickedness. Fifth indication of a dangerous character — *Premeditation.*

6. The number of accomplices is another mark of depravity: concert supposes reflection. The union of many persons against a single innocent person also displays a cruel cowardice. Sixth indication of a dangerous character — *Conspiracy.*

To these causes of aggravation may be added two other causes, not so easily classed: *falsehood*, and *violation of confidence.*

Falsehood stamps a character with a deep and degrading stain, which even the most brilliant qualities cannot efface. Public opinion is right in this respect. Truth is one of the first wants of man; it is one of the elements of our existence; necessary as the light of the day to us. At every moment of our lives, we are obliged to build our judgments, and to direct our conduct, upon the knowledge of facts, of which there are only a few that can pass under our own observation. Hence there follows the most absolute necessity for our trusting to the reports of others. If falsehood is mingled with these reports, our judgments become erroneous, our progress faulty, our hopes deceived: we live in a state of unquiet distrust, and know not where to seek for security: In a word, falsehood includes the principle of every evil, since it would bring in its train the dissolution of human society.

The importance of truth is so great, that the least violation of its laws, even in trifling matters, always draws after it a certain danger: the slightest wandering is an attack upon the respect due to it: the first transgression facilitates the second, by familiarizing the odious idea of a lie. If the evil of falsehood is so great in things which are unimportant in themselves, what will it be in those greater occasions when it serves as an instrument of crime?

Falsehood is sometimes an essential circumstance in a crime; sometimes simply an accessory. It is necessarily comprised in perjury, in fraudulent acquisition, and all its modifications. In other offences, it is only collateral and accidental. It is only by relation to these last, that it can furnish a separate cause of aggravation.

Violation of confidence refers to a particular position; to a power confided, which imposes on the delinquent an obligation which he has violated. It may sometimes be considered as the principal offence, sometimes only as an accessory offence. It is not necessary here to consider the details.

We may here make one general observation with respect to all these sources of aggravation. Although they all furnish unfavourable indications as to the character of the offender, this is not a reason for proportionably augmenting his punishment. It is sufficient if a certain modification be given to it, which shall have some analogy with this accessory offence, and which shall serve to waken in the minds of the citizens a salutary antipathy against this aggravating circumstance. This will become more clear, when we treat of the methods of rendering punishments characteristic.†

* It was from not having known the utility, not to say the necessity, of this subordination, that the French fell, during the revolution, into that excess of folly which delivered them up to unheard-of evils, and which has carried desolation to the four quarters of the world: it was because they had no superiors in France, that there was no security. The principle of equality includes within itself that of anarchy: it is the total of the small masses of particular influence which sustains the grand barrier of the laws against the torrent of the passions.

† An interesting question in morals and legislation arises here —

If an individual perform actions which the public opinion condemns, and which, according to the principles of utility, it ought not to condemn, can an unfavourable indication be drawn from hence with respect to the character of that individual?

I reply, that a good man, though he submit in general to the tribunal of public opinion, may reserve to himself the right of private judgment in particular cases, when the judgment of this tribunal appears to him opposed to his reason and his happiness, or when it exacts from him a painful sacrifice, without any real utility to any

We proceed, however, to the extenuations which may be drawn from this same source, and which have the effect of more or less diminishing the demand for punishment. I call those circumstances which tend to diminish alarm, Extenuations, because they furnish a favourable indication with regard to the character of the individual. They may be reduced to nine:—

1. Absence of evil intention.
2. Self-preservation.
3. Previous provocation.
4. Preservation of dear connections.
5. Overstepping the bounds of necessary defence.
6. Submission to threats.
7. Submission to authority.
8. Intoxication.
9. Infancy.

One point common to these circumstances, except the two last, is, that the offence has not had its source in the will of the offender. The first cause is the act of another; a foreign will, or some physical accident. Apart from this event, he would have remained as innocent to the end of his life, as he had been till then; and even should he not be punished, his future conduct would be as good as if he had not committed the offence in question.

Each of these circumstances requires details and explanations. I confine myself here to observing, that it will be necessary to leave great latitude to the judge for appreciating these different sources of extenuation, their validity and extent.

With respect to a provocation received, for example, this provocation should have been *recently* given, in order to merit indulgence: it ought to have been received in the course of the same quarrel. But what constitutes the same quarrel? what ought to be considered a *recent* injury? It is necessary to trace these lines of demarcation. "*Let not the sun go down upon your wrath*," is the precept of the Scriptures. Sleep ought to calm the transport of the passions, the fever of the senses, and prepare the mind for the influence of the tutelary motives. This natural period might serve, in the case of homicide, to separate that which is premeditated, from that which is not.

In the case of intoxication, it is necessary to examine whether the intention to commit the offence did not exist beforehand: whether the intoxication has not been feigned: whether it had not for its object to embolden the individual in the commission of the crime. A relapse ought perhaps to destroy the excuse which might be drawn from this source. He who knows, by experience, that wine renders him dangerous, does not deserve any indulgence for those excesses into which it may lead him.

The English law does not admit intoxication as a ground of excuse. This would be, it is said, to excuse one crime by another. This morality appears hard and unthinking: it is derived from the principle of asceticism.

Whilst, as to infancy, this does not refer to that age at which the offender does not know that he is responsible for what he does, and where punishments would be inefficacious. To what good purpose punish judicially, for the crime of incendiarism, an infant of four years old?

Within what limits ought this source of extenuation to be confined? It seems that a reasonable limit is the period when a man is considered to have arrived at such maturity as no longer to require a guardian; and he becomes his own master. Before this period, it is not expected that he has sufficient reason for the management of his own affairs.

It is not said that, with respect to every crime committed before mature age, the ordinary punishment ought necessarily to be diminished. This diminution ought to depend upon the whole circumstances. But what is intended to be said is, that this period being passed, punishment ought no longer to be diminished on this account.

On account of minority in age, infamous punishments are principally remitted. He who has no hope of reviving honour, is with difficulty again incited to virtue.

When I speak of majority, I do not mean the Roman majority, fixed at twenty-five years; because there is injustice and folly in restraining the liberty of the man for so long a time, and keeping him in the bonds of infancy after the full development of his faculties. The period which I have in view is the English period of twenty-one years. Before this age, Pompey had conquered provinces; and Pliny the younger had sustained with honour the interests of his fellow-citizens at the bar. Great Britain was governed by a minister, who managed the complicated system of her finances with eclât, before the

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person. Take a Jew to Lisbon, for example: he dissimulates, he violates the laws, he braves an opinion which has in its favour all the force of the popular sanction: is he, therefore, the most wicked of men? Do you believe him capable of every crime? Will he be a slanderer, a thief, a perjurer, if he could hope not to be discovered? No: a Jew in Portugal is not more addicted to these crimes than others. A monk allows himself in secret to violate some of the absurd and painful observances of his convent: does it follow, that he would be a deceitful and dangerous man, ready to violate his word upon a point in which probity was concerned? Such a conclusion would be very ill founded. Good sense, enlightened by interest, is sufficient to detect a general error, and does not on that account lead to the contempt of essential laws.

age at which, in the other parts of Europe, he would have been allowed to sell an acre of land.

Case in which there is no Alarm.

The alarm is absolutely null in the case in which the only persons exposed to the danger, if there are any, are unsusceptible of fear.

This circumstance explains the insensibility of many nations with respect to infanticide; that is to say, homicide committed upon a new-born child, with the consent of its father and mother. I say their *consent;* for without this, the alarm would be nearly the same as if it respected an adult. The less infants are susceptible of fear for themselves, the more the tenderness of parents is apt to be alarmed for them.

I pretend not to justify these nations. They are so much the more barbarous, inasmuch as they have given to the father the right of disposing of the new born babe, without the consent of the mother, who, after all the dangers of maternity, finds herself deprived of its reward, and reduced, by this unworthy slavery, to the same condition with those inferior creatures whose fecundity is a burthen to us. Infanticide, such as I have defined it to be, cannot be punished as a principal offence, since it produces no evil of the first or second class; but it ought to be punished as a step towards other crimes, furnishing an indication against the characters of its authors. The sentiments of respect for humanity cannot be too strongly fortified; nor can too great a repugnance be inspired against every thing which leads to habits of cruelty. Infanticide ought therefore to be punished, by attaching to it some disgrace. The fear of shame is commonly its cause: it requires, therefore, a greater stigma to repress it. But, at the same time, the occasions for punishment should be rendered rare, by requiring clear proof of its commission.

The laws against this offence, upon pretence of humanity, have been most manifest violations of it. Compare the crime and the punishment. What is the crime? The death of an infant, which has ceased to exist before it has known existence; an event which cannot excite the slightest uneasiness in the imagination of the most fearful, and which can leave no regrets but with those who, from a feeling of shame and of pity, have refused to prolong its days, commenced under such unhappy auspices. And what is the punishment? A barbarous punishment, an ignominious death, inflicted upon an unhappy mother, whose crime itself proves her excessive sensibility: on a woman led astray by despair, who has injured herself alone, by refusing to yield to the sweetest instinct of nature. She is devoted to infamy, because she too deeply dreaded shame; and the existence of her friends, who survive her, is poisoned by opprobrium and ignominy! But if the legislator himself has been the first cause of the evil; if he can be considered as the true murderer of these innocent creatures, how much more odious would this rigour appear! It is, however, he alone, who by acting harshly against her frailty has excited this direful combat in the heart of a mother, between tenderness and shame.

Of the Cases in which the Danger is greater than the Alarm.

Although alarm in general corresponds with danger, there are some cases in which this proportion is not exact: the danger may be greater than the alarm.

This happens in those mixed offences which include a private evil, and a danger which is proper to them in their character of public offences.

It might happen in a state, that a prince should be robbed by unfaithful officers, and the public oppressed by the vexations of his subordinates. The accomplices in these disorders might compose a threatening phalanx, allowing nothing to approach the throne but mercenary eulogiums; insomuch that truth should become the greatest of all crimes. Timidity, under the mask of prudence, would soon form the national character. If, during this universal abasement of courage, a virtuous citizen should venture to denounce the offenders, and should become the victim of his zeal, his loss would excite but little alarm: his magnanimity would only be considered as an act of folly; and each one, promising to himself that he would not act like him, would behold, without emotion, a misfortune which he would see that he had the means of avoiding. But the alarm, in thus subsiding, would make way for a more considerable mischief: this mischief consists in the danger of impunity for all public offences, in the cessation of all voluntary services to justice, in the profound indifference of individuals to every thing which does not personally affect them.

It is said, that in certain of the Italian states, those who have given evidence against thieves and robbers have been exposed to the vengeance of their accomplices, and obliged to seek in flight that security which the laws could not give them; it being more dangerous for individuals to lend their services to justice, than to arm themselves against it: a witness running more danger than an assassin. The alarm which results from this state of things is weak; because no one need expose himself to this mischief, but the danger is increased in the same proportion.

CHAPTER XIV.

REASONS FOR CONSIDERING CERTAIN ACTIONS AS CRIMES.*

We have made an analysis of evil. This analysis shows, that there are certain actions from which there results more evil than good: it is actions of this kind, or, at least, those which have been reputed such, that legislators have prohibited. A prohibited action is what is called a crime: to make these prohibitions respected, it has been necessary to institute punishments.

But is it proper to consider certain actions as crimes? or, in other terms, is it proper to subject them to legal punishments?

What a question! Is not all the world agreed upon it? Is it necessary to prove a recognised truth, a truth so well established in the minds of men?

All the world may be agreed; but upon what is this agreement founded? Ask each one his reasons. You will find a strange diversity of sentiments and principles: you will find it not only among the people, but among the philosophers. Is it lost time to seek for an uniform base of agreement upon so essential an object?

The agreement which exists is only founded upon prejudices; and those prejudices vary according to times and places, according to opinions and customs. I have always been told that such an action was a crime, and I think that it is a crime. Such is the guide of the people, and even of the legislator. But if custom has considered innocent actions as crimes; if it have considered small offences as great ones, and great offences as small ones; if it vary every where, it is clear that it ought to be subjected to a rule, and not be taken as the rule itself. We appeal, then, here to the principle of utility: it confirms the decisions of prejudice wherever they are just; it annuls them wherever they are pernicious.

I suppose myself a stranger to all our present denominations of vice or virtue: I am called to consider human actions only with relation to their good or evil effects. I open two accounts; I place on the side of pure profit all pleasures; I place on the side of loss all pains: I faithfully weigh the interests of all parties; the man whom prejudice brands as vicious; he who is accounted virtuous, are, for the moment, equal before me. I wish to judge the prejudice itself, and to weigh in this new balance all actions, with the intention of forming a catalogue of those which ought to be permitted, and of those which ought to be prohibited.

The operation, which at first appears so complicated, becomes easy, by means of the distinction which we have made between the evil of the first, the second, and the third order.

Have I to examine an act attacking the security of an individual? I compare all the pleasure, or, in other terms, all the profit which arises from this act to its author, with all the evil, or all the loss, which results from it to the party injured. I see at once that the evil of the first order surpasses the good of the first order. But I do not stop there. This action is followed by danger and alarm to society: the evil which was confined at first to a single person, spreads itself over all in the shape of fear. The pleasure resulting from the action is only for one: the pain is for a thousand, for ten thousand, for all. The disproportion, already prodigious, appears almost infinite, if I pass on to the evil of the third order, by considering, that if the act in question were not repressed, there would result from it an universal and durable discouragement, a cessation of labour, and at last the dissolution of society.

I shall consider the strongest desires, those the satisfaction of which is accompanied with the greatest pleasures; and it will be seen that their satisfaction, when it is obtained at the expense of security, is much more fruitful of evil than of good.

1. Let us first take enmity: it is the most fruitful cause of attacks upon honour and the person. I have conceived, it matters not on what account, enmity against you. Passion leads me astray: I insult you, I degrade you, I wound you. The spectacle of your suffering gives me, at least for a time, a feeling of pleasure. But even for this time, can it be believed that the pleasure I feel is equal to the pain you suffer? If even each atom of your pain could be painted in my mind, is it probable that each atom of pleasure which corresponds to it, would appear to me to have the same intensity? and yet there are only some scattered atoms of your sufferings which present themselves to my distracted and troubled imagination: as to you, not one of them can be lost; as to me, the greater part is always dissipated in pure loss. But this pleasure, such as it is, is not slow in letting its natural impurity break out. Humanity, a principle which nothing perhaps can stifle in the most atrocious minds, awakens a secret remorse in mine: fears of all kinds; fear of vengeance, either on your part, or on the part of those connected with you; fear of the public voice; religious fears, if there remain any spark of religion in me: all these fears will soon arise to trouble my security and corrupt my triumph. The passion has faded; the pleasure is destroyed; internal reproach succeeds it. But on your side the

* This chapter is inserted from Dumont's "Traités de Legislation," Vol. I. ch. ii., in order to complete the exhibition of Bentham's principles as published in his lifetime.—Ed.

suffering still endures, and may have a long duration. It is thus with slight wounds that time can heal: what will it be in those cases in which, from the nature of the injury, the wound is incurable, when the limbs have been cut off, the features disfigured, or the faculties destroyed? Weigh these evils, their intensity, their duration, their consequences; measure all their dimensions, and see how in all senses the pleasure is inferior to the pain.

Let us pass on to the effects of the second order. The news of your misfortune spreads over all minds the poison of fear. Every man who has an enemy, or who may have an enemy, thinks with dread on every thing which can inspire the passion of hatred: among feeble beings, who have so many things for which to envy one another, about which to dispute; whom a thousand little rivalries place without ceasing, in opposition to one another; the spirit of revenge announces a train of endless evils.

Hence, every act of cruelty produced by a passion, of which the principle is in all hearts, and by which every body may suffer, causes an alarm, which will continue until the punishment of the guilty has removed the danger to the side of injustice and enmity. This is a suffering common to all; and we ought not to forget another pain, which results from it, that pain of sympathy which is felt by generous minds on beholding crimes of this nature.

2. If we, secondly, examine those actions which may arise from that imperious motive, from that desire to which nature has confided the perpetuity of the species, and so large a portion of man's happiness; we shall see, that when it injures personal security, or the domestic condition, the good which results from its satisfaction bears no comparison with the evil to which it gives rise.

I speak here only of that attack which manifestly compromises the security of the person—Rape. It is not proper, by a gross and puerile joke, to deny the existence of this crime, and to diminish the horror of it. Notwithstanding all that may be said in this respect, even those women who are most prodigal of their favours, would not like that a brutal fury should ravish them. But here the magnitude of the alarm renders useless all discussion respecting the primitive evil: whatever may be the case with the actual crime, the possibility of its perpetration will always be an object of dread. The more universal the desire which gives birth to this crime, the greater its alarm and its force. In those times when the laws had not sufficient power to repress it, or manners were not sufficiently regulated to disgrace it, it gave rise to revenges, of which history has preserved some recollection. Whole nations have interested themselves in the quarrel, and hatred has been transmitted from fathers to their sons. It seems that the severe confinement of the Greek women, unknown in the time of Homer, owed its origin to a period of trouble and revolution, in which the feebleness of the laws had multiplied disorders of this kind, and disseminated a general terror.

3. With regard to the motive of cupidity. If we compare the pleasure of acquiring by usurpation, with the pain of losing, the one will not be found an equivalent for the other. But there are cases in which, if it were possible to restrain their effects to evils of the first order, the good would have an incontestible preponderance over the evil. In considering such crimes in this point of view only, no good reason can be assigned for the rigour of the laws. Every thing turns upon the evils of the second order: it is these which give to the action the character of a crime; it is these which render punishment necessary. Suppose, for example, the physical desire has for its object the satisfying of hunger; that a poor man, pressed with want, steals a loaf in the house of a rich man, which perhaps may save his life: can the good which he has done to himself, and the evil he has done to the rich man, be considered equal? The same observation may be applied to less striking examples. Suppose that a man pillages the public funds: he enriches himself, and impoverishes nobody: the wrong he does to individuals reduces itself to impalpable portions. It is not, therefore, on account of the evil of the first order that it is necessary to consider these actions as crimes: it is on account of the evils of the second order.

If the pleasures attached to the satisfaction of desires, so powerful as enmity, lust, and hunger, in opposition to the will of the parties interested, is far from equalling the evils which arise from such satisfaction, the disproportion will appear much greater with regard to less active and powerful motives.

The desire of self-preservation is the only one which still demands a separate consideration.

Suppose this desire regards an evil which the laws themselves would impose upon an individual, it is necessary that this should be for some very pressing reason, such as the necessity of putting in execution the punishments directed by the tribunals; punishments, without which there would be no security, no government. Now, if the desire to escape from this punishment is satisfied, the law is found in this respect struck with impotence. The evil which results from this satisfaction is, then, that which results from the impotence of the laws, or (which amounts to the same thing) the non-existence of all law. But the evil which results from the non-existence of laws is in effect the assemblage of the different evils which laws are established to prevent; that is to say, of all the evils that

men are liable to experience from men. A single triumph of this kind on the part of an individual over the laws, is not sufficient to strike the whole system with impotence. Nevertheless, every example of this kind is a symptom of weakness, a step towards destruction. There results from it an evil of the second order: an alarm, a danger at least; and if the laws connive at this evasion, they are in contradiction with their proper ends: for the purpose of avoiding a small evil, they admit another much more than its equivalent.

There remains the case in which an individual repels an evil to which the laws do not wish to expose him. But since they do not wish that he should submit to this evil, they wish that he should not submit to it. To avert this evil is in itself a good. It is possible that, in endeavouring to preserve himself, the individual may cause an evil more than equivalent to this good. The evil which he has caused in his self-defence, is it confined to what was necessary for this object, or has it exceeded it? What relation does the evil done bear to the evil averted? Is it equal? Is it greater? Is it less? Would the evil averted have been susceptible of indemnification, if, instead of being prevented by such costly proceedings, the party had temporarily submitted to it? These are so many questions of fact, which the law ought to take into consideration in establishing regulations in detail, with regard to self-defence. It is a subject which belongs to the penal code; in the examination of the means of justification or extenuation with regard to offences. It is enough to observe here, that in all cases, whatever may be the evil of the first order, all the evil that an individual can do in self-defence, does not produce any alarm, any danger. If the individual be not attacked, and his security compromised, other persons have nothing to fear from him.

CHAPTER XV.

§ 1. *General View of Cases unmeet for Punishment.*

I.

THE general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief.

II.

But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.*

III.

It is plain, therefore, that in the following cases, punishment ought not to be inflicted.

1. Where it is *groundless;* where there is no mischief for it to prevent; the act not being mischievous upon the whole.

2. Where it must be *inefficacious;* where it cannot act so as to prevent the mischief.

3. Where it is *unprofitable*, or too *expensive;* where the mischief it would produce would be greater than what it would prevent.

* What follows, relative to the subject of punishment, ought regularly to be preceded by a distinct chapter on the ends of punishment. But having little to say on that particular branch of the subject, which has not been said before, it seemed better, in a work, which will at any rate be but too volumnious, to omit this title, reserving it for another, hereafter to be published, entitled, *Rationale of Punishment.*[a] To the same work I must refer the analysis of the several possible modes of punishment, a particular and minute examination of the nature of each, and of its advantages and disadvantages, and various other disquisitions, which did not seem absolutely necessary to be inserted here. A very few words, however, concerning the *ends* of punishment, can scarcely be dispensed with.

The immediate principal end of punishment is to controul action. This action is either that of the offender, or of others: that of the offender it controuls by its influence, either on his will, in which case it is said to operate in the way of *reformation;* or on his physical power, in which case it is said to operate by *disablement:* that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example.* A kind of collateral end, which it has a natural tendency to answer, is that of affording a pleasure or satisfaction to the party injured, where there is one, and, in general, to parties whose ill-will, whether on a self-regarding account, or on the account of sympathy or antipathy, has been excited by the offence. This purpose, as far as it can be answered *gratis*, is a beneficial one. But no punishment ought to be allotted merely to this purpose, because (setting aside its effects in the way of controul) no such pleasure is ever produced by punishment as can be equivalent to the pain. The punishment, however, which is allotted to the other purpose, ought, as far as it can be done without expense, to be accommodated to this. Satisfaction thus administered to a party injured, in the shape of a dissocial pleasure,[b] may be styled a vindictive satisfaction or compensation: as a compensation, administered in the shape of a self-regarding profit, or stock of pleasure, may be styled a lucrative one. See B. I. tit. vi. [Compensation.] Example is the most important end of all, in proportion as the *number* of the persons under temptation to offend is to *one.*

[a] This is the work which, from the Author's papers, has since been published by Mr. Dumont, in French, in company with *The Rationale of Reward* added to it, for the purpose of mutual illustration. Both of these have since been published in English from the Author's MSS., and are reprinted in this edition.

[b] See ch. x. [Motives.]

4. Where it is *needless;* where the mischief may be prevented, or cease of itself, without it; that is, at a cheaper rate.

§ 2. *Cases in which Punishment is groundless.*

IV.

These are, 1. Where there has never been any mischief; where no mischief has been produced to any body by the act in question. Of this number are those in which the act was such as might, on some occasions, be mischievous or disagreeable, but the person whose interest it concerns gave his *consent* to the performance of it.* This consent, provided it be free, and fairly obtained,* is the best proof that can be produced, that, to the person who gives it, no mischief, at least no immediate mischief, upon the whole, is done. For no man can be so good a judge as the man himself, what it is gives him pleasure or displeasure.

V.

2. Where the mischief was *outweighed:* although a mischief was produced by that act, yet the same act was necessary to the production of a benefit which was of greater value† than the mischief. This may be the case with any thing that is done in the way of precaution against instant calamity, as also with any thing that is done in the exercise of the several sorts of powers necessary to be established in every community, to wit, domestic, judicial, military, and supreme.*

VI.

3. Where there is a certainty of an adequate compensation; and that in all cases where the offence can be committed. This supposes two things: 1. That the offence is such as admits of an adequate compensation: 2. That such a compensation is sure to be forthcoming. Of these suppositions, the latter will be found to be a merely ideal one: a supposition that cannot, in the universality here given to it, be verified by fact. It cannot, therefore, in practice, be numbered amongst the grounds of absolute impunity. It may, however, be admitted as a ground for an abatement of that punishment, which other considerations, standing by themselves, would seem to dictate. ‡

§ 3. *Cases in which Punishment must be inefficacious.*

VII.

These are, 1. Where the penal provision is *not established* until after the act is done. Such are the cases, 1. Of an *ex-post facto* law; where the legislator himself appoints not a punishment till after the act is done. 2. Of a sentence beyond the law; where the judge, of his own authority, appoints a punishment which the legislator had not appointed.

VIII.

2. Where the penal provision, though established, is *not conveyed* to the notice of the person on whom it seems intended that it should operate. Such is the case where the law has omitted to employ any of the expedients which are necessary, to make sure that every person whatsoever, who is within the reach of the law, be apprized of all the cases whatsoever, in which (being in the station of life he is in) he can be subjected to the penalties of the law.‖

IX.

3. Where the penal provision, though it were conveyed to a man's notice, *could produce no effect* on him, with respect to the preventing him from engaging in any act of the *sort* in question. Such is the case, 1. In extreme *infancy;* where a man has not yet attained that state or disposition of mind in which the prospect of evils so distant as those which are held forth by the law, has the effect of influencing his conduct. 2. In *insanity*, where the person, if he has attained to that disposition, has since been deprived of it through the influence of some permanent though unseen cause. 3. In *intoxication;* where he has been deprived of it by the transient influence of a visible cause: such as the use of wine, or opium, or other drugs, that act in this manner on the nervous system: which condition is indeed neither more nor less than a temporary insanity produced by an assignable cause.§

* See B. I. tit. [Justifications.]

† See *supra*, ch. iv. [Value.]

‡ This, for example, seems to have been one ground, at least, of the favour shown by perhaps all systems of laws, to such offenders as stand upon a footing of responsibility: shown, not directly indeed to the persons themselves; but to such offences as none but responsible persons are likely to have the opportunity of enaging in. In particular, this seems to be the reason why embezzlement, in certain cases, has not commonly been punished upon the footing of theft: nor mercantile frauds upon that of common sharping.[a]

[a] See tit. [Simple Merc. Defraudment.]

‖ See B. II. Appendix, tit. iii. [Promulgation.]

§ Notwithstanding what is here said, the cases of infancy and intoxication (as we shall see hereafter) cannot be looked upon in practice as affording sufficient grounds for absolute impunity. But this exception in point of practice is no objection to the propriety of the rule in point of theory. The ground of the exception is neither more nor less than the difficulty there is of ascertaining the matter of fact: viz. whether at the requisite point of time the party was actually in the state in question; that is, whether a given case comes really under the rule. Suppose the matter of fact capable of being perfectly ascertained, without danger or mistake, the impropriety of punishment would be as indubitable in these cases as in any other.[a]

The reason that is commonly assigned for the

[a] See B. I. tit. iv. [Exemptions], and tit. vii. [Extenuations.]

X.

4. Where the penal provision (although, being conveyed to the party's notice, it might very well prevent his engaging in acts of the sort in question, provided he knew that it related to those acts) could not have this effect with regard to the *individual* act he is about to engage in: to wit, because he knows not that it is of the number of those to which the penal provision relates. This may happen, 1. In the case of *unintentionality;* where he intends not to engage, and thereby knows not that he is about to engage, in the *act* in which eventually he is about to engage.* 2. In the case of *unconsciousness;* where, although he may know that he is about to engage in the *act* itself, yet, from not knowing all the material *circumstances* attending it, he knows not of the *tendency* it has to produce that mischief, in contemplation of which it has been made penal in most instances. 3. In the case of *mis-supposal;* where, although he may know of the tendency the act has to produce that degree of mischief, he supposes it, though mistakenly, to be attended with some circumstance, or set of circumstances, which, if it had been attended with, it would either not have been productive of that mischief, or have been productive of such a greater degree of good, as has determined the legislator in such a case not to make it penal.†

XI.

5. Where, though the penal clause might exercise a full and prevailing influence, were it to act alone, yet by the *predominant* influence of some opposite cause upon the will, it must necessarily be ineffectual: because the evil which he sets himself about to undergo, in the case of his *not* engaging in the act, is so great, that the evil denounced by the penal clause, in case of his engaging in it, cannot appear greater. This may happen, 1. In the case of *physical danger;* where the evil is such as appears likely to be brought about by the unassisted powers of *nature*. 2. In the case of a *threatened mischief;* where it is such as appears likely to be brought about through the intentional and conscious agency of *man*.‡

XII.

6. Where, though the penal clause may exert a full and prevailing influence over the *will* of the party, yet his *physical faculties* (owing to the predominant influence of some physical cause) are not in a condition to follow the determination of the will: insomuch that the act is absolutely *involuntary*. Such is the case of physical *compulsion* or *restraint*, by whatever means brought about; where the man's hand, for instance, is pushed against some object which his will disposes him *not* to touch; or tied down from touching some object which his will disposes him to touch.

§ 4. *Cases where Punishment is unprofitable.*

XIII.

These are, 1. Where, on the one hand, the nature of the offence; on the other hand, that of the punishment, are, *in the ordinary state of things*, such, that when compared together, the evil of the latter will turn out to be greater than that of the former.

XIV.

Now the evil of the punishment divides itself into four branches, by which so many different sets of persons are affected. 1. The evil of *coercion* or *restraint;* or the pain which it gives a man not to be able to do the act, whatever it be, which by the apprehension of the punishment he is deterred from doing. This is felt by those by whom the law is *observed*. 2. The evil of *apprehension;* or the pain which a man, who has exposed himself to punishment, feels at the thoughts of undergoing it. This is felt by those by whom the law has been *broken*, and who feel themselves in *danger* of its being executed upon them. 3. The evil of *sufferance:*‖ or the pain which a man feels, in virtue of the punishment itself, from the time when he begins to undergo it. This is felt by those by whom the law is broken, and upon whom it comes actually to be executed. 4. The pain of sympathy, and the other *derivative* evils resulting to the persons who are in *connection* with the several classes of original sufferers just mentioned.§ Now of these four lots of evil, the first will be greater or less,

establishing an exemption from punishment in favour of infants, insane persons, and persons under intoxication, is either false in fact, or confusedly expressed. The phrase is, that the will of these persons concurs not with the act; that they have no vicious will; or, that they have not the free use of their will. But suppose all this to be true; what is it to the purpose? Nothing: except in as far as it implies the reason given in the text.

* See ch. viii. [Intentionality.]

† See ch. ix. [Consciousness.]

‡ The influences of the *moral* and *religious* sanctions, or, in other words, of the motives of *love of reputation* and *religion*, are other causes, the force of which may, upon particular occasions, come to be greater than that of any punishment which the legislator is *able*, or at least which he will *think proper*, to apply. These, therefore, it will be proper for him to have his eye upon. But the force of these influences is variable and different in different times and places: the force of the foregoing influences is constant and the same, at all times and every where. These, therefore, it can never be proper to look upon as safe grounds for establishing absolute impunity: owing (as in the abovementioned cases of infancy and intoxication) to the impracticability of ascertaining the matter of fact.

‖ See ch. v. [Pleasures and Pains.]

§ See ch. xii. [Consequences], par. 4.

according to the nature of the act from which the party is restrained: the second and third according to the nature of the punishment which stands annexed to that offence.

XV.

On the other hand, as to the evil of the offence, this will also, of course, be greater or less, according to the nature of each offence. The proportion between the one evil and the other will therefore be different in the case of each particular offence. The cases, therefore, where punishment is unprofitable on this ground, can by no other means be discovered, than by an examination of each particular offence; which is what will be the business of the body of the work.

XVI.

2. Where, although in the *ordinary state* of things, the evil resulting from the punishment is not greater than the benefit which is likely to result from the force with which it operates, during the same space of time, towards the excluding the evil of the offence, yet it may have been rendered so by the influence of some *occasional circumstances*. In the number of these circumstances may be, 1. The multitude of delinquents at a particular juncture; being such as would increase, beyond the ordinary measure, the *quantum* of the second and third lots, and thereby also of a part of the fourth lot, in the evil of the punishment. 2. The extraordinary value of the services of some one delinquent; in the case where the effect of the punishment would be to deprive the community of the benefit of those services. 3. The displeasure of the *people;* that is, of an indefinite number of the members of the *same* community, in cases where (owing to the influence of some occasional incident) they happen to conceive that the offence or the offender ought not to be punished at all, or at least ought not to be punished in the way in question. 4. The displeasure of *foreign powers;* that is, of the governing body, or a considerable number of the members of some *foreign* community or communities, with which the community in question is connected.

§ 5. *Cases where Punishment is needless.*

XVII.

These are, 1. Where the purpose of putting an end to the practice may be attained as effectually at a cheaper rate: by instruction, for instance, as well as by terror: by informing the understanding, as well as by exercising an immediate influence on the will. This seems to be the case with respect to all those offences which consist in the disseminating pernicious principles in matters of *duty;* of whatever kind the duty be; whether political, or moral, or religious. And this, whether such principles be disseminated *under*, or even *without*, a sincere persuasion of their being beneficial. I say, even *without:* for though in such a case it is not instruction that can prevent the writer from endeavouring to inculcate his principles, yet it may the readers from adopting them; without which, his endeavouring to inculcate them will do no harm. In such a case, the sovereign will commonly have little need to take an active part: if it be the interest of *one* individual to inculcate principles that are pernicious, it will as surely be the interest of *other* individuals to expose them. But if the sovereign must needs take a part in the controversy, the pen is the proper weapon to combat error with, not the sword.

CHAPTER XVI.

OF THE PROPORTION BETWEEN PUNISHMENTS AND OFFENCES.

I.

WE have seen that the general object of all laws is to prevent mischief; that is to say, when it is worth while; but that, where there are no other means of doing this than punishment, there are four cases in which it is *not* worth while.

II.

When it *is* worth while, there are four subordinate designs or objects, which, in the course of his endeavours to compass, as far as may be, that one general object, a legislator, whose views are governed by the principle of utility, comes naturally to propose to himself.

III.

1. His first, most extensive, and most eligible object, is to prevent, in as far as it is possible, and worth while, all sorts of offences whatsoever:* in other words, so to manage, that no offence whatsoever may be committed.

IV.

2. But if a man must needs commit an offence of some kind or other, the next object is to induce him to commit an offence *less* mischievous, *rather* than one *more* mischievous: in other words, to choose always the *least* mischievous of two offences that will either of them suit his purpose.

V.

3. When a man has resolved upon a particular offence, the next object is to dispose him to do *no more* mischief than is *necessary* to his purpose: in other words, to do as little mischief as is consistent with the benefit he has in view.

VI.

4. The last object is, whatever the mischief be which it is proposed to prevent, to prevent it at as *cheap* a rate as possible.

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* By *offences* I mean, at present, acts which appear to him to have a tendency to produce mischief.

VII.

Subservient to these four objects, or purposes, must be the rules or canons by which the proportion of punishments* to offences is to be governed.

VIII.

Rule 1. — 1. The first object, it has been seen, is to prevent, in as far as it is worth while, all sorts of offences: therefore,

The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit† of the offence.‡

If it be, the offence (unless some other considerations, independent of the punishment, should intervene and operate efficaciously in the character of tutelary motives ‖) will be sure to be committed notwithstanding: § the whole lot of punishment will be thrown away: it will be altogether *inefficacious.**

IX.

The above rule has been often objected to, on account of its seeming harshness: but this can only have happened for want of its being properly understood. The strength of the temptation, *cæteris paribus*, is as the profit of the offence: the quantum of the punishment must rise with the profit of the offence: *cæteris paribus*, it must therefore rise with the strength of the temptation. This there is no disputing. True it is, that the stronger the temptation, the less conclusive is the indication which the act of delinquency affords of the depravity of the offender's disposition.† So far, then, as the absence of any aggravation, arising from extraordinary depravity of disposition, may operate, or at the utmost, so far as the presence of a ground of extenuation, resulting from the innocence or beneficence of the offender's disposition, can operate, the strength of the temptation may operate in abatement of the demand for punishment. But it can never operate so far as to indicate the propriety of making the punishment ineffectual, which it is sure to be when brought below the level of the apparent profit of the offence.

The partial benevolence which should prevail for the reduction of it below this level, would counteract as well those purposes which such a motive would actually have in view, as those more extensive purposes which benevolence ought to have in view: it would be cruelty not only to the public, but to the very persons in whose behalf it pleads: in its effects, I mean, however opposite in its intention. Cruelty to the public, that is, cruelty to the

* [Punishments.] The same rules (it is to be observed) may be applied, with little variation, to rewards as well as punishment: in short, to motives in general, which, according as they are of the pleasurable or painful kind, are of the nature of *reward* or *punishment*: and, according as the act they are applied to produce is of the positive or negative kind, are styled impelling or restraining. See ch. x. [Motives], par. 43.

† [Profit.] By the profit of an offence, is to be understood, not merely the pecuniary profit, but the pleasure or advantage, of whatever kind it be, which a man reaps, or expects to reap, from the gratification of the desire which prompted him to engage in the offence.[a]

It is the profit (that is, the expectation of the profit) of the offence that constitutes the *impelling* motive, or, where there are several, the sum of the impelling motives, by which a man is prompted to engage in the offence. It is the punishment, that is, the expectation of the punishment, that constitutes the *restraining* motive, which, either by itself, or in conjunction with others, is to act upon him in a *contrary* direction, so as to induce him to abstain from engaging in the offence. Accidental circumstances apart, the strength of the temptation is as the force of the seducing, that is, of the impelling motive or motives. To say then, as authors of great merit and great name have said, that the punishment ought not to increase with the strength of the temptation, is as much as to say in mechanics, that the moving force or *momentum* of the *power* need not increase in proportion to the momentum of the *burthen*.

‡ Beccaria, dei diletti, § 6, id. trad. par. Morellet, § 23.

‖ See ch. xi. [Dispositions], par. 29.

§ It is a well-known adage, though it is to be hoped not a true one, that every man has his price. It is commonly meant of a man's virtue. This saying, though in a very different sense, was strictly verified by some of the Anglo-Saxon laws: by which a fixed price was set, not upon a man's virtue indeed, but upon his life: that of the sovereign himself among the rest. For 200 shillings you might have killed a peasant:[b] for six times as much, a nobleman: for six-and-thirty times as much you might have killed the king. A king in those days was worth exactly 7200 shillings. If, then, the heir to the throne, for example, grew weary of waiting for it, he had a secure and legal way of gratifying his impatience: he had but to kill the king with one hand, and pay himself with the other, and all was right. An Earl Godwin, or a Duke Streon, could have bought the lives of a whole dynasty. It is plain, that if ever a king in those days died in his bed, he must have had something else, besides this law, to thank for it. This being the production of a remote and barbarous age, the absurdity of it is presently recognised: but, upon examination, it would be found, that the freshest laws of the most civilized nations are continually falling into the same error.[c] This, in short, is the case wheresoever the punishment is fixed while the profit of delinquency is indefinite: or, to speak more precisely, where the punishment is limited to such a mark, that the profit of delinquency may reach beyond it.

[a] See ch. x. [Motives], § 1.

[b] Wilkin's Leg. Anglo-Sax. p. 71, 72. See Hume, Vol. I. App. I. p. 219.

* See ch. xv. [Cases unmeet], § 1.

† See ch. xi. [Dispositions], par. 42.

[c] See in particular the *English Statute Laws* throughout, *Bonaparte's* Penal Code, and the recently enacted or not enacted *Spanish* Penal Code. — *Note by the Author, July* 1822.

innocent, by suffering them, for want of an adequate protection, to lie exposed to the mischief of the offence: cruelty even to the offender himself, by punishing him to no purpose, and without the chance of compassing that beneficial end, by which alone the introduction of the evil of punishment is to be justified.

X.

Rule 2. But whether a given offence shall be prevented in a given degree by a given quantity of punishment, is never any thing better than a chance; for the purchasing of which, whatever punishment is employed, is so much expended in advance. However, for the sake of giving it the better chance of outweighing the profit of the offence,

*The greater the mischief of the offence, the greater is the expense, which it may be worth while to be at, in the way of punishment.**

XI.

Rule 3. The next object is, to induce a man to choose always the least mischievous of two offences: therefore,

Where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.†

XII.

Rule 4. When a man has resolved upon a particular offence, the next object is, to induce him to do no more mischief than what is necessary for his purpose: therefore

The punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.‡

XIII.

Rule 5. The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore

The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.

XIV.

Rule 6. It is further to be observed, that owing to the different manners and degrees in which persons under different circumstances are affected by the same exciting cause, a punishment which is the same in name will not always either really produce, or even so much as appear to others to produce, in two different persons the same degree of pain: therefore,

That the quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into account.‖

XV.

Of the above rules of proportion, the four first, we may perceive, serve to mark out the limits on the side of diminution; the limits *below* which a punishment ought not to be *diminished:* the fifth, the limits on the side of increase; the limits *above* which it ought not to be *increased.* The five first are calculated to serve as guides to the legislator: the sixth is calculated, in some measure, indeed, for the same purpose; but principally for guiding the judge in his endeavours to conform, on both sides, to the intentions of the legislator.

XVI.

Let us look back a little. The first rule, in order to render it more conveniently applicable to practice, may need, perhaps, to be a little more particularly unfolded. It is to be observed, then, that for the sake of accuracy it was necessary, instead of the word *quantity,* to make use of the less perspicuous term *value.* For the word *quantity* will not properly include the circumstances either of certainty or proximity: circumstances which, in estimating the value of a lot of pain or pleasure, must always be taken into the account.§ Now, on the one hand, a lot of punishment is a lot of pain; on the other hand, the profit of an offence is a lot of pleasure, or what is equivalent to it. But the profit of the offence *is* commonly more *certain* than the punishment, or, what comes to the same thing, *appears* so at least to the offender. It is, at any rate, commonly more *immediate.* It follows, therefore, that, in order to maintain its superiority over the profit of the offence, the punishment must have its value made up in some other way, in proportion to that whereby it falls short in the two points of *certainty* and *proxi-*

* For example, if it can ever be worth while to be at the expense of so horrible a punishment as that of burning alive, it will be more so in the view of preventing such a crime as that of murder or incendiarism, than in the view of preventing the uttering of a piece of bad money. See B. I. tit. [Defraudment touching the Coin] and [Incendiarism.]

† Espr. des Loix, L. vi. c. 16.

‡ If any one have any doubt of this, let him conceive the offence to be divided into as many separate offences as there are distinguishable parcels of mischief that result from it. Let it consist, for example, in a man's giving you ten blows, or stealing from you ten shillings. If, then, for giving you ten blows, he is punished no more than for giving you five, the giving you five of these ten blows is an offence for which there is no punishment at all: which being understood, as often as a man gives you five blows, he will be sure to give you five more, since he may have the pleasure of giving you these five for nothing. In like manner, if for stealing from you ten shillings, he is punished no more than for stealing five, the stealing of the remaining five of those ten shillings is an offence for which there is no punishment at all. This rule is violated in almost every page of every body of laws I have ever seen.

The profit, it is to be observed, though frequently, is not constantly, proportioned to the mischief: for example, where a thief, along with the things he covets, steals others which are of no use to him. This may happen through wantonness, indolence, precipitation, &c. &c.

‖ See ch. vi. [Sensibility.]

§ See ch. iv. [Value.]

mity. Now, there is no other way in which it can receive any addition to its *value*, but by receiving an addition in point of *magnitude*. Wherever, then, the value of the punishment falls short, either in point of *certainty*, or of *proximity*, of that of the profit of the offence, it must receive a proportionable addition in point of *magnitude*.*

XVII.

Yet farther. To make sure of giving the value of the punishment the superiority over that of the offence, it may be necessary, in some cases, to take into the account the profit not only of the *individual* offence to which the punishment is to be annexed, but also of such *other* offences of the *same sort* as the offender is likely to have already committed without detection. This random mode of calculation, severe as it is, it will be impossible to avoid having recourse to, in certain cases: in such, to wit, in which the profit is pecuniary, the chance of detection very small, and the obnoxious act of such a nature as indicates a habit: for example, in the case of frauds against the coin. If it be *not* recurred to, the practice of committing the offence will be sure to be, upon the balance of the account, a gainful practice. That being the case, the legislator will be absolutely sure of *not* being able to suppress it, and the whole punishment that is bestowed upon it will be thrown away. In a word (to keep to the same expressions we set out with) that whole quantity of punishment will be *inefficacious*.

XVIII.

Rule 7. These things being considered, the three following rules may be laid down by way of supplement and explanation to Rule 1.

To enable the value of the punishment to outweigh that of the profit of the offence, it must be increased, in point of magnitude, in proportion as it falls short in point of certainty.

XIX.

Rule 8. *Punishment must be further increased in point of magnitude, in proportion as it falls short in point of proximity.*

XX.

Rule 9. *Where the act is conclusively indicative of a habit, such an increase must be given to the punishment as may enable it to outweigh the profit not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.*

XXI.

There may be a few other circumstances or considerations which may influence, in some small degree, the demand for punishment: but as the propriety of these is either not so demonstrable, or not so constant, or the application of them not so determinate, as that of the foregoing, it may be doubted whether they be worth putting on a level with the others.

XXII.

Rule 10. *When a punishment, which in point of quality is particularly well calculated to answer its intention, cannot exist in less than a certain quantity, it may sometimes be of use, for the sake of employing it, to stretch a little beyond that quantity which, on other accounts, would be strictly necessary.*

XXIII.

Rule 11. *In particular, this may sometimes be the case, where the punishment proposed is of such a nature as to be particularly well calculated to answer the purpose of a moral lesson.*†

XXIV.

Rule 12. The tendency of the above considerations is to dictate an augmentation in the punishment: the following rule operates in the way of diminution. There are certain cases (it has been seen)‡ in which, by the influence of accidental circumstances, punishment may be rendered unprofitable in the whole: in the same cases it may chance to be rendered unprofitable as to a part only. Accordingly,

In adjusting the quantum of punishment, the circumstances, by which all punishment may be rendered unprofitable, ought to be attended to.

XXV.

Rule 13. It is to be observed, that the more various and minute any set of provisions are, the greater the chance is that any given article in them will not be borne in mind: without which, no benefit can ensue from it. Distinctions, which are more complex than what the conceptions of those whose conduct it is designed to influence can take in, will even be worse than useless. The whole system will present a confused appearance: and thus the effect, not only of the proportions established by the articles in question, but of whatever is connected with them, will be

* It is for this reason, for example, that simple compensation is never looked upon as sufficient punishment for theft or robbery.

† A punishment may be said to be calculated to answer the purpose of a moral lesson, when, by reason of the ignominy it stamps upon the offence, it is calculated to inspire the public with sentiments of aversion towards those pernicious habits and dispositions with which the offence appears to be connected; and thereby to inculcate the opposite beneficial habits and dispositions.

It is this, for example, if any thing, that must justify the application of so severe a punishment as the infamy of a public exhibition, hereinafter proposed, for him who lifts up his hand against a woman, or against his father. See B. I. tit. [Simp. Corporal Injuries.]

It is partly on this principle, I suppose, that military legislators have justified to themselves the inflicting death on the soldier who lifts up his hand against his superior officer.

‡ See ch. xv. [Cases unmeet], § 4.

destroyed.* To draw a precise line of direction in such case seems impossible. However, by way of memento, it may be of some use to subjoin the following rule.

Among provisions designed to perfect the proportion between punishments and offences, if any occur, which, by their own particular good effects, would not make up for the harm they would do by adding to the intricacy of the Code, they should be omitted.†

XXVI.

It may be remembered, that the political sanction, being that to which the sort of punishment belongs, which in this chapter is all along in view, is but one of four sanctions, which may all of them contribute their share towards producing the same effects. It may be expected, therefore, that in adjusting the quantity of political punishment, allowance should be made for the assistance it may meet with from those other controuling powers. True it is, that from each of these several sources a very powerful assistance may sometimes be derived. But the case is, that (setting aside the moral sanction, in the case where the force of it is expressly adopted into and modified by the political)‡ the force of those other powers is never determinate enough to be depended upon. It can never be reduced, like political punishment, into exact lots, nor meted out in number, quantity, and value. The legislator is therefore obliged to provide the full complement of punishment, as if he were sure of not receiving any assistance whatever from any of those quarters. If he does, so much the better: but lest he should not, it is necessary he should, at all events, make that provision which depends upon himself.

XXVII.

It may be of use, in this place, to recapitulate the several circumstances, which, in establishing the proportion betwixt punishments and offences, are to be attended to. These seem to be as follows: —

I. *On the part of the Offence:*

1. The profit of the offence;
2. The mischief of the offence;
3. The profit and mischief of other greater or lesser offences, of different sorts, which the offender may have to choose out of;
4. The profit and mischief of other offences, of the same sort, which the same offender may probably have been guilty of already.

II. *On the part of the Punishment:*

5. The magnitude of the punishment: composed of its intensity and duration;
6. The deficiency of the punishment in point of certainty;
7. The deficiency of the punishment in point of proximity;
8. The quality of the punishment;
9. The accidental advantage in point of quality of a punishment, not strictly needed in point of quantity;
10. The use of a punishment of a particular quality, in the character of a moral lesson.

III. *On the part of the Offender:*

11. The responsibility of the class of persons in a way to offend;
12. The sensibility of each particular offender;
13. The particular merits or useful qualities of any particular offender, in case of a punishment which might deprive the community of the benefit of them;
14. The multitude of offenders on any particular occasion.

IV. *On the part of the Public*, at any particular conjuncture:

15. The inclinations of the people, for or against any quantity or mode of punishment;
16. The inclinations of foreign powers.

V. *On the part of the Law:* that is, of the public for a continuance:

17. The necessity of making small sacrifices, in point of proportionality, for the sake of simplicity.

XXVIII.

There are some, perhaps, who, at first sight, may look upon the nicety employed in the adjustment of such rules, as so much labour lost: for gross ignorance, they will say, never troubles itself about laws, and passion does not calculate. But the evil of ignorance admits of cure:‖ and as to the proposition that passion does not calculate, this, like most of these very general and oracular propositions, is not true. When matters of such importance as pain and pleasure are at stake, and these in the highest degree (the only matters, in short, that can be of importance) who is there that does not calculate? Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate.§ Passion calculates, more or less, in every man: in different men, according to the warmth or coolness of

* See B. II. tit. [Purposes.] Append. tit. [Composition.]

† Notwithstanding this rule, my fear is, that in the ensuing model, I may be thought to have carried my endeavours at proportionality too far. Hitherto scarce any attention has been paid to it. Montesquieu seems to have been almost the first who has had the least idea of any such thing. In such a matter, therefore, excess seemed more eligible than defect. The difficulty is to invent: that done, if any thing seems superfluous, it is easy to retrench.

‡ See B. I. tit. [Punishments.]

‖ See Append. tit. [Promulgation.]

§ There are few madmen but what are observed to be afraid of the strait waistcoat.

their dispositions: according to the firmness or irritability of their minds: according to the nature of the motives by which they are acted upon. Happily, of all passions, that is the most given to calculation, from the excesses of which, by reason of its strength, constancy, and universality, society has most to apprehend:* I mean that which corresponds to the motive of pecuniary interest: so that these niceties, if such they are to be called, have the best chance of being efficacious, where efficacy is of the most importance.

CHAPTER XVII.

OF THE PROPERTIES TO BE GIVEN TO A LOT OF PUNISHMENT.

I.

It has been shown what the rules are, which ought to be observed in adjusting the proportion between the punishment and the offence. The properties to be given to a lot of punishment, in every instance, will, of course, be such as it stands in need of, in order to be capable of being applied, in conformity to those rules: the *quality* will be regulated by the *quantity*.

II.

The first of those rules, we may remember, was, that the quantity of punishment must not be less, in any case, than what is sufficient to outweigh the profit of the offence: since, as often as it is less, the whole lot (unless by accident the deficiency should be supplied from some of the other sanctions) is thrown away; it is *inefficacious*. The fifth was, that the punishment ought in no case to be more than what is required by the several other rules: since, if it be, all that is above that quantity is *needless*. The fourth was, that the punishment should be adjusted in such manner to each individual offence, that every part of the mischief of that offence may have a penalty (that is, a tutelary motive) to encounter it: otherwise, with respect to so much of the offence as has not a penalty to correspond to it, it is as if there were no punishment in the case. Now, to none of those rules can a lot of punishment be conformable, unless, for every variation in point of quantity, in the mischief of the species of offence to which it is annexed, such lot of punishment admits of a correspondent variation. To prove this, let the profit of the offence admit of a multitude of degrees. Suppose it, then, at any one of these degrees: if the punishment be less than what is suitable to that degree, it will be *inefficacious;* it will be so much thrown away: if it be more, as far as the difference extends, it will be *needless;* it will therefore be thrown away also in that case.

The first property, therefore, that ought to be given to a lot of punishment, is that of being variable in point of quantity, in conformity to every variation which can take place in either the profit or mischief of the offence. This property might, perhaps, be termed, in a single word, *variability*.

III.

A second property, intimately connected with the former, may be styled *equability*. It will avail but little, that a mode of punishment (proper in all other respects) has been established by the legislator; and that capable of being screwed up or let down to any degree that can be required; if, after all, whatever degree of it be pitched upon, that same degree shall be liable, according to circumstances, to produce a very heavy degree of pain, or a very slight one, or even none at all. In this case, as in the former, if circumstances happen one way, there will be a great deal of pain produced which will be *needless:* if the other way, there will be no pain at all applied, or none that will be *efficacious*. A punishment, when liable to this irregularity, may be styled an unequable one: when free from it an equable one. The quantity of pain produced by the punishment will, it is true, depend in a considerable degree upon circumstances distinct from the nature of the punishment itself: upon the condition which the offender is in, with respect to the circumstances by which a man's sensibility is liable to be influenced. But the influence of these very circumstances will in many cases be reciprocally influenced by the nature of the punishment: in other words, the pain which is produced by any mode of punishment, will be the joint effect of the punishment which is applied to him, and the circumstances in which he is exposed to it. Now there are some punishments, of which the effect may be liable to undergo a greater alteration by the influence of such foreign circumstances, than the effect of other punishments is liable to undergo. So far, then, as this is the case, equability or unequability may be regarded as properties belonging to the punishment itself.

IV.

An example of a mode of punishment which is apt to be unequable, is that of *banishment*, when the *locus a quo* (or place the party is banished from) is some determinate place appointed by the law, which perhaps the offender cares not whether he ever see or no. This is also the case with *pecuniary*, or *quasi-pecuniary* punishment, when it respects some particular species of property, which the offender may have been possessed of, or not, as it may happen. All these punishments may be split down into parcels, and measured out with the utmost nicety: being divisible by time, at least, if by nothing else. They are not, therefore, any of them defective in point of variability: and yet, in many cases, this defect in

* See ch. xii. [Consequences], par. 33.

point of equability may make them as unfit for use as if they were.*

v.

The third rule of proportion was, that where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less. Now, to be sufficient for this purpose, it must be evidently and uniformly greater: greater, not in the eyes of some men only, but of all men who are liable to be in a situation to take their choice between the two offences; that is, in effect, of all mankind. In other words, the two punishments must be perfectly *commensurable*. Hence arises a third property, which may be termed *commensurability:* to wit, with reference to other punishments.†

vi.

But punishments of different kinds are in very few instances uniformly greater one than another; especially when the lowest degrees of that which is ordinarily the greater, are compared with the highest degrees of that which is ordinarily the less: in other words, punishments of different kinds are in few instances uniformly commensurable. The only certain and universal means of making two lots of punishment perfectly commensurable, is by making the lesser an ingredient in the composition of the greater. This may be done in either of two ways. 1. By adding to the lesser punishment another quantity of punishment of the same kind. 2. By adding to it another quantity of a different kind. The latter mode is not less certain than the former; for though one cannot always be absolutely sure, that to the same person a given punishment will appear greater than another given punishment; yet one may be always absolutely sure, that any given punishment, so as it does but come into contemplation, will appear greater than none at all.

vii.

Again: Punishment cannot act any farther than in as far as the idea of it, and of its connection with the offence, is present in the mind. The idea of it, if not present, cannot act at all; and then the punishment itself must be *inefficacious*. Now, to be present, it must be remembered, and to be remembered it must have been learnt. But of all punishments that can be imagined, there are none of which the connection with the offence is either so easily learnt, or so efficaciously remembered, as those of which the idea is already in part associated with some part of the idea of the offence; which is the case when the one and the other have some circumstance that belongs to them in common. When this is the case with a punishment and an offence, the punishment is said to bear an *analogy* to, or to be *characteristic* of, the offence.‡ *Characteristicalness* is, therefore, a fourth property, which on this account ought to be given, whenever it can conveniently be given, to a lot of punishment.

viii.

It is obvious, that the effect of this contrivance will be the greater, as the analogy is the closer. The analogy will be the closer, the more *material*‖ that circumstance is, which is in common. Now, the most material circumstance that can belong to an offence and a punishment in common, is the hurt or damage which they produce. The closest analogy, therefore, that can subsist between an offence and the punishment annexed to it, is that which subsists between them when the hurt or damage they produce is of the same nature: in other words, that which is constituted by the circumstance of identity in point of damage.§ Accordingly, the mode of punishment, which of all others bears the closest analogy to the offence, is that which in the proper and exact sense of the word is termed *retaliation*. Retaliation, therefore, in the few cases in which it is practicable, and not too expensive, will have one great advantage over every other mode of punishment.

ix.

Again: It is the idea only of the punishment (or, in other words, the *apparent* punishment) that really acts upon the mind; the punishment itself (the *real* punishment) acts not any farther than as giving rise to that idea. It is the apparent punishment, therefore, that does all the service; I mean in the way of example, which is the principal object.¶ It is the real punishment that does all

* By the English law, there are several offences which are punished by a total forfeiture of moveables, not extending to immoveables. This is the case with suicide, and with certain species of theft and homicide. In some cases, this is the principal punishment: in others, even the only one. The consequence is, that if a man's fortune happens to consist in moveables, he is ruined; if in immoveables, he suffers nothing.

† See *View of the Hard-Labour Bill.* Lond. 1778, p. 100.

For the idea of this property, I must acknowledge myself indebted to an anonymous letter in the St. James's Chronicle, of the 27th of September 1777; the author of which is totally unknown to me. If any one should be disposed to think lightly of the instruction, on account of the channel by which it was first communicated, let him tell me where I can find an idea more ingenious or original.

‡ See Montesq. Esp. des Loix. L. xii. ch. iv. He seems to have the property of characteristicalness in view: but that the idea he had of it was very indistinct, appears from the extravagant advantages he attributes to it.

‖ See ch. vii. [Actions], par. 3.

§ Besides this, there are a variety of other ways in which the punishment may bear an analogy to the offence. This will be seen by looking over the table of punishments.

¶ See ch. xv. [Cases unmeet], § 1, 2, note.

the mischief.* Now the ordinary and obvious way of increasing the magnitude of the apparent punishment, is by increasing the magnitude of the real. The apparent magnitude, however, may to a certain degree be increased by other less expensive means: whenever, therefore, at the same time that these less expensive means would have answered that purpose, an additional real punishment is employed, this additional real punishment is *needless*. As to these less expensive means, they consist, 1. In the choice of a particular mode of punishment; a punishment of a particular quality, independent of the quantity.† 2. In a particular set of *solemnities* distinct from the punishment itself, and accompanying the execution of it.‡

X.

A mode of punishment, according as the appearance of it bears a greater proportion to the reality, may be said to be the more *exemplary*. Now, as to what concerns the choice of the punishment itself, there is not any means by which a given quantity of punishment can be rendered more exemplary, than by choosing it of such a sort as shall bear an *analogy* to the offence. Hence, another reason for rendering the punishment analogous to, or in other words characteristic of, the offence.

XI.

Punishment, it is still to be remembered, is in itself an expense: it is in itself an evil.‖ Accordingly, the fifth rule of proportion is, not to produce more of it than what is demanded by the other rules. But this is the case as often as any particle of pain is produced, which contributes nothing to the effect proposed. Now, if any mode of punishment is more apt than another to produce any such superfluous and needless pain, it may be styled *unfrugal;* if less, it may be styled *frugal. Frugality*, therefore, is a sixth property to be wished for in a mode of punishment.

XII.

The perfection of frugality, in a mode of punishment, is where not only no superfluous pain is produced on the part of the person punished, but even that same operation, by which he is subjected to pain, is made to answer the purpose of producing pleasure on the part of some other person. Understand a profit or stock of pleasure of the self-regarding kind; for a pleasure of the dissocial kind is produced almost, of course, on the part of all persons in whose breasts the offence has excited the sentiment of ill-will. Now, this is the case with pecuniary punishment, as also with such punishments of the *quasi-pecuniary* kind as consist in the subtraction of such a species of possession as is tranferable from one party to another. The pleasure, indeed, produced by such an operation, is not in general equal to the pain:§ it may, however, be so in particular circumstances, as where he, from whom the thing is taken, is very rich, and he, to whom it is given, very poor; and, be it what it will, it is always so much more than can be produced by any other mode of punishment.

XIII.

The properties of exemplarity and frugality seem to pursue the same immediate end, though by different courses. Both are occupied in diminishing the ratio of the real suffering to the apparent: but exemplarity tends to increase the apparent: frugality to reduce the real.

XIV.

Thus much concerning the properties to be given to punishments in general, to whatsoever offences they are to be applied. Those which follow are of less importance, either as referring only to certain offences in particular, or depending upon the influence of transitory and local circumstances.

In the first place, the four distinct ends into which the main and general end of punishment is divisible,§ may give rise to so many distinct properties, according as any particular mode of punishment appears to be more particularly adapted to the compassing of one or of another of those ends. To that of *example*, as being the principal one, a particular property has already been adapted. There remain the three inferior ones of *reformation*, *disablement*, and *compensation*.

XV.

A seventh property, therefore, to be wished for in a mode of punishment, is that of *subserviency to reformation*, or *reforming tendency*. Now any punishment is subservient to reformation, in proportion to its *quantity:* since the greater the punishment a man has experienced, the stronger is the tendency it has to create in him an aversion towards the offence which was the cause of it; and that with respect to all offences alike. But there are certain punishments which, with regard to certain offences, have a particular tendency to produce that effect by reason of their *quality:* and where this is the case, the punishments in question, as applied to the offences in question, will *pro tanto* have the advantage over all others. This influence will depend upon the nature of the motive which is the cause of the offence: the punishment, most subservient to reformation, will be the sort of punishment that is best calculated to invalidate the force of that motive.

XVI.

Thus, in offences originating from the mo-

* See ch. xv. [Cases unmeet], § 4, par. 3.
† See B. I. tit [Punishments.]
‡ See B. II. tit. [Execution.]
‖ Ch. xv. [Cases unmeet], par. 2.

§ See ch. xv. [Cases unmeet], par. 2, note.

tive of ill-will,* that punishment has the strongest reforming tendency, which is best calculated to weaken the force of the irascible affections; and more particularly, in that sort of offence which consists in an obstinate refusal, on the part of the offender, to do something which is lawfully required of him,† and in which the obstinacy is in great measure kept up by his resentment against those who have an interest in forcing him to compliance, the most efficacious punishment seems to be that of confinement to spare diet.

XVII.

Thus, also, in offences which owe their birth to the joint influence of indolence and pecuniary interest, that punishment seems to possess the strongest reforming tendency, which is best calculated to weaken the force of the former of those dispositions. And more particularly, in the cases of theft, embezzlement, and every species of defraudment, the mode of punishment best adapted to this purpose seems, in most cases, to be that of penal labour.

XVIII.

An eighth property to be given to a lot of punishment in certain cases, is that of *efficacy with respect to disablement*, or, as it might be styled more briefly, *disabling efficacy*. This is a property which may be given in perfection to a lot of punishment; and that with much greater certainty than the property of subserviency to reformation. The inconvenience is, that this property is apt, in general, to run counter to that of frugality: there being, in most cases, no certain way of disabling a man from doing mischief, without, at the same time, disabling him, in a great measure, from doing good, either to himself or others. The mischief, therefore, of the offence must be so great as to demand a very considerable lot of punishment, for the purpose of example, before it can warrant the application of a punishment equal to that which is necessary for the purpose of disablement.

XIX.

The punishment, of which the efficacy in this way is the greatest, is evidently that of death. In this case the efficacy of it is certain. This accordingly is the punishment peculiarly adapted to those cases in which the name of the offender, so long as he lives, may be sufficient to keep a whole nation in a flame. This will now and then be the case with competitors for the sovereignty, and leaders of the factions in civil wars: though, when applied to offences of so questionable a nature, in which the question concerning criminality turns more upon success than any thing else; an infliction of this sort may seem to savour more of hostility than punishment. At the same time this punishment, it is evident, is in an eminent degree *unfrugal;* which forms one among the many objections there are against the use of it, in any but very extraordinary cases.‡

XX.

In ordinary cases the purpose may be sufficiently answered by one or other of the various kinds of confinement and banishment: of which, imprisonment is the most strict and efficacious. For when an offence is so circumstanced that it cannot be committed but in a certain place, as is the case, for the most part, with offences against the person, all the law has to do, in order to disable the offender from committing it, is to prevent his being in that place. In any of the offences which consist in the breach or the abuse of any kind of trust, the purpose may be compassed at a still cheaper rate, merely by forfeiture of the trust: and in general, in any of those offences which can only be committed under favour of some relation in which the offender stands with reference to any person, or sets of persons, merely by forfeiture of that relation: that is, of the right of continuing to reap the advantages belonging to it. This is the case, for instance, with any of those offences which consist in an abuse of the privileges of marriage, or of the liberty of carrying on any lucrative or other occupation.

XXI.

The *ninth* property is that of *subserviency to compensation.* This property of punishment, if it be *vindictive* compensation that is in view, will, with little variation, be in proportion to the quantity: if *lucrative*, it is the peculiar and characteristic property of pecuniary punishment.

XXII.

In the rear of all these properties may be introduced that of *popularity;* a very fleeting and indeterminate kind of property, which may belong to a lot of punishment one moment, and be lost by it the next. By popularity is meant the property of being acceptable, or rather not unacceptable, to the bulk of the people, among whom it is proposed to be established. In strictness of speech, it should rather be called *absence of unpopularity;* for it cannot be expected, in regard to such a matter as punishment, that any species or lot of it should be positively acceptable and grateful to the people: it is sufficient, for the most part, if they have no decided aversion to the thoughts of it. Now the property of characteristicalness, above noticed, seems to go as far towards conciliating the approbation of the people to a mode of punishment, as any; insomuch that popularity may be regarded as a kind of secondary quality, depending upon that of characteristicalness.‖

* See ch. x. [Motives.]

† See B. I. tit. [Offences against Justice.]

‡ See B. I tit. [Punishments.]

‖ The property of characteristicalness, therefore, is useful in a mode of punishment in three

The use of inserting this property in the catalogue, is chiefly to make it serve by way of memento to the legislator, not to introduce, without a cogent necessity, any mode or lot of punishment, towards which he happens to perceive any violent aversion entertained by the body of the people.

XXIII.

The effects of unpopularity in a mode of punishment are analogous to those of unfrugality. The unnecessary pain which denominates a punishment unfrugal, is most apt to be that which is produced on the part of the offender. A portion of superfluous pain is in like manner produced when the punishment is unpopular: but in this case it is produced on the part of persons altogether innocent, the people at large. This is already one mischief; and another is, the weakness which it is apt to introduce into the law. When the people are satisfied with the law, they voluntarily lend their assistance in the execution: when they are dissatisfied, they will naturally withhold that assistance; it is well if they do not take a positive part in raising impediments. This contributes greatly to the uncertainty of the punishment; by which, in the first instance, the frequency of the offence receives an increase. In process of time, that deficiency, as usual, is apt to draw on an increase in magnitude: an addition of a certain quantity which otherwise would be *needless*.*

XXIV.

This property, it is to be observed, necessarily supposes, on the part of the people, some prejudice or other, which it is the business of the legislator to endeavour to correct. For if the aversion to the punishment in question were grounded on the principle of utility, the punishment would be such as, on other accounts, ought not to be employed: in which case its popularity or unpopularity would never be worth drawing into question. It is properly, therefore, a property not so much of the punishment as of the people: a disposition to entertain an unreasonable dislike against an object which merits their approbation. It is the sign also of another property; to wit, indolence or weakness, on the part of the legislator: in suffering the people, for the want of some instruction, which ought to be and might be given them, to quarrel with their own interest. Be this as it may, so long as any such dissatisfaction subsists, it behoves the legislator to have an eye to it, as much as if it were ever so well grounded. Every nation is liable to have its prejudices and its caprices, which it is the business of the legislator to look out for, to study, and to cure.†

XXV.

The eleventh and last of all the properties that seem to be requisite in a lot of punishment, is that of *remissibility*.‡ The general presumption is, that when punishment is applied, punishment is needful: that it ought to be applied, and therefore cannot want to be *remitted*. But in very particular, and those always very deplorable cases, it may by accident happen otherwise. It may happen that punishment shall have been inflicted, where, according to the intention of the law itself, it ought not to have been inflicted: that is, where the sufferer is innocent of the offence. At the time of the sentence passed he appeared guilty: but since then, accident has brought his innocence to light. This being the case, so much of the destined punishment as he has suffered already, there is no help for. The business is then to free him from as much as is yet to come. But *is* there any yet to come? There is very little chance of their being any, unless it be so much as consists of *chronical* punishment: such as imprisonment, banishment, penal labour, and the like. So much as consists in *acute* punishment, to wit, where the penal process itself is over presently, however permanent the punishment may be in its effects, may be considered as *ir*remissible. This is the case, for example, with whipping, branding, mutilation, and capital punishment. The most perfectly irremissible of any is capital punishment. For though other punishments cannot, when they are over, be remitted, they may be compensated for; and although the unfortunate victim cannot be put into the same condition, yet possibly means may be found of putting him into as good a condition as he would have been in if he had never suffered. This may in general be done very effectually where the punishment has been no other than pecuniary.

There is another case in which the property of remissibility may appear to be of use: this is, where, although the offender has been justly punished, yet on account of some good behaviour of his, displayed at a time subsequent to that of the commencement of the punishment, it may seem expedient to remit a part of it. But this it can scarcely be, if the proportion of the punishment is, in other respects, what it ought to be. The purpose of example is the more important object, in comparison of that of reformation.‖ It is not

different ways: 1. It renders a mode of punishment, before infliction, more easy to be borne in mind: 2. It enables it, especially after infliction, to make the stronger impression, when it is there; that is, renders it the more *exemplary*: 3. It tends to render it more acceptable to the people, that is, it renders it the more *popular*.

* See ch. xv. [Cases unmeet], § v.

† See ch. xv. [Cases unmeet], § iv. par. 4.

‡ See View of the Hard Labour Bill, p. 109.

‖ See ch. xv. [Cases unmeet], par. 2, note.

very likely, that less punishment should be required for the former purpose than for the latter. For it must be rather an extraordinary case, if a punishment, which is sufficient to deter a man who has only thought of it for a few moments, should not be sufficient to deter a man who has been feeling it all the time. Whatever, then, is required for the purpose of example, must abide at all events: it is not any reformation on the part of the offender that can warrant the remitting of any part of it: if it could, a man would have nothing to do but to reform immediately, and so free himself from the greatest part of that punishment which was deemed necessary. In order, then, to warrant the remitting of any part of a punishment upon this ground, it must first be supposed that the punishment at first appointed was more than was necessary for the purpose of example, and consequently that a part of it was *needless* upon the whole. This, indeed, is apt enough to be the case, under the imperfect systems that are as yet on foot: and therefore, during the continuance of those systems, the property of remissibility may, on this second ground likewise, as well as on the former, be deemed a useful one. But this would not be the case in any new-constructed system, in which the rules of proportion above laid down should be observed. In such a system, therefore, the utility of this property would rest solely on the former ground.

XXVI.

Upon taking a survey of the various possible modes of punishment, it will appear evidently, that there is not any one of them that possesses all the above properties in perfection. To do the best that can be done in the way of punishment, it will therefore be necessary, upon most occasions, to compound them, and make them into complex lots, each consisting of a number of different modes of punishment put together: the nature and proportions of the constituent parts of each lot being different, according to the nature of the offence which it is designed to combat.

XXVII.

It may not be amiss to bring together, and exhibit in one view, the eleven properties above established. They are as follows: —

Two of them are concerned in establishing a proper proportion between a single offence and its punishment; viz.

1. Variability.
2. Equability.

One, in establishing a proportion between more offences than one, and more punishments than one; viz.

3. Commensurability.

A fourth contributes to place the punishment in that situation in which alone it can be efficacious; and at the same time to be bestowing on it the two farther properties of exemplarity and popularity; viz.

4. Characteristicalness.

Two others are concerned in excluding all useless punishment; the one indirectly, by heightening the efficacy of what is useful; the other in a direct way; viz.

5. Exemplarity.
6. Frugality.

Three others contribute severally to the three inferior ends of punishment; viz.

7. Subserviency to reformation.
8. Efficacy in disabling.
9. Subserviency to compensation.

Another property tends to exclude a collateral mischief, which a particular mode of punishment is liable accidentally to produce; viz.

10. Popularity.

The remaining property tends to palliate a mischief, which all punishment, as such, is liable accidentally to produce; viz.

11. Remissibility.

The properties of commensurability, characteristicalness, exemplarity, subserviency to reformation, and efficacy in disabling, are more particularly calculated to augment the *profit* which is to be made by punishment: frugality, subserviency to compensation, popularity, and remissibility, to diminish the *expense:* variability and equability are alike subservient to both those purposes.

XXVIII.

We now come to take a general survey of the system of *offences;* that is, of such *acts* to which, on account of the mischievous *consequences* they have a *natural* tendency to produce, and in the view of putting a stop to those consequences, it may be proper to annex a certain *artificial* consequence, consisting of punishment, to be inflicted on the authors of such acts, according to the principles just established.

CHAPTER XVIII.

§ 1. *Classes of Offences.*

I.

*IT is necessary, at the outset, to make a distinction between such acts as *are* or *may* be, and such as *ought* to be offences. Any act

* This chapter is an attempt to put our ideas of offences into an exact method. The particular uses of *method* are various: but the general one is, to enable men to understand the things that are the subjects of it. To understand a thing, is to be acquainted with its qualities or properties. Of these properties, some are common to it with other things; the rest, peculiar. But the qualities which are peculiar to any one sort of thing are few indeed, in comparison with those which are common to it with other things. To make it known in respect of its *difference*, would therefore be doing little, unless it were

may be an offence, which they whom the community are in the habit of obeying shall be pleased to make one: that is, any act which they shall be pleased to prohibit or to punish. But, upon the principle of utility, such acts alone *ought* to be made offences, as the good of the community requires should be made so.

II.

The good of the community cannot require, that any act should be made an offence, which is not liable, in some way or other, to be detrimental to the community. For in the case of such an act, all punishment is *groundless*.*

III.

But if the whole assemblage of any number of individuals be considered as constituting an imaginary compound *body*, a community or political state; any act that is detrimental to any one or more of those *members* is, as to so much of its effects, detrimental to the *state*.

IV.

An act cannot be detrimental to a *state*, but by being detrimental to some one or more of the *individuals* that compose it. But these individuals may either be *assignable*† or *unassignable*.

V

When there is any assignable individual to whom an offence is detrimental, that person may either be a person *other* than the offender, or the offender *himself*.

VI.

Offences that are detrimental, in the first instance, to assignable persons other than the offender, may be termed by one common name, *offences against individuals*. And of these may be composed the 1st class of offences. To contrast them with offences of the 2d and 4th classes, it may also sometimes be convenient to style them *private* offences. To contrast them at the same time with offences of the 3d class, they may be styled *private extra-regarding* offences.

VII.

When it appears, in general, that there are persons to whom the act in question may be detrimental, but such persons cannot be individually assigned, the circle within which it appears that they may be found, is either of less extent than that which comprises the whole community, or not. If of less, the persons comprised within this lesser circle may be considered for this purpose as composing a body of themselves; comprised within, but distinguishable from, the greater body of the whole community. The circumstance that constitutes the union between the members of this lesser body, may be either their residence within a particular place, or, in short, any other less explicit principle of union, which may serve to distinguish them from the remaining members of the community. In the first case, the act may be styled an *offence against a neighbourhood:* in the second, an offence against a particular *class* of persons in the community. Offences, then, against a class or neighbourhood, may, together, constitute the 2d class of offences.* To

made known also by its *genus*. To understand it perfectly, a man must therefore be informed of the points in which it agrees, as well as of those in which it disagrees, with all other things. When a number of objects, composing a logical whole, are to be considered together, all of these possessing with respect to one another a certain congruency or agreement denoted by a certain name, there is but one way of giving a perfect knowledge of their nature; and that is, by distributing them into a system of parcels, each of them a part, either of some other parcel, or, at any rate, of the common whole. This can only be done in the way of *bipartition*, dividing each superior branch into two, and but two, immediately subordinate ones; beginning with the logical whole, dividing that into two parts, then each of those parts into two others; and so on. These first-distinguished parts agree in respect of those properties which belong to the whole: they differ in respect of those properties which are peculiar to each. To divide the whole into more than two parcels at once, for example into three, would not answer the purpose; for, in fact, it is but two objects that the mind can compare together exactly at the same time. Thus, then, let us endeavour to deal with offences; or rather, strictly speaking, with acts which possess such properties as seem to indicate them fit to be constituted offences. The task is arduous; and, as *yet* at least, perhaps *for ever*, above our force. There is no speaking of objects but by their names: but the business of giving them names has always been prior to the true and perfect knowledge of their natures. Objects the most dissimilar have been spoken of and treated as if their properties were the same. Objects the most similar have been spoken of and treated as if they had scarce any thing in common. Whatever discoveries may be made concerning them, how different soever their real congruencies and disagreements may be found to be from those which are indicated by their names, it is not without the utmost difficulty that any means can be found out of expressing those discoveries by other more apposite denominations. Change the import of the old names, and you are in perpetual danger of being misunderstood: introduce an entire new set of names, and you are sure not to be understood at all. Complete success, then, is, as yet at least, unattainable. But an attempt, though imperfect, may have its use: and, at the worst, it may accelerate the arrival of that perfect system, the possession of which will be the happiness of some maturer age. Gross ignorance descries no difficulties; imperfect knowledge finds them out, and struggles with them: it must be perfect knowledge that overcomes them.

* See ch. xv. [Cases unmeet] § 2, par. 1.

† [Assignable.] That is, either by name, or at least by description, in such manner as to be sufficiently distinguished from all others; for instance, by the circumstance of being the owner or occupier of such and such goods. See B. I. tit. [Personation.] *Supra*, ch. xii. [Consequences] par. 15.

‡ With regard to offences against a class or neighbourhood, it is evident, that the fewer the individuals are, of which such class is composed,

contrast them with private offences on the one hand, and public on the other, they may also be styled *semi-public* offences.

VIII.

Offences, which in the first instance are detrimental to the offender himself, and to no one else, unless it be by their being detrimental to himself, may serve to compose a third class. To contrast them the better with offences of the first, second, and fourth classes, all which are of a *transitive* nature, they might be styled *intransitive** offences; but still better, *self-regarding*.

IX.

The fourth class may be composed of such acts as ought to be made offences, on account of the distant mischief which they threaten to bring upon an unassignable indefinite multitude of the whole number of individuals, of which the community is composed; although no particular individual should appear more likely to be a sufferer by them than another. These may be called *public* offences, or offences against the *state*.

X.

A fifth class, or appendix, may be composed of such acts as, according to the circumstances in which they are committed, and more particularly according to the purposes to which they are applied, may be detrimental in any one of the ways in which the act of one man can be detrimental to another. These may be termed *multiform*, or *heterogeneous offences*.† Offences that are in this case may be reduced to two great heads: 1. Offences by *falsehood:* and, 2. Offences against *trust*.

and the narrower that neighbourhood is, the more likely are the persons, to whom the offence is detrimental, to become assignable: insomuch that, in some cases, it may be difficult to determine concerning a given offence, whether it be an offence against individuals, or against a class or neighbourhood. It is evident, also, that the larger the class or neighbourhood is, the more it approaches to a coincidence with the great body of the state. The three classes, therefore, are liable, to a certain degree, to run into one another, and be confounded. But this is no more than what is the case, more or less, with all those ideal compartments under which men are wont to distribute objects for the convenience of discourse.

* See ch. vii. [Actions] par. 13.

† 1. Offences by *falsehood:* 2. Offences against *trust*. See also par. 20 to 30, and 66. Maturer views have suggested the feasibility, and the means, of ridding the system of this anomalous excrescence. Instead of considering these as so many *divisions* of offences, divided into *genera*, correspondent and collateral to the several *genera* distinguished by other appellations, they may be considered as so many specific differences, respectively applicable to those *genera*. Thus, in the case of a *simple personal injury*, in the operation of which a plan of falsehood has been employed, it seems more simple and more natural to consider the offence thus committed as a particular *species* or *modification* of the *genus* of offence termed a *simple personal injury*, than to consider the simple personal injury, when effected by such means, as a modification of the *division* of offences entitled *Offences through falsehood*. By this means, the circumstances of the intervention of falsehood as an instrument, and of the existence of a particular obligation of the nature of a trust, will be reduced to a par with various other classes of circumstances capable of affording grounds of modification, commonly of *aggravation* or *extenuation*, to various genera of offences: instance, *premeditation* and *conspiracy*, on the one hand; *provocation received*, and *intoxication*, on the other. This class will appear, but too plainly, as a kind of botch in comparison of the rest. But such is the fate of science, and more particularly of the moral branch; the distribution of things must in a great measure be dependent on their names: arrangement, the work of mature reflection, must be ruled by nomenclature, the work of popular caprice.

In the book of the laws, offences must therefore be treated of, as much as possible, under their accustomed names. Generical terms, which are in continual use, and which express ideas for which there are no other terms in use, cannot safely be discarded. When any such occur, which cannot be brought to quadrate with such a plan of classification as appears to be most convenient upon the whole, what then is to be done? There seems to be but one thing, which is, to retain them, and annex them to the regular part of the system in the form of an appendix. Though they cannot, when entire, be made to rank under any of the classes established in the rest of the system, the divisions to which they give title may be broken down into lesser divisions, which may not be alike intractable. By this means, how discordant soever with the rest of the system they may appear to be at first sight, on a closer inspection they may be found conformable.

This must inevitably be the case with the names of offences, which are so various and universal in their nature, as to be capable, each of them, of doing whatever mischief can be done by any other kind or kinds of offences whatsoever. Offences of this description may well be called anomalous.

Such offences, it is plain, cannot but shew themselves equally intractable under every kind of system. Upon whatever principle the system be constructed, they cannot, any of them, with any degree of propriety, be confined to any one division. If, therefore, they constitute a blemish in the present system, it is such a blemish as could not be avoided but at the expense of a greater. The class they are here thrown into will traverse, in its subordinate ramifications, the other classes and divisions of the present system: true, but so would they of any other. An irregularity, and that but a superficial one, is a less evil than continual error and contradiction. But even this slight deviation, which the fashion of language seemed to render unavoidable at the outset, we shall soon find occasion to correct as we advance. For though the first great parcels into which the offences of this class are divided are not referable, any of them, to any of the former classes, yet the subsequent lesser subdivisions *are*.

§ 2. *Divisions and Sub-divisions.*

XI.

Let us see by what method these classes may be farther subdivided. First, then, with regard to offences against individuals.

In the present period of existence, a man's being and well being, his happiness and his security, in a word, his pleasures and his immunity from pains, are all dependant, more or less, in the first place, upon his *own person;* in the next place, upon the *exterior objects* that surround him. These objects are either *things*, or other *persons*. Under one or other of these classes must evidently be comprised every sort of exterior object, by means of which his interest can be affected. If, then, by means of any offence, a man should on any occasion become a sufferer, it must be in one or other of two ways: 1. *absolutely*, to wit, immediately in his own person; in which case the offence may be said to be an offence against his person: or, 2. *relatively*, by reason of some *material* relation* which the before-mentioned exterior objects may happen to bear, in the way of *causality* (See ch. VII. Actions, par. 24), to his happiness. Now in as far as a man is in a way to derive either happiness or security from any object which belongs to the class of *things*, such thing is said to be his *property*, or at least he is said to have a *property* or an *interest* therein: an offence, therefore, which tends to lessen the facility he might otherwise have of deriving happiness or security from an object which belongs to the class of things, may be styled an offence against his property. With regard to persons, in as far as, from objects of this class, a man is in a way to derive happiness or security, it is in virtue of their *services*. in virtue of some services, which, by one sort of inducement or another, they may be disposed to render him.‡ Now, then, take any man, by way of example, and the disposition, whatever it may be, which he may be in to render you service, either has no other connection to give birth or support to it, than the general one which binds him to the whole species, or it has some other connection more particular. In the latter case, such a connection may be spoken of as constituting, in your favour, a kind of fictitious or incorporeal object of property, which is styled your *condition*. An offence, therefore, the tendency of which is to lessen the facility you might otherwise have of deriving happiness from the services of a person thus specially connected with you, may be styled an offence against your condition in life, or simply against your condition. Conditions in life must evidently be as various as the relations by which they are constituted. This will be seen more particularly farther on. In the mean time, those of husband, wife, parent, child, master, servant, citizen of such or such a city, natural-born subject of such or such a country, may answer the purpose of examples.

Where there is no such particular connection, or (what comes to the same thing) where the disposition, whatever it may be, which a man is in to render you service, is not considered as depending upon such connection, but simply upon the good-will he bears to you; in such case, in order to express what chance you have of deriving a benefit from his services, a kind of fictitious object of property is spoken of, as being constituted in your favour, and is called your *reputation*. An offence, therefore, the tendency of which is to lessen the facility you might otherwise have had of deriving happiness or security from the services of persons at large, whether connected with you or not by any special tie, may be styled an offence against your *reputation*. It appears, therefore, that if by any offence an individual becomes a sufferer, it must be in one or other of the four points above mentioned; viz. his person, his property, his condition in life, or his reputation. These sources of distinction,

* See ch. vii. [Actions] par. 3 and 24.

If, by reason of the word *relation*, this part of the division should appear obscure, the unknown term may be got rid of in the following manner. Our ideas are derived, all of them, from the senses; pleasurable and painful ones, therefore, among the rest: consequently, from the operation of sensible objects upon our senses. A man's happiness, then, may be said to depend more or less upon the *relation* he bears to any sensible object, when such subject is in a way that stands a chance, greater or less, of producing to him, or averting from him, pain or pleasure. Now this, if at all, it must do in one or other of two ways: 1. In an *active* way, properly so called; viz. by motion: or, 2. In a *passive* or quiescent way, by being moved to, or acted upon: and in either case, either, 1. in an *immediate* way, by acting upon, or being acted on by, the organs of sense, without the intervention of any other external object: or, 2. in a more or less *remote* way, by acting upon, or being acted on by, some other external object, which (with the intervention of a greater or less number of such objects, and at the end of more or less considerable intervals of time) will come at length to act upon, or be acted upon by, those organs. And this is equally true, whether the external objects in question be things or persons. It is also equally true of pains and pleasures of the mind; as of those of the body: all the difference is, that in the production of these, the pleasure or pain may result immediately from the perception which it accompanies: in the production of those of the mind, it cannot result from the action of an object of sense, any otherwise than by *association;* to wit, by means of some connexion which the perception has contracted with certain prior ones, lodged already in the memory.[a]

[a] See ch. v. [Pleasures and Pains] par. 15, 31. Ch. x. [Motives] par. 39, note.

‡ See ch. x. [Motives.]

then, may serve to form so many subordinate divisions. If any offences should be found to affect a person in more than one of these points at the same time, such offences may respectively be put under so many separate divisions; and such compound divisions may be subjoined to the preceding simple ones. The several divisions (simple and compound together) which are hereinafter established, stand as follows: 1. Offences against person. 2. Offences against reputation. 3. Offences against property. 4. Offences against condition. 5. Offences against person and property together. 6. Offences against person and reputation together.*

XII.

Next with regard to semi-public offences. Pain, considered with reference to the time of the act from which it is liable to issue, must, it is evident, be either present, past, or future. In as far as it is either present or past, it cannot be the result of any act which comes under the description of a semi-public offence: for if it be present or past, the individuals who experience, or who have experienced, it are *assignable*.† There remains that sort of mischief, which, if it ever come to exist at all, is as yet but future: mischief, thus circumstanced, takes the name of *danger*.‡ Now, then, when by means of the act of any person a whole neighbourhood, or other class of persons, are exposed to danger, this danger must either be *intentional* on his part, or *unintentional*.‖ If unintentional, such danger, when it is converted into actual mischief, takes the name of a *calamity:* offences, productive of such danger, may be styled *semi-public offences operating through calamity;* or, more briefly, *offences through calamity*. If the danger be intentional, insomuch that it might be produced, and might convert itself into actual mischief, without the concurrence of any calamity, it may be said to originate in *mere delinquency:* offences, then, which, without the concurrence of any calamity, tend to produce such danger as disturbs the security of a local, or other subordinate class of persons, may be styled *semi-public offences operating merely by delinquency*, or, more briefly, *offences of mere delinquency*.

XIII.

With regard to any farther sub-divisions, offences against calamity will depend upon the nature of the several calamities to which man, and the several things that are of use to him, stand exposed. These will be considered in another place.§

XIV.

Semi-public offences of mere delinquency will follow the method of division applied to offences against individuals. It will easily be conceived, that whatever pain or inconvenience any given individual may be made to suffer, to the danger of that pain or inconvenience may any number of individuals, assignable or not assignable, be exposed. Now there are four points or articles, as we have seen, in respect to which an individual may be made to suffer pain or inconvenience. If, then, with respect to any one of them, the connection of causes and effects is such, that to the danger of suffering in that article a number of persons, who individually are not assignable, may, by the delinquency of one person, be exposed, such article will form a ground of distinction, on which a particular sub-division of semi-public offences may be established: if, with respect to any such article, no such effect can take place, that ground of distinction will lie for the present unoccupied: ready, however, upon any change of circumstances, or in the manner of viewing the subject, to receive a correspondent subdivision of offences, if ever it should seem necessary that any such offences should be created.

XV.

We come next to self-regarding offences; or, more properly, to acts productive in the first instance of no other than a self-regarding mischief: acts which, if in any instance it be thought fit to constitute them offences, will come under the denomination of offences against one's self. This class will not for the present give us much trouble. For it is evident, that in whatever points a man is vulnerable by the hand of another, in the same points may he be conceived to be vulnerable by his own. Whatever divisions, therefore, will serve for the first class, the same will serve for this. As to the questions, What acts are productive of a mischief of this stamp? and, among such as *are*, which it may, and which it may not, be *worth while*¶ to treat

* Subsequent consideration has here suggested several alterations. The necessity of adding, to *property*, *power*, in the character of a distinguishable as well as valuable object or subject matter of possession, has presented itself to view: and in regard to the fictitious entity here termed *condition* (for shortness instead of saying *condition in life*), it has been observed to be a sort of composite object, compounded of *property*, *reputation*, *power*, and *right* to *services*. For this *composite* object the more proper place was therefore at the tail of the several *simple* ones.—*Note by the Editor, July* 1822.

† *Supra*, par. 4, note.

‡ See ch. xii. [Consequences.]

‖ See ch. viii. [Intentionality.]

§ See B. I. tit. [Semi-public Offences.] In the mean time, that of *pestilence* may serve as an example. A man, without any intention of giving birth to such a calamity, may expose a neighbourhood to the danger of it, by breaking *quarantine*, or violating any of those other preventive regulations which governments, at certain conjunctures, may find it expedient to have recourse to, for the purpose of guarding against such danger.

¶ See ch. xv. [Cases unmeet] § 4.

upon the footing of offences? these are points (the latter of which at least is) too unsettled, and too open to controversy, to be laid down with that degree of confidence which is implied in the exhibition of properties which are made use of as the groundwork of an arrangement. Properties for this purpose ought to be such as show themselves at first glance, and appear to belong to the subject beyond dispute.

XVI.

Public offences may be distributed under eleven divisions.* 1. Offences against *external* security. 2. Offences against *justice*. 3. Offences against the *preventive* branch of the *police*. 4. Offences against the public *force*. 5. Offences against the *positive* increase of the national *felicity*. 6. Offences against the public *wealth*. 7. Offences against *population*. 8. Offences against the *national wealth*. 9. Offences against the *sovereignty*. 10. Offences against *religion*. 11. Offences against the national *interest* in general. The way in which these several sorts of offences connect with one another, and with the interest of the public, that is, of an unassignable multitude of the individuals of which that body is composed, may be thus conceived.

XVII.

Mischief, by which the interest of the public, as above defined, may be affected, must, if produced at all, be produced either by means of an influence exerted on the operations of government, or by other means, without the exertion of such influence.† To begin with the latter case: mischief, be it what it will, and let it happen to whom it will, must be produced either by the unassisted powers of the agent in question, or by the instrumentality of some other agents. In the latter case, these agents will be either persons or things. Persons, again, must be either not members of the community in question, or members. Mischief produced by the instrumentality of persons, may accordingly be produced by the instrumentality either of *external* or of *internal* adversaries. Now when it is produced by the agent's own unassisted powers, or by the instrumentality of internal adversaries, or only by the instrumentality of things, it is seldom that it can show itself in any other shape (setting aside any influence it may exert on the operations of government) than either that of an offence against assignable individuals, or that of an offence against a local or other subordinate class of persons. If there should be a way in which mischief can be produced, by any of these means, to individuals altogether unassignable, it will scarcely be found conspicuous or important enough to occupy a title by itself: it may accordingly be referred to the miscellaneous head of *offences against the national interest in general*.‡ The only mischief, of any considerable account, which can be made to impend indiscriminately over the whole number of members in the community, is that complex kind of mischief which results from a state of war, and is produced by the instrumentality of external adversaries: by their being provoked, for instance, or invited, or encouraged to invasion. In this way may a man very well bring down a mischief, and that a very heavy one, upon the whole community in general, and that without taking a part in any of the injuries which came in consequence to be offered to particular individuals.

Next with regard to the mischief which

* In this part of the analysis, I have found it necessary to deviate in some degree from the rigid rules of the exhaustive method I set out with. By me, or by some one else, this method may, perhaps, be more strictly pursued at some maturer period of the science. At present, the benefit that might result from the unrelaxed observance of it, seemed so precarious, that I could not help doubting whether it would pay for the delay and trouble. Doubtless such a method is eminently instructive: but the fatigue of following it out is so great, not only to the author, but probably also to the reader, that if carried to its utmost length at the first attempt, it might perhaps do more disservice in the way of disgust, than service in the way of information. For knowledge, like physic, how salutary soever in itself, becomes no longer of any use, when made too unpalatable to be swallowed. Meantime, it cannot but be a mortifying circumstance to a writer, who is sensible of the importance of his subject, and anxious to do it justice, to find himself obliged to exhibit what he perceives to be faulty, with any view, how indistinct soever, of something more perfect before his eyes. If there be any thing new and original in this work it is to the exhaustive method, so often aimed at, that I am indebted for it. It will, therefore, be no great wonder if I should not be able to quit it without reluctance. On the other hand, the marks of stiffness which will doubtless be perceived in a multitude of places, are chiefly owing to a solicitous, and not perfectly successful, pursuit of this same method. New instruments are seldom handled at first with perfect ease.

† The idea of government, it may be observed, is introduced here without any preparation. The fact of its being established, I assume as notorious, and the necessity of it as alike obvious and incontestible. Observations indicating that necessity, if any such should be thought worth looking at in this view, may be found by turning to a passage in a former chapter, where they were incidentally adduced for the purpose of illustration. See ch. xii. [Consequences] par. 17.

‡ See *infra*, par. 54, note. Even this head, ample as it is, and vague as it may seem to be, will not, when examined by the principle of utility, serve, any more than another, to secrete any offence which has no title to be placed there. To show the pain or loss of pleasure which is likely to ensue, is a problem, which before a legislator can justify himself in adding the act to the catalogue of offences, he may in this case, as in every other, be called upon to solve.

an offence may bring upon the public by its influence on the operations of the government. This it may occasion either, 1. In a more immediate way, by its influence on those *operations* themselves: 2. In a more remote way, by its influence on the *instruments* by, or by the help of which those operations should be performed: or, 3. In a more remote way still, by its influence on the *sources* from whence such instruments are to be derived. First, then, as to the operations of government, the tendency of these, in as far as it is conformable to what on the principle of utility it ought to be, is in every case either to avert mischief from the community, or to make an addition to the sum of positive good.* Now mischief, we have seen, must come either from external adversaries, from internal adversaries, or from calamities. With regard to mischief from external adversaries, there requires no further division. As to mischief from internal adversaries, the expedients employed for averting it may be distinguished into such as may be applied *before* the discovery of any mischievous design in particular, and such as can not be employed but in consequence of the discovery of some such design: the former of these are commonly referred to a branch which may be styled the *preventive* branch of the *police:* the latter to that of justice.† Second. As to the *instruments* which government, whether in the averting of evil or in the producing of positive good, can have to work with, these must be either *persons* or *things*. Those which are destined to the particular function of guarding against mischief from adversaries in general, but more particularly from external adversaries,‡ may be distinguished from the rest under the collective appellation of the *public military force*, and, for conciseness sake, the *military force*. The rest may be characterised by the collective appellation of the *public wealth*. Thirdly. With regard to the sources or funds from whence these instruments, howsoever applied, must be derived, such of them as come under the denomination of *persons* must be taken out of the whole number of persons that are in the community, that is, out of the total *population* of the state; so that the greater the population, the greater may, *cæteris paribus*, be this branch of the public wealth; and the less, the less. In like manner, such as come under the denomination of *things* may be, and most of them commonly are, taken out of the sum total of those things which are the separate properties of the several members of the community: the sum of which properties may be termed *the national wealth*:‖ so that the

* For examples, see *infra*, par. 54, note. This branch of the business of government, a sort of work of supererogation, as it may be called, in the calendar of political duty, is comparatively but of recent date. It is not for this that the untutored many could have originally submitted themselves to the dominion of the few. It was the dread of evil, not the hope of good, that first cemented societies together. Necessaries come always before luxuries. The state of language marks the progress of ideas. Time out of mind, the military department has had a name: so has that of justice: the power which occupies itself in preventing mischief, not till lately, and that but a loose one, the police: for the power which takes for its object the introduction of positive good, no peculiar name, however inadequate, seems yet to have been devised.

† The functions of justice, and those of the police, must be apt, in many points, to run one into another: especially as the business would be very badly managed if the same persons, whose more particular duty it is to act as officers of the police, were not upon occasion to act in the capacity of officers of justice. The ideas, however, of the two functions may still be kept distinct: and I see not where the line of separation can be drawn, unless it be as above.

As to the word *police*, though of Greek extraction, it seems to be of French growth: it is from France, at least, that it has been imported into Great Britain, where it still retains its foreign garb: in Germany, if it did not originate there, it has at least been naturalized. Taken all together, the idea belonging to it seems to be too multifarious to be susceptible of any single definition. Want of words obliged me to reduce the two branches here specified into one. Who would have endured, in this place, to have seen two such words as the *phthano-paranomic* or *crime-preventing* and the *phthano-symphoric* or *calamity-preventing*, branches of the police? The inconvenience of uniting the two branches under the same denomination, are, however, the less, inasmuch as the operations requisite to be performed for the two purposes will in many cases be the same. Other functions, commonly referred to the head of police, may be referred either to the head of that power which occupies itself in promoting, in a positive way, the increase of the national felicity, or of that which employs itself in the management of the public wealth. See *infra*, par. 54, note.

‡ It is from abroad that those pernicious enterprises are most apt to originate, which come backed with a greater quantity of physical force than the persons who are, in a more particular sense, the officers of justice, are wont to have at their command. Mischief, the perpetration of which is ensured by a force of such magnitude, may therefore be looked upon in general as the work of *external* adversaries. Accordingly, when the persons by whom it is perpetrated, are in such force as to bid defiance to the ordinary efforts of justice, they loosen themselves from their original denomination, in proportion as they increase in force, till at length they are looked upon as being no longer members of the state, but as standing altogether upon a footing with external adversaries. Give force enough to robbery, and it swells into rebellion: give permanence enough to rebellion, and it settles into hostility.

‖ It must be confessed, that in common speech the distinction here established between the public wealth and the national wealth is but indifferently settled: nor is this to be wondered at; the ideas themselves, though here necessary to be distinguished, being so frequently convertible. But I am mistaken if the language will furnish any

greater the national wealth, the greater, *cæteris paribus*, may be this remaining branch of the public wealth; and the less, the less. It is here to be observed, that if the influence exerted on any occasion by an individual over the operations of the government be pernicious, it must be in one or other of two ways: 1. By causing, or tending to cause, operations *not* to be performed which *ought* to be performed; in other words, by *impeding the* operations of government: or, 2. By causing operations to *be* performed which ought *not* to be performed; in other words, by *misdirecting* them. Last, to the total assemblage of the persons by whom the several political operations above mentioned come to be performed, we set out with applying the collective appellation of *the government*. Among these persons there *commonly** is some one person, or body of persons, whose office it is to assign and distribute to the rest their several departments, to determine the conduct to be pursued by each in the performance of the particular set of operations that belongs to him, and even upon occasion to exercise his function in his stead. Where there is any such person, or body of persons, *he* or *it* may, according as the turn of the phrase requires, be termed *the sovereign*, or the *sovereignty*. Now it is evident, that to impede or misdirect the operations of the sovereign, as here described, may be to impede or misdirect the operations of the several departments of government, as described above.

From this analysis, by which the connection between the several above-mentioned heads of offences is exhibited, we may now collect a definition for each article. By *offences against external security*, we may understand such offences whereof the tendency is to bring upon the public a mischief resulting from the hostilities of foreign adversaries. By *offences against justices*, such offences whereof the tendency is to impede or misdirect the operations of that power, which is employed in the business of guarding the public against the mischiefs resulting from the delinquency of internal adversaries, as far as it is to be done by expedients, which do not come to be applied in any case till *after* the discovery of some particular design of the sort of those which they are calculated to prevent. By *offences against the preventive branch of the police*, such offences whereof the tendency is to impede or misdirect the operations of that power, which is employed in guarding against mischiefs resulting from the delinquency of internal adversaries, by expedients that come to be applied *before-hand*; or of that which is employed in guarding against the mischiefs that might be occasioned by physical calamities. By *offences against the public* force, such offences whereof the tendency is to impede or misdirect the operations of that power which is destined to guard the public from the mischiefs which may result from the hostility of foreign adversaries, and, in case of necessity, in the capacity of ministers of justice, from mischiefs of the number of those which result from the delinquency of internal adversaries. By *offences against the increase of the national felicity*, such offences whereof the tendency is to impede or misapply the operations of those powers that are employed in the conducting of various establishments, which are calculated to make, in so many different ways, a positive addition to the stock of public happiness. By *offences against the public wealth*, such offences whereof the tendency is to diminish the amount, or misdirect the application, of the money and other articles of wealth, which the government reserves as a fund, out of which the stock of instruments employed in the service above mentioned may be kept up. By *offences against population*, such offences whereof the tendency is to diminish the numbers, or impair the political value, of the sum total of the members of the community. By *offences against the national wealth*, such offences whereof the tendency is to diminish the quantity, or impair the value, of the things which compose the separate properties or estates of the several members of the community.

XVIII.

In this deduction, it may be asked, what place is left for *religion?* This we shall see presently. For combating the various kinds of offences above enumerated, that is, for combating all the offences (those not excepted which we are now about considering) which it is in man's nature to commit, the state has two great engines, *punishment* and *reward:* punishment, to be applied to all, and upon all ordinary occasions: reward, to be applied to a few, for particular purposes, and upon extraordinary occasions. But whether or no a man has done the act which renders him an object meet for punishment or reward, the eyes of those, whosoever they be, to whom the management of these engines is entrusted, cannot always see, nor, where it is punishment that is to be administered, can their hands be always sure to reach him. To supply these deficiencies in point of power, it is thought necessary, or at

other two words that would express the distinction better. Those in question will, I imagine, be allowed to be thus far well chosen, that if they were made to change their places, the import given to them would not appear to be quite so proper as that which is given to them as they stand at present.

* I should have been afraid to have said *necessarily*. In the United Provinces, in the Helvetic, or even in the Germanic body, where is that one assembly in which an absolute power over the whole resides? where was there in the Roman Commonwealth? I would not undertake for certain to find an answer to all these questions.

least *useful* (without which the *truth* of the doctrine would be nothing to the purpose), to inculcate into the minds of the people the belief of the existence of a power applicable to the same purposes, and not liable to the same deficiencies: the power of a supreme invisible being, to whom a disposition of contributing to the same ends to which the several institutions already mentioned are calculated to contribute, must for this purpose be ascribed. It is of course expected that this power will, at one time or other, be employed in the promoting of those ends: and to keep up and strengthen this expectation among men, is spoken of as being the employment of a kind of allegorical personage, feigned, as before,* for convenience of discourse, and styled *religion*. To diminish, then, or misapply the influence of religion, is *pro tanto* to diminish or misapply what power the state has of combating with effect any of the before enumerated kinds of offences; that is, all kinds of offences whatsoever. Acts that appear to have this tendency may be styled *offences against religion*. Of these, then, may be composed the tenth division of the class of offences against the state.†

XIX.

If there be any acts which appear liable to affect the state in any one or more of the above ways, by operating in prejudice of the external security of the state, or of its internal security; of the public force; of the increase of the national felicity; of the public wealth; of the national population; of the national wealth; of the sovereignty; or of religion; at the same time that it is not clear in which of all these ways they will affect it most, nor but that, according to contingencies, they may affect it in one of these ways only, or in another; such acts may be collected together under a miscellaneous division by themselves, and styled *offences against the national interest in general*. Of these, then, may be composed the eleventh and last division of the class of offences against the state.

XX.

We come now to class the fifth: consisting of *multiform* offences. These, as has been already intimated, are either offences by *falsehood*, or offences concerning *trust*. Under the head of offences by falsehood, may be comprehended, 1. Simple falsehoods. 2. Forgery. 3. Personation. 4. Perjury.‡ Let us observe in what particulars these four kinds of falsehood agree, and in what they differ.

XXI.

Offences by falsehood, however diversified in other particulars, have this in common, that they consist in some abuse of the faculty of discourse, or rather, as we shall see hereafter, of the faculty of influencing the sentiment of belief in other men,‖ whether by discourse or otherwise. The use of discourse is to influence belief, and that in such manner as to give other men to understand that things are as they are really. Falsehoods, of whatever kind they be, agree in this: that they give men to understand that things are otherwise than as in reality they are.

XXII.

Personation, forgery, and perjury, are each of them distinguished from other modes of uttering falsehood by certain special circum-

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* See par. 17, with regard to *justice*.

† It may be observed, that upon this occasion I consider religion in no other light, than in respect of the influence it may have on the happiness of the *present* life. As to the effects it may have in assuring us of and preparing us for a better life to come, this is a matter which comes not within the cognizance of the legislator. See tit. [Offences against Religion.]

I say offences against *religion*, the fictitious entity: not offences against God, the real being. For, what sort of pain should the act of a feeble mortal occasion to a being unsusceptible of pain? How should an offence affect him? Should it be an offence against his person, his property, his reputation, or his condition?

It has commonly been the way to put offences against religion foremost. The idea of precedence is naturally enough connected with that of reverence. *Ex* Διος αρχωμεσθα. But for expressing reverence, there are other methods enough that are less equivocal. And in point of method and perspicuity, it is evident, that with regard to offences against religion, neither the nature of the mischief which it is their tendency to produce, nor the reason there may be for punishing them, can be understood, but from the consideration of the several mischiefs which result from the several other sorts of offences. In a political view, it is only because those others are mischievous, that offences against religion are so too.

‡ This division of falsehoods, it is to be observed, is not regularly drawn out: that being what the nature of the case will not here admit of. Falsehood may be infinitely diversified in other ways than these. In a particular case, for instance, simple falsehood, when uttered by writing, is distinguished from the same falsehood when uttered by word of mouth; and has had a particular name given to it accordingly: I mean, where it strikes against reputation; in which case, the instrument it has been uttered by has been called a *libel*. Now it is obvious, that in the same manner it might have received a distinct name in all other cases where it is uttered by writing. But there has not happened to be any thing in particular that has disposed mankind in those cases to give it such a name. The case is, that among the infinity of circumstances by which it might have been diversified, those which constitute it a libel, happen to have engaged a peculiar share of attention on the part of the institutors of language; either in virtue of the influence which these circumstances have on the tendency of the act, or in virtue of any particular degree of force with which on any other account they may have disposed it to strike upon the imagination.

‖ See B. I. tit. [Falsehoods.]

stances. When a falsehood is not accompanied by any of those circumstances, it may be styled simple falsehood. These circumstances are, 1. The *form* in which the falsehood is uttered. 2. The circumstance of its relating or not to the identity of the *person* of him who utters it. 3. The solemnity of the *occasion* on which it is uttered.* The particular application of these distinctive characters may more commodiously be reserved for another place.†

XXIII.

We come now to the sub-divisions of offences by falsehood. These will bring us back into the regular track of analysis, pursued, without deviation, through the four preceding classes.

By whatever means a mischief is brought about, whether falsehood be or be not of the number, the individuals liable to be affected by it must either be assignable or unassignable. If assignable, there are but four material articles in respect to which they can be affected; to wit, their persons, their properties, their reputations, and their conditions in life. The case is the same, if, though unassignable, they are comprisable in any class subordinate to that which is composed of the whole number of members of the state. If the falsehood tend to the detriment of the whole state, it can only be by operating in one or other of the characters, which every act that is an offence against the state must assume; viz. that of an offence against external security, against justice, against the preventive branch of the police, against the public force, against the increase of the national felicity, against the public wealth, against the national population, against the national wealth, against the sovereignty of the state, or against its religion.

XXIV.

It is the common property, then, of the offences that belong to this division, to run over the same ground that is occupied by those of the preceding classes. But some of them, as we shall see, are apt, on various occasions, to drop or change the names which bring them under this division: this is chiefly the case with regard to simple falsehoods. Others retain their names unchanged; and even thereby supersede the names which would otherwise belong to the offences which they denominate: this is chiefly the case with regard to personation, forgery, and perjury. When this circumstance, then, the circumstance of falsehood, intervenes, in some cases the name which takes the lead, is that which indicates the offence by its effect; in other cases, it is that which indicates the expedient or instrument, as it were, by the help of which the offence is committed. Falsehood, take it by itself, consider it as not being accompanied by any other material circumstances, nor therefore productive of any material effects, can never, upon the principle of utility, constitute any offence at all. Combined with other circumstances, there is scarce any sort of pernicious effect which it may not be instrumental in producing. It is therefore rather in compliance with the laws of language, than in consideration of the nature of the things themselves, that falsehoods are made separate mention of under the name and in the character of distinct offences. All this would appear plain enough, if it were now a time for entering into particulars: but that is what cannot be done, consistently with any principle of order or convenience, until the inferior divisions of those other classes shall have been previously exhibited.

XXV.

We come now to offences against trust. A trust is, where there is any particular act which one party, in the exercise of some *power*, or some *right*,‡ which is conferred on

* There are two other circumstances still more material; viz. 1. The parties whose interest is affected by the falsehood. 2. The point or article in which that interest is affected. These circumstances, however, enter not into the composition of the generical character. Their use is, as we shall see, to characterize the several species of each genus. See B. I. tit. [Falsehoods.]

† Ibid.

‡ Powers, though not a species of rights (for the two sorts of fictitious entities, termed a *power* and a *right*, are altogether disparate), are yet so far included under rights, that wherever the word *power* may be employed, the word *right* may also be employed: The reason is, that wherever you may speak of a person as having a power, you may also speak of him as having a right to such power: but the converse of this proposition does not hold good: there are cases in which, though you may speak of a man as having a right, you can not speak of him as having a power, or in any other way make any mention of that word. On various occasions you have a *right*, for instance, to the services of the magistrate: but if you are a private person, you have no *power* over him: all the power is on his side. This being the case, as the word *right* was employed, the word *power* might, perhaps, without any deficiency in the sense, have been omitted. On the present occasion, however, as in speaking of trusts this word is commonly made more use of than the word *right*, it seemed most eligible, for the sake of perspicuity, to insert them both.

It may be expected that, since the word *trust* has been here expounded, the words *power* and *right*, upon the meaning of which the exposition of the word *trust* is made to depend, should be expounded also: and certain it is, that no two words can stand more in need of it than these do. Such exposition I accordingly set about to give, and indeed have actually drawn up: but the details into which I found it necessary to enter for this purpose, were of such length as to take up more room than could consistently be allotted to them in this place. With respect to these words, therefore, and a number of others,

him, is bound to perform for the benefit of another. Or, more fully, thus: A party is said to be invested with a trust, when, being invested with a *power*, or with a *right*, there is a certain behaviour which, in the exercise of that power, or of that right, he is bound to maintain for the benefit of some other party. In such case, the party first mentioned is styled a trustee: for the other party, no name has ever yet been found: for want of a name, there seems to be no other resource than to give a new and more extensive sense to the word *beneficiary*, or to say at length *the party to be benefited*.*

such as *possession*, *title*, and the like, which in point of import are inseparably connected with them, instead of exhibiting the exposition itself, I must content myself with giving a general idea of the plan which I have pursued in framing it: and as to every thing else, I must leave the import of them to rest upon whatever footing it may happen to stand upon in the apprehension of each reader. Power and right, and the whole tribe of fictitious entities of this stamp, are all of them, in the sense which belongs to them in a book of jurisprudence, the results of some manifestation or other of the legislator's will with respect to such or such an act. Now every such manifestation is either a prohibition, a command, or their respective negations; viz. a permission, and the declaration which the legislator makes of his will when on any occasion he leaves an act uncommanded. Now, to render the expression of the rule more concise, the commanding of a positive act may be represented by the prohibition of the negative act which is opposed to it. To know, then, how to expound a right, carry your eye to the act which, in the circumstances in question, would be a violation of that right: the law creates the right by prohibiting that act. Power, whether over a man's own person, or over other persons, or over things, is constituted in the first instance by permission: but in as far as the law takes an active part in corroborating it, it is created by prohibition, and by command: by prohibition of such acts (on the part of other persons) as are judged incompatible with the exercise of it; and upon occasion, by command of such acts as are judged to be necessary for the removal of such or such obstacles of the number of those which may occur to impede the exercise of it. For every right which the law confers on one party, whether that party be an individual, a subordinate class of individuals, or the public, it thereby imposes on some other party a *duty* or *obligation*. But there may be laws which command or prohibit acts, that is, impose duties, without any other view than the benefit of the agent: these generate no rights: duties, therefore, may be either *extra-regarding* or *self-regarding*: extra-regarding have rights to correspond to them: self-regarding, none.

That the exposition of the words *power* and *right* must, in order to be correct, enter into a great variety of details, may be presently made appear. One branch of the system of rights and powers, and but one, are those of which property is composed: to be correct, then, it must, among other things, be applicable to the whole tribe of modifications of which property is susceptible. But the commands and prohibitions, by which the *powers* and *rights* that compose those several modifications are created, are of many different forms: to comprise the exposition in question within the compass of a single paragraph, would therefore be impossible: to take as many paragraphs for it as would be necessary in order to exhibit these different forms, would be to engage in a detail so ample, that the analysis of the several possible species of property would compose only a part of it. This labour, uninviting as it was, I have accordingly undergone: but the result of it, as may well be

imagined, seemed too voluminous and minute to be exhibited in an outline like the present. Happily it is not necessary, except only for the scientific purpose of arrangement, to the understanding of any thing that need be said on the penal branch of the art of legislation. In a work which should treat of the civil branch of that art, it would find its proper place: and in such a work, if conducted upon the plan of the present one, it would be indispensable. Of the limits which seem to separate the one of these branches from the other, a pretty ample description will be found in the next chapter: from which some further lights respecting the course to be taken for developing the notions to be annexed to the words *right* and *power*, may incidentally be collected. See in particular, § 3 and 4. See also par. 55 of the present chapter.

I might have cut this matter very short, by proceeding in the usual strain, and saying, that a power was a faculty, and that a right was a privilege, and so on, following the beaten track of definition. But the inanity of such a method, in cases like the present, has been already pointed out:[a] a power is not a—any thing: neither is a right a—any thing: the case is, they have neither of them any superior genus: these, together with *duty*, *obligation*, and a multitude of others of the same stamp, being of the number of those fictitious entities, of which the import can by no other means be illustrated than by showing the relation which they bear to real ones.

* The first of these parties is styled, in the law language, as well as in common speech, by the name here given to him. The other is styled, in the technical language of the English law, a *cestuy que trust*: in common speech, as we have observed, there is, unfortunately, no name for him. As to the law phrase, it is antiquated French, and though complex, it is still elliptical, and to the highest degree obscure. The phrase in full length would run in some such manner as this: *cestuy* al use de qui le trust est créé: he to whose use the trust or benefit is created. In a particular case, a *cestuy que trust* is called by the Roman law, *fidei-commissarius*. In imitation of this, I have seen him somewhere or other called in English a *fide-committee*. This term, however, seems not very expressive. A fide-committee, or, as it should have been, a *fidei*-committee, seems, literally speaking, to mean one who is committed to the good faith of another. Good faith seems to consist in the keeping of a promise. But a trust may be created without any promise in the case. It is indeed common enough to exact a promise, in order the more effectually to oblige a man to do that which he is made to promise he will do:

[a] See Fragmen on Government, ch. v. § 6, note.

The trustee is also said to have a trust *conferred* or *imposed* upon him, to be *invested* with a trust, to have had a trust given him to execute, to perform, to discharge, or to fulfil. The party to be benefited, is said to have a trust established or created in his favour; and so on through a variety of other phrases.

XXVI.

Now it may occur, that a *trust* is oftentimes spoken of as a species of *condition*: * that a trust is also spoken of as a species of *property*: and that a condition itself is also spoken of in the same light. It may be thought, therefore, that in the first class, the division of offences against condition should have been included under that of the offences against property: and that at any rate, so much of the fifth class now before us as contains offences against trust, should have been included under one or other of those two divisions of the first class. But upon examination it will appear, that no one of these divisions could with convenience, nor even perhaps with propriety, have been included under either of the other two. It will appear at the same time, that there is an intimate connection subsisting amongst them all: insomuch that of the lists of the offences to which they are respectively exposed, any one may serve in great measure as a model for any other. There are certain offences to which all trusts as such are exposed: to all these offences every sort of condition will be found exposed: at the same time that particular species of the offences against trust will, upon their application to particular conditions, receive different particular denominations. It will appear also, that of the two groups of offences into which the list of those against trust will be found naturally to divide itself, there is one, and but one, to which property, taken in its proper and more confined sense, stands exposed: and that these, in their application to the subject of property, will be found susceptible of distinct modifications, to which the usage of language, and the occasion there is for distinguishing them in point of treatment, make it necessary to find names.

In the first place, as there are, or at least may be (as we shall see) conditions which are not trusts,* so there are trusts of which the idea would not be readily and naturally understood to be included under the word *condition*: add to which, that of those conditions which do include a trust, the greater number include other ingredients along with it: so that the idea of a condition, if, on the one hand, it stretches beyond the idea of a trust, does, on the other hand, fall short of it. Of the several sorts of trusts, by far the most important are those in which it is the public that stands in the relation of *beneficiary*. Now these trusts, it should seem, would hardly present themselves at first view upon the mention of the word *condition*. At any rate, what is more material, the most important of the offences against these kinds of trust would not seem to be included under the denomination of offences against condition. The offences which by this latter appellation would be brought to view, would be such only as seemed to affect the interests of an individual: of him, for example, who is considered as being invested with that condition. But in offences against public trust, it is the influence they have on the interests of the public that constitutes by much the most material part of their pernicious tendency: the influence they have on the interests of any individual, the only part of their influence which would be readily brought to view by the appellation of offences against condition, is comparatively as nothing. The word trust directs the attention at once to the interests of that party for whom the person in question is trustee: which party, upon the addition of the epithet public, is immediately understood to be the body composed of the whole assemblage, or an indefinite portion of the whole assemblage of the members of the state. The idea presented by the words *public trust*, is clear and unambiguous: it is but an obscure and ambiguous garb that that idea could be expressed in by the words *public*

but this is merely an accidental circumstance; a trust may be created without any such thing. What is it that constitutes a legal obligation in any case? A command, express or virtual, together with punishment appointed for the breach of it. By the same means may an obligation be constituted in this case as well as any other. Instead of the word *beneficiary*, which I found it necessary to adopt, the sense would be better expressed by some such word as *beneficiendary* (a word analogous in its formation to *referendary*), were it such an one as the ear could bring itself to endure. This would put it more effectually out of doubt, that the party meant was the party who *ought* to receive the benefit, whether he actually receives it or no: whereas the word *beneficiary* might be understood to intimate that the benefit was *actually* received: while in offences against trust, the mischief commonly is, that such benefit is reaped, not by the person it was designed for, but by some other: for instance, the trustee.

* It is for shortness sake that the proposition is stated as it stands in the text. If critically examined, it might be found, perhaps, to be scarcely justifiable by the laws of language. For the fictitious entities, characterised by the two abstract terms, *trust* and *condition*, are not subalternate but disparate. To speak with perfect precision, we should say that he who is invested with a trust, is, on that account, spoken of as being invested with a condition; viz. the condition of a trustee. We speak of the condition of a trustee, as we speak of the condition of a husband or a father.

† *Infra*, par. 55.

condition. It appears, therefore, that the principal part of the offences, included under the denomination of offences against trust, could not, commodiously at least, have been included under the head of offences against condition.

It is evident enough, that for the same reasons, neither could they have been included under the head of offences against property. It would have appeared preposterous, and would have argued a total inattention to the leading principle of the whole work, the principle of utility, to have taken the most mischievous and alarming part of the offences to which the public stands exposed, and forced them into the list of offences against the property of an individual; of that individual, to wit, who in that case would be considered as having in him the property of that public trust, which by the offences in question is affected.

Nor would it have been less improper to have included conditions, all of them, under the head of property: and thereby the whole catalogue of offences against condition, under the catalogue of offences against property. True it is, that there are offences against condition, which perhaps with equal propriety, and without any change in their nature, might be considered in the light of offences against property: so extensive and so vague are the ideas that are wont to be annexed to both these objects. But there are other offences, which though with unquestionable propriety they might be referred to the head of offences against condition, could not, without the utmost violence done to language, be forced under the appellation of offences against property. Property, considered with respect to the proprietor, implies invariably a benefit, and nothing else: whatever obligations or burthens may, by accident, stand annexed to it, yet in itself it can never be otherwise than beneficial. On the part of the proprietor, it is created not by any commands that are laid on him, but by his being left free to do with such or such an article as he likes. The obligations it is created by, are in every instance laid upon other people. On the other hand, as to conditions, there are several which are of a mixed nature, importing as well a burthen to him who stands invested with them as a benefit: which indeed is the case with those conditions which we hear most of under that name, and which make the greatest figure.

There are even conditions which import nothing but burthen, without any spark of benefit. Accordingly, when between two parties there is such a relation, that one of them stands in the place of an object of property with respect to the other, the word *property* is applied only on one side; but the word *condition* is applied alike to both: it is but one of them that is said on that account to be possessed of a property; but both of them are alike spoken of as being possessed of, or being invested with, a condition: it is the master alone that is considered as possessing a property, of which the servant, in virtue of the services he is bound to render, is the object; but the servant, not less than the master, is spoken of as possessing or being invested with a condition.

The case is, that if a man's condition is ever spoken of as constituting an article of his *property*, it is in the same loose and indefinite sense of the word in which almost every other offence that could be imagined might be reckoned into the list of offences against property. If the language, indeed, were in every instance, in which it made use of the phrase, *object of property*,* perspicuous enough to point out under that appellation the material and really existent body, the *person* or the *thing* in which those acts terminate, by the performance of which the property is said to be *enjoyed;* if, in short, in the import given to the phrase, *object of property*, it made no other use of it than the putting it to signify what is now called a corporeal *object*, this difficulty and this confusion would not have occurred. But the import of the phrase, *object of property*, and in consequence the import of the word *property*, has been made to take a much wider range. In almost every case in which the law does any thing for a man's benefit or advantage, men are apt to speak of it, on some occasion or other, as conferring on him a sort of property. At the same time, for one reason or other, it has in several cases been not practicable, or not agreeable, to bring to view, under the appellation of *the object of his property*, the thing in which the acts, by the performance of which the property is said to be enjoyed, have their termination, or the person in whom they have their commencement. Yet something which could be spoken of under that appellation, was absolutely requisite.†

* For *object of property*, say now, 1827, subject-matter.

† It is to be observed, that in common speech, in the phrase, *the object of a man's property*, the words, *the object of*, are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words, *a man's property*, perform the office of the whole. In some cases, then, it was only on a *part* of the object that the acts in question might be performed: and to say, on this account, that the object was a man's property, was as much as to intimate that they might be performed on any part. In other cases, it was only certain particular acts that might be exercised on the object: and to say of the object that it was his property, was as much as to intimate that any acts whatever might be exercised on it. Sometimes the acts in question were not to be exercised but at a future *time*, nor then, perhaps, but in the case of the happening of a particular event, of which the happening was *uncertain:* and to say of an object that it was his property, was as much as to intimate that the acts in ques-

The expedient, then, has been to create, as it were, on every occasion, an ideal being, and to assign to a man this ideal being for the object of his property: and these are the sort of objects to which men of science, in taking a view of the operations of the law in this behalf, came, in process of time, to give the name of *incorporeal*. Now of these incorporeal objects of property, the variety is prodigious. Fictitious entities of this kind have been fabricated almost out of every thing: not *conditions* only (that of a trustee included) but even *reputation*, have been of the number. Even *liberty* has been considered in this same point of view: and though on so many occasions it is contrasted with *property*, yet on other occasions, being reckoned into the catalogue of possessions, it seems to have been considered as a branch of property. Some of these applications of the words *property*, *object of property* (the last, for instance), are looked upon, indeed, as more figurative, and less proper than the rest: but since the truth is, that where the immediate object is incorporeal, they are all of them improper, it is scarce practicable any where to draw the line.

Notwithstanding all this latitude, yet, among the relations in virtue of which you are said to be possessed of a condition, there is one, at least, which can scarcely, by the most forced construction, be said to render any other man, or any other thing, the object of your property. This is the right of persevering in a certain course of action; for instance, in the exercising of a certain trade. Now, to confer on you this right, in a certain degree at least, the law has nothing more to do than barely to abstain from forbidding you to exercise it. Were it to go farther, and, for the sake of enabling you to exercise your trade to the greater advantage, prohibit others from exercising the like, then, indeed, persons might be found, who in a certain sense, and by a construction rather forced than otherwise, might be spoken of as being the objects of your property; viz. by being made to render you that sort of negative service which consists in the forbearing to do those acts which would lessen the profits of your trade. But the ordinary right of exercising any such trade or profession, as is not the object of a monopoly, imports no such thing; and yet, by possessing this right, a man is said to possess a condition:* and by forfeiting it, to forfeit his condition.

After all, it will be seen, that there must be cases in which, according to the usage of language, the same offence may, with more or less appearance of propriety, be referred to the head of offences against condition, or that of offences against property indifferently. In such cases, the following rule may serve for drawing the line. Wherever, in virtue of your possessing a property, or being the object of a property possessed by another, you are characterized, according to the usage of language, by a particular name, such as master, servant, husband, wife, steward, agent, attorney, or the like, there the word *condition* may be employed in exclusion of the word *property;* and an offence in which, in virtue of your bearing such relation, you are concerned, either in the capacity of an offender, or in that of a party injured, may be referred to the head of offences against condition, and not to that of offences against property. To give an example: Being bound in the capacity of land-steward to a certain person, to oversee the repairing of a certain bridge, you forbear to do so: in this case, as the services you are bound to render are of the number of those which give occasion to the party, from whom they are due, to be spoken of under a certain generical name, viz. that of land steward, the offence of withholding them may be referred to the class of offences against condition. But suppose that, without being engaged in that general and miscellaneous course of service, which with reference to a particular person would denominate you his land-steward, you were bound, whether by usage or by contract, to render him that single sort of service which consists in the providing, by yourself or by others, for the repairing of that bridge: in this case, as there is not any such current denomination to which, in virtue of your being bound to render this service, you stand aggregated (for that of architect, mason, or the like, is not here in question), the offence you commit by withholding such service cannot with propriety be referred to the class of offences against condition: it can only, therefore, be referred to the class of offences against property.

By way of further distinction, it may be

tion might be exercised on it at any time. Sometimes the object on which the acts in question were to have their termination, or their commencement, was a human creature: and to speak of one human creature as being the property of another, is what would shock the ear every where but where slavery is established, and even there, when applied to persons in any other condition than that of slaves. Among the first Romans, indeed, the wife herself was the property of her husband; the child, of his father; the servant, of his master. In the civilized nations of modern times, the two first kinds of property are altogether at an end; and the last, unhappily not yet at an end, but however verging, it is to be hoped, towards extinction. The husband's property, is now the company[a] of his wife; the father's the guardianship and service of his child; the master's, the service of his servant.

[a] The *consortium*, says the English Law.

* To condition, in this case, should be added the words, *in life*.

remarked, that where a man, in virtue of his being bound to render, or of others being bound to render him, certain services, is spoken of as possessing a condition, the assemblage of services is generally so considerable, in point of duration, as to constitute a course of considerable length, so as on a variety of occasions to come to be varied and repeated: and in most cases, when the condition is not of a domestic nature, sometimes for the benefit of one person, sometimes for that of another. Services which come to be rendered to a particular person on a particular occasion, especially if they be of short duration, have seldom the effect of occasioning either party to be spoken of as being invested with a condition. The particular occasional services which one man may come, by contract or otherwise, to be bound to render to another, are innumerably various; but the number of conditions which have names may be counted, and are, comparatively, but few.

If after all, notwithstanding the rule here given for separating conditions from articles of property, any object should present itself which should appear to be referable, with equal propriety, to either head, the inconvenience would not be material; since in such cases, as will be seen a little farther on, whichever appellation were adopted, the list of the offences, to which the object stands exposed, would be substantially the same.

These difficulties being cleared up, we now proceed to exhibit an analytical view of the several possible offences against trust.

XXVII.

Offences against trust may be distinguished, in the first place, into such as concern the existence of the trust in the hands of such or such a person, and such as concern the *exercise* of the functions that belong to it.* First, then, with regard to such as relate to its existence. An offence of this description, like one of any other description, if an offence it ought to be, must to some person or other import a prejudice. This prejudice may be distinguished into two branches: 1. That which may fall on such persons as are or should be invested with the trust: 2. That which may fall on the persons for whose sake it is or should be instituted, or on other persons at large. To begin with the former of these branches. Let any trust be conceived. The consequences which it is in the nature of it to be productive of to the possessor must, in in as far as they are *material*,† be either of an advantageous or of a disadvantageous nature: in as far as they are advantageous, the trust may be considered as a *benefit* or privilege: in as far as they are disadvantageous, it may be considered as a *burthen*.‡ To consider it, then, upon the footing of a benefit. The trust either is of the number of those which ought by law to subsist;‖ that is, which the

* We shall have occasion, a little farther on, to speak of the person in whose hands the trust exists, under the description of the person who possesses, or is in possession of it, and thence of the possession of the trust abstracted from the consideration of the possessor. However different the expression, the import is in both cases the same. So irregular and imperfect is the structure of language on this head, that no one phrase can be made to suit the idea on all the occasions on which it is requisite it should be brought to view: the phrase must be continually shifted, or new modified: so likewise in regard to conditions, and in regard to property. The being invested with, or possessing a condition; the being in possession of an article of property, that is, if the object of the property be corporeal; the having a legal title (defeasible or indefeasible) to the physical possession of it, answers to the being in possession of a trust, or the being the person in whose hands a trust exists. In like manner, to the *exercise* of the *functions* belonging to a trust, or to a condition, corresponds the *enjoyment* of an article of property; that is, if the object of it be corporeal, the *occupation*. These verbal discussions are equally tedious and indispensable. Striving to cut a new road through the wilds of jurisprudence, I find myself continually distressed for want of tools that are fit to work with. To frame a complete set of new ones, is impossible. All that can be done is, to make here and there a new one in cases of absolute necessity, and for the rest, to patch up from time to time the imperfections of the old.

As to the bipartition which this paragraph sets out with, it must be acknowledged not to be of the nature of those which to a first glance afford a sort of intuitive proof of their being exhaustive. There is not that marked connection and opposition between the terms of it, which subsists between contradictory terms, and between terms that have the same common genus. I imagine, however, that upon examination it would be found to be exhaustive notwithstanding: and that it might even be demonstrated so to be. But the demonstration would lead us too far out of the ordinary track of language.

† See ch. vii. [Actions] par 3.

‡ If advantageous, it will naturally be on account of the *powers* or *rights* that are annexed to the trust: if disadvantageous, on account of the *duties*.

‖ It may seem a sort of anachronism to speak on the present occasion of a trust, condition, or other possession, as one of which it may happen that a man ought or ought not to have had possession given him by the law; for the plan here set out upon is to give such a view all along of the laws that are proposed, as shall be taken from the reasons which there are for making them: the reason, then, it would seem, should subsist before the law, not the law before the reason. Nor is this to be denied; for, unquestionably, upon the principle of utility, it may be said with equal truth of those operations by which a trust, or any other article of property, is instituted, as of any other operations of the law, that it never can be expedient they should be performed, unless some reason for performing them, deduced from that principle, can be assigned. To give property to one man, you must impose obligation on another: you must oblige him to do

legislator meant should be established; or is not. If it is, the possession which at any time you may be deprived of, with respect to it, must at that time be either present or to come; if to come (in which case it may be regarded either as certain or as contingent), the investitive event, or event from whence your possession of it should have taken its commencement, was either an event in the production of which the will of the offender should have been instrumental, or any other event at large: in the former case, the offence may be termed *wrongful non-investment of trust:* in the latter case, *wrongful interception of trust.** If at the time of the offence whereby you are deprived of it, you were already in possession of it, the offence may be styled *wrongful divestment of trust.* In any of these cases, the effect of the offence is either to put somebody else into the trust, or not: if not, it is wrongful divestment, wrongful interception, or wrongful divestment, and nothing more: if it be, the person put in possession is either the wrong doer himself, in which case it may be styled *usurpation of trust;* or some other person, in which case it may be styled *wrongful investment*, or attribution, *of trust.* If the trust in question is not of the number of those which ought to subsist, it depends upon the manner in which one man deprives another of it, whether such deprivation shall or shall not be an offence; and, accordingly, whether non-investment, interception, or divestment, shall or shall not be wrongful. But the putting any body into it, must at any rate be an offence: and this offence may be either usurpation or wrongful investment, as before.

In the next place, to consider it upon the footing of a burthen. In this point of view, if no other interest than that of the persons liable to be invested with it were considered, it is what ought not, upon the principle of utility, to subsist: if it ought, it can only be for the sake of the persons in whose favour it is established. If, then, it ought *not* on any account to subsist, neither non-investment, interception, nor divestment, can be wrongful with relation to the persons first mentioned, whatever they may be on any other account, in respect of the manner in which they happen to be performed: for usurpation, though not likely to be committed, there is the same room as before: so likewise is there for wrongful investment; which, in as far as the trust is considered as a burthen, may be styled *wrongful imposition of trust.* If the trust, being still of the burthensome kind, is of the number of those which *ought* to subsist, any offence that can be committed, with relation to the existence of it, must consist either in causing a person to *be* in possession of it, who ought *not* to be, or in causing a person *not* to be in possession of it, who *ought* to be: in the former case, it must be either usurpation or wrongful divestment, as before: in the latter case, the person who is caused to be not in possession, is either the wrong doer himself, or some other: if the wrong doer himself, either, at the time of the offence, he was in possession of it, or he was not: if he was, it may be termed *wrongful abdication* of trust; if not, *wrongful detrectation*† or *non-*

something which he may have a mind not to do, or to abstain from doing something which he may have a mind to do: in a word, you must in some way or other expose him to inconvenience. Every such law, therefore, must at any rate be mischievous in the first instance; and if no good effects can be produced to set against the bad, it must be mischievous upon the whole. Some reasons, therefore, in this case, as in every other, there ought to be. The truth is, that in the case before us the reasons are of too various and complicated a nature to be brought to view in an analytical outline like the present. Where the offence is of the number of those by which *person* or *reputation* are affected, the reasons for prohibiting it lie on the surface, and apply to every man alike. But *property*, before it can be offended against, must be created, and at the instant of its creation distributed, as it were, into parcels of different sorts and sizes, which require to be assigned, some to one man and some to another, for reasons, of which many lie a little out of sight, and which being different in different cases, would take up more room than could consistently be allotted to them here. For the present purpose, it is sufficient if it appear that, for the carrying on of the several purposes of life, there are trusts, and conditions, and other articles of property, which must be possessed by somebody: and that it is not every article that can, nor every article that ought, to be possessed by everybody. What articles ought to be created, and to what persons, and in what cases they ought to be respectively assigned, are questions which cannot be settled here. Nor is there any reason for wishing that they could, since the settling them one way or another is what would make no difference in the nature of any offence whereby any party may be exposed, on the occasion of any such institution, to sustain a detriment.

* In the former case, it may be observed, the act is of the negative kind; in the latter, it will commonly be of the positive kind.

As to the expression, *non-investment of trust*, I am sensible that it is not perfectly consonant to the idiom of the language: the usage is to speak of a person as being invested (that is, clothed) with a trust, not of a trust as of a thing, that is itself *invested*, or put on. The phrase at length would be, the non-investment of a person with a trust: but this phrase is by much too long-winded to answer the purpose of an appellative. I saw, therefore, no other resource than to venture upon the ellipsis here employed. The ancient lawyers, in the construction of their appellatives, have indulged themselves in much harsher ellipsises without scruple. See above, 25, note. It is already the usage to speak of a trust as a thing that *vests*, and as a thing that may be *divested.*

† [Detrectation.] I do not find that this word has yet been received into the English language. In the Latin, however, it is very expressive, and

assumption: if the person, whom the offence causes not to be in the trust, is any other person, the offence must be either wrongful divestment, wrongful non-investment, or wrongful interception, as before: in any of which cases, to consider the trust in the light of a burthen, it might also be styled *wrongful exemption from trust.*

Lastly, with regard to the prejudice which the persons for whose benefit the trust is instituted, or any other persons whose interests may come to be affected by its existing or not existing in such or such hands, are liable to sustain. Upon examination it will appear, that by every sort of offence whereby the persons who are, or should be in possession of it, are liable, in that respect, to sustain a prejudice, the persons now in question are also liable to sustain a prejudice. The prejudice, in this case, is evidently of a very different nature from what it was of in the other: but the same general names will be applicable in this case as in that. If the beneficiaries, or persons whose interests are at stake upon the exercise of the trust, or any of them, are liable to sustain a prejudice, resulting from the quality of the person by whom it may be filled, such prejudice must result from the one or the other of two causes: 1. From a person's having the possession of it, who ought not to have it: or 2. From a person's not having it, who ought: whether it be a benefit or burthen to the possessor, is a circumstance that to this purpose makes no difference. In the first of these cases, the offences from which the prejudice takes its rise are those of usurpation of trust, wrongful attribution of trust, and wrongful imposition of trust: in the latter, wrongful non-investment of trust, wrongful interception of trust, wrongful divestment of trust, wrongful abdication of trust, and wrongful detrectation of trust.

So much for the offences which concern the existence or possession of a trust: those which concern the exercise of the functions that belong to it, may be thus conceived. You are in possession of a trust: the time, then, for your acting in it must, on any given occasion (neglecting, for simplicity's sake, the then present instant), be either past, or yet to come. If past, your conduct on that occasion must have been either conformable to the purposes for which the trust was instituted, or unconformable: if conformable, there has been no mischief in the case: if unconformable, the fault has been either in yourself alone, or in some other person, or in both: in as far as it has lain in yourself, it has consisted either in your *not* doing something which you ought to do, in which case it may be styled *negative breach of trust;* or in your *doing* something which you ought *not* to do: if in the doing something which you ought not to do, the party to whom the prejudice has accrued is either the same for whose benefit the trust was instituted, or some other party at large: in the former of these cases, the offence may be styled *positive breach of trust;* in the other, *abuse of trust.** In as far as the fault lies in another person, the offence on his part may be styled *disturbance of trust.* Supposing the time for your acting in the trust to be yet to come, the effect of any act which tends to render your conduct unconformable to the purposes of the trust, may be either to render it actually and eventually unconformable, or to produce a chance of its being so. In the former of these cases, it can do no otherwise than take one or other of the shapes that have just been mentioned. In the latter case, the blame must lie either in yourself alone, or in some other person, or in both together, as before. If in another person, the acts whereby he may tend to render your conduct unconformable, must be exercised either on yourself, or on other objects at large. If exercised on yourself, the influence they possess must either be such as operates immediately on your body, or such as operates immediately on your mind. In the latter case, again, the tendency of them must be to deprive you either of the knowledge, or of the power, or of the inclination,† which would be necessary to your maintaining such a conduct as shall be conformable to the purposes in question. If they be such, of which the tendency is to deprive you of the inclination in question, it must be by applying to your will the force of some *seducing* motive.‡

is used in a sense exactly suitable to the sense here given to it. *Militiam detrectare*, to endeavour to avoid serving in the army, is a phrase not unfrequently met with in the Roman writers.

* What is here meant by abuse of trust, is the exercise of a power usurped over strangers, under favour of the powers properly belonging to the trust. The distinction between what is here meant by breach of trust, and what is here meant by abuse of trust, is not very steadily observed in common speech; and in regard to public trusts, it will even in many cases be imperceptible. The two offences are, however, in themselves perfectly distinct: since the persons, by whom the prejudice is suffered, are in many cases altogether different. It may be observed, perhaps, that with regard to abuse of trust, there is but one species here mentioned, viz. that which corresponds to positive breach of trust: none being mentioned as corresponding to negative breach of trust. The reason of this distinction will presently appear. In favour of the parties, for whose benefit the trust was created, the trustee is bound to act; and therefore, merely by his doing nothing, they may receive a prejudice: but in favour of other persons at large, he is not bound to act; and therefore it is only from some positive act on his part that any prejudice can ensue to them.

† See *infra;* and ch. xx. [Indirect Legislation.]

‡ See ch. xi. [Dispositions] par. 29.

Lastly, this motive must be either of the *coercive*, or of the *alluring* kind; in other words, it must present itself either in the shape of a mischief or of an advantage. Now in none of all the cases that have been mentioned, except the last, does the offence receive any new denomination: according to the event, it is either a disturbance of trust, or an abortive attempt to be guilty of that offence. In this last, it is termed *bribery;* and it is that particular species of it which may be termed *active* bribery, or *bribe-giving*. In this case, to consider the matter on your part, either you accept of the bribe, or you do not: if not, and you do not afterwards commit, or go about to commit, either a breach or an abuse of trust, there is no offence, on your part, in the case: if you do accept it, whether you eventually do or do not commit the breach or the abuse which it is the bribe-giver's intention you should commit, you at any rate commit an offence which is also termed bribery; and which, for distinction sake, may be termed *passive* bribery, or *bribe-taking*.* As to any farther distinctions, they will depend upon the nature of the particular sort of trust in question, and therefore belong not to the present place. And thus we have thirteen sub-divisions of offences against trust; viz. 1. Wrongful non-investment of trust. 2. Wrongful interception of trust. 3. Wrongful divestment of trust. 4. Usurpation of trust. 5. Wrongful investment or attribution of trust. 6. Wrongful abdication of trust. 7. Wrongful detrectation of trust. 8. Wrongful imposition of trust. 9. Negative breach of trust. 10. Positive breach of trust. 11. Abuse of trust. 12. Disturbance of trust. 13. Bribery.

XXVIII.

From what has been said, it appears that there cannot be any other offences, on the part of a trustee, by which a *beneficiary* can receive on any particular occasion any assignable specific prejudice. One sort of acts, however, there are, by which a trustee may be put in some *danger* of receiving a prejudice, although neither the nature of the prejudice, nor the occasion on which he is in danger of receiving it, should be assignable. These can be no other than such acts, whatever they may be, as dispose the trustee to be acted upon by a given bribe with greater effect than any with which he could otherwise be acted upon; or in other words, which place him in such circumstances as have a tendency to increase the quantum of his sensibility to the action of any motive of the sort in question.† Of these acts, there seem to be no others, that will admit of a description applicable to all places and times alike, than acts of *prodigality* on the part of the trustee. But in acts of this nature, the prejudice to the *beneficiary* is contingent only and unliquidated; while the prejudice to the trustee himself is certain and liquidated. If therefore, on any occasion, it should be found advisable to treat it on the footing of an offence, it will find its place more naturally in the class of self-regarding ones.

XXIX.

As to the sub-divisions of offences against trust, these are perfectly analogous to those of offences by falsehood. The trust may be private, semi-public, or public: it may concern property, person, reputation, or condition; or any two or more of those articles at a time, as will be more particularly explained in another place. Here, too, the offence, in running over the ground occupied by the three prior classes, will in some instances change its name, while in others it will not.

XXX.

Lastly, if it be asked, What sort of relation there subsists between falsehoods on one hand, and offences concerning trust on the other hand; the answer is, they are altogether disparate. Falsehood is a circumstance that may enter into the composition of any sort of offence, those concerning trust, as well as any other: in some as an accidental, in others as an essential instrument. Breach or abuse of trust are circumstances which, in the character of accidental concomitants, may enter into the composition of any other offences (those against falsehood included) besides those to which they respectively give name.

Genera of Class I.

XXXI.

Returning now to class the first, let us pursue the distribution a step farther, and branch out the several divisions of that class, as above exhibited, into their respective *genera;* that is, into such minuter divisions as are capable of being characterized by denominations of which a great part are already current among the people.‡ In this place

* To bribe a trustee, as such, is in fact neither more nor less than to *suborn* him to be guilty of a breach or an abuse of trust. Now subornation is of the number of those *accessory* offences which every principal offence, one as well as another, is liable to be attended with. See *infra*, and B. I. tit. [Accessory Offences.] This particular species of subornation, however, being one that, besides its having a specific name framed to express it, is apt to engage a particular share of attention, and to present itself to view in company with other offences against trust, it would have seemed an omission not to have included it in that catalogue.

† See ch. vi. [Sensibility] par. 2.

‡ In the enumeration of these genera, it is all all along to be observed, that offences of an accessory nature are not mentioned; except unless it be here and there, where they have obtained current names which seemed too much in vogue

the analysis must stop. To apply it in the same regular form to any of the other classes seems scarcely practicable: to semi-public, as also to public offences, on account of the interference of local circumstances: to self-regarding ones, on account of the necessity it would create of deciding prematurely upon points which may appear liable to controversy: to offences by falsehood, and offences against trust, on account of the dependence there is between this class and the three former. What remains to be done in this way, with reference to these four classes, will require discussion, and will therefore be introduced with more propriety in the body of the work, than in a preliminary part, of which the business is only to draw outlines.

XXXII.

An act, by which the happiness of an individual is disturbed, is either *simple* in its effects, or *complex*. It may be styled simple in its effects, when it affects him in one only of the articles or points in which his interest, as we have seen, is liable to be affected: complex, when it affects him in several of those points at once. Such as are simple in their effects must of course be first considered.

XXXIII.

In a simple way, that is, in one way at a time, a man's happiness is liable to be disturbed, either, 1. By actions referring to his own person itself; or 2. By actions referring to such external objects on which his happiness is more or less dependent. As to his own person, it is composed of two different parts, or reputed parts, his body and his mind. Acts which exert a pernicious influence on his person, whether it be on the corporeal or on the mental part of it, will operate thereon either immediately, and without affecting his will, or mediately, through the intervention of that faculty; viz. by means of the influence which they cause his will to exercise over his body. If with the intervention of his will, it must be by *mental coercion;* that is, by causing him to *will* to maintain, and thence actually to maintain, a certain conduct which it is disagreeable, or in any other way pernicious, to him to maintain. This conduct may either be positive or negative:* when positive, the coercion is styled *compulsion* or *con*straint: when negative, *re*straint. Now the way in which the coercion is disagreeable to him, may be by producing either pain of body, or only pain of mind. If pain of body is produced by it, the offence will come as well under this as under other denominations, which we shall come to presently. Moreover, the conduct which a man, by means of the coercion, is forced to maintain, will be determined, either specifically and originally, by the determination of the particular acts themselves, which he is forced to perform or to abstain from, or generally and incidentally, by means of his being forced to be or not to be in such or such a place. But if he is prevented from being in one place, he is confined thereby to another. For the whole surface of the earth, like the surface of any greater or lesser body, may be conceived to be divided into two, as well as into any other number of parts or spots. If the spot, then, which he is confined to, be smaller than the spot which he is excluded from, his condition may be called *confinement:* if larger, *banishment.*† Whether an act, the effect of which is to exert a pernicious influence on the person of him who suffers by it, operates with or without the intervention of an act of his will, the mischief it produces will either be *mortal* or *not mortal.* If not mortal, it will either be *reparable*, that is, temporary; or *irreparable*, that is, perpetual. If reparable, the mischievous act may be termed a *simple corporal injury;* if irreparable, an *irreparable corporal injury.* Lastly, a pain that a man experiences in his mind will either be a pain of actual *sufferance*, or a pain of *apprehension.* If a pain of apprehension, either the offender himself is represented as intending to bear a part in the production of it, or he is not. In the former case, the offence may be styled *menacement:* in the latter case, as also where the pain is a pain of actual sufferance, a *simple mental injury.* And thus we have nine genera or kinds of personal injuries; which, when ranged in the order most commodious for examination, will stand as follows; viz. 1. Simple corporal injuries. 2. Irreparable corporal injuries. 3. Simple injurious restrainment. 4. Simple injurious compulsion.‡ 5. Wrongful confinement. 6. Wrongful banishment. 7. Wrongful homi-

to be omitted. Accessory offences are those which, without being the very acts from which the mischief in question takes its immediate rise, are, in the way of causality, connected with those acts. See ch. vii. [Actions] par. 24, and B. I. tit. [Accessory Offences.]

* Ch. vii. [Actions] par. 8.

† Of these, and the several other leading expressions which there is occasion to bring to view in the remaining part of this analysis, ample definitions will be found in the body of the work, conceived in *terminis legis.* To give particular references to these definitions, would be incumbering the page to little purpose.

‡ Injurious restrainment at large, and injurious compulsion at large, are here styled *simple*, in order to distinguish them from confinement, banishment, robbery, and extortion; all which are, in many cases, but so many modifications of one or other of the two first-mentioned offences.

To constitute an offence an act of simple injurious restrainment, or simple injurious compulsion, it is sufficient if the influence it exerts be, in the first place, pernicious; in the next place, exerted on the person by the medium of the will: it is not necessary that that part of the person on which it is exerted be the part to which it is pernicious: it is not even necessary

cide. 8. Wrongful menacement.* 9. Simple mental injuries.†

that it should immediately be pernicious to either of these parts, though to one or other of them it must be pernicious in the long run, if it be pernicious at all. An act in which the body, for example, is concerned, may be very disagreeable, and thereby pernicious, to him who performs it, though neither disagreeable nor pernicious to his body: for instance, to stand or sit in public with a label on his back, or under any other circumstances of ignominy.

* It may be observed, that wrongful menacement is included as well in simple injurious restrainment, and simple injurious compulsion, except in the rare case where the motives by which one man is prevented by another from doing a thing that would have been materially to his advantage, or induced to do a thing that is materially to his prejudice, are of the *alluring* kind.

† Although, for reasons that have been already given (*supra*, par. 31), no complete catalogue, nor therefore any exhaustive view, of either semi-public or self-regarding offences, can be exhibited in this chapter, it may be a satisfaction, however, to the reader, to see some sort of list of them, if it were only for the sake of having examples before his eyes. Such lists cannot any where be placed to more advantage than under the heads of the several divisions of private extra-regarding offences, to which the semi-public and self-regarding offences in question respectively correspond. Concerning the two latter, however, and the last more particularly, it must be understood, that all I mean by inserting them here is to exhibit the mischief, if any, which it is of the nature of them respectively to produce, without deciding upon the question, whether it would be *worth while* [See ch. xv. Cases unmeet] in every instance, for the sake of combating that mischief, to introduce the evil of punishment. In the course of this detail, it will be observed, that there are several heads of extra-regarding private offences, to which the correspondent heads, either of semi-public or self-regarding offences, or of both, are wanting. The reasons of these deficiencies will probably, in most instances, be evident enough upon the face of them. Lest they should not, they are, however, specified in the body of the work. They would take up too much room were they to be inserted here.

I. Semi-public Offences through calamity. Calamities, by which the persons or properties of men, or both, are liable to be affected, seem to be as follows: 1. Pestilence or contagion. 2. Famine, and other kinds of scarcity. 3. Mischiefs producible by persons deficient in point of understanding, such as infants, idiots, and maniacs, for want of their being properly taken care of. 4. Mischief producible by the ravages of noxious animals, such as beasts of prey, locusts, &c. &c. 5. Collapsion, or fall of large masses of solid matter, such as decayed buildings, or rocks, or masses of snow. 6. Inundation or submersion. 7. Tempest. 8. Blight. 9. Conflagration. 10. Explosion. In as far as a man may contribute by any imprudent act of his, to give birth to any of the above calamities, such act may be an offence. In as far as a man may fail to do what is incumbent on him to do towards preventing them, such failure may be an offence.

II. Semi-public Offences of mere delin-

xxxiv.

We come now to offences against reputation merely. These require but few distinctions. In point of reputation there is but one way of suffering, which is by losing a portion of the good-will of others. Now, in respect of the good-will which others bear you, you may be a loser in either of two ways: 1. By the manner in which you are thought to behave *yourself;* and, 2. By the manner in which *others* behave, or are thought to behave, towards you. To cause people to think that you yourself have so behaved, as to have been guilty of any of those acts which cause a man to possess less than he did before of the good-will of the community, is what may be styled *defamation.* But such is the constitution of human nature, and such the force of prejudice, that a man, merely by manifesting his own want of good-will towards you, though ever so unjust in itself, and ever so unlawfully expressed, may in a manner force others to withdraw from you a part of theirs. When he does this by words, or by such actions as have no other effect than in as far as they stand in the place of words, the offence may

quency. A whole neighbourhood may be made to suffer, 1. Simple corporal injuries: in other words, they may be made to suffer in point of health, by offensive or dangerous trades or manufactures: by selling or falsely puffing off unwholsome medicines or provisions: by poisoning or drying up of springs, destroying of aqueducts, destroying woods, walls, or other fences against wind and rain: by any kinds of artificial scarcity; or by any other calamities intentionally produced. 2 and 3. Simple injurious restrainment, and simple injurious compulsion: for instance, by obliging a whole neighbourhood, by dint of threatening handbills, or threatening discourses, publicly delivered, to join, or forbear to join, in illuminations, acclamations, outcries, invectives, subscriptions, undertakings, processions, or any other mode of expressing joy or grief, displeasure or approbation; or in short, in any other course of conduct whatsoever. 4 and 5. Confinement and banishment: by the spoiling of roads, bridges, or ferry-boats: by destroying or unwarrantably pre-occupying public carriages, or houses of accommodation. 6. By menacement: as by incendiary letters, and tumultuous assemblies: by newspapers or handbills, denouncing vengeance against persons of particular denominations: for example, against Jews, Catholics, Protestants, Scotchmen, Gascons, Catalonians, &c. 7. Simple mental injuries: as by distressful, terrifying obscene, or irreligious exhibitions: such as exposure of sores by beggars, exposure of dead bodies, exhibitions or reports of counterfeit witchcrafts or apparitions, exhibition of obscene or blasphemous prints: obscene or blasphemous discourses held in public: spreading false news of public defeats in battle, or of other misfortunes.

III. Self-regarding Offences against person. 1. Fasting. Abstinence from venery, self-flagellation, self-mutilation, and other self-denying and self-tormenting practices. 2. Gluttony, drunkenness, excessive venery, and other species of intemperance. 3. Suicide.

be styled *vilification*. When it is done by such actions as, besides their having this effect, are injuries to the person, the offence may be styled a *personal insult*: if it has got the length of reaching the body, a *corporal insult*: if it stopt short before it reached that length, it may be styled *insulting menacement*. And thus we have two *genera* or kinds of offences against reputation merely; to wit, 1. Defamation: and, 2. Vilification, or Revilement.* As to corporal insults, and insulting menacement, they belong to the compound title of offences against person and reputation both together.

XXXV.

If the property of one man suffers by the delinquency of another, such property either was in trust with the offender, or it was not: if it was in trust, the offence is a breach of trust, and of whatever nature it may be in other respects, may be styled *dissipation in breach of trust*, or *dissipation of property in trust*. This is a particular case: the opposite one is the more common: in such case the several ways in which property may, by possibility, become the object of an offence, may be thus conceived. Offences against property, of whatever kind it be, may be distinguished, as hath been already intimated,† into such as concern the legal possession of it, or right to it, and such as concern only the enjoyment of it, or, what is the same thing, the exercise of that right. Under the former of these heads come, as hath been already intimated,† the several offences of *wrongful non-collation or non-investment*, *wrongful interception*, *wrongful ablation or divestment*, *usurpation*, and *wrongful attribution*. When in the commission of any of these offences a falsehood has served as an instrument, and that, as it is commonly called, a *wilful*, or as it might more properly be termed, an *advised*‡ one, the epithet *fraudulent* may be prefixed to the name of the offence, or substituted in the room of the word *wrongful*. The circumstance of fraudulency then may serve to characterize a particular species, comprisable under each of those generic heads: in like manner, the circumstance of *force*, of which more a little farther on, may serve to characterize another. With respect to wrongful interception, in particular, the *collative event*, by which the title to the thing in question should have accrued to you, and for want of which such title is, through the delinquency of the offender, as it were, *intercepted*, is either an act of his own, expressing it as his will, that you should be considered by the law as the person who is legally in possession of it, or it is any other event at large: in the former case, if the thing, of which you should have been put into possession, is a sum of money to a certain amount, the offence is that which has received the name of *insolvency*; which branch of delinquency, in consideration of the importance and extent of it, may be treated on the footing of a distinct genus of itself.‖

* I. SEMI-PUBLIC OFFENCES. 1. Calumniation and vilification of particular denominations of persons; such as Jews, Catholics, &c.

II. SELF-REGARDING OFFENCES. 1. Incontinence in females. 2. Incest.

† *Supra*, par. 27.

‡ See ch. ix. [Consciousness] par. 2.

‖ The light in which the offence of insolvency is here exhibited, may perhaps at first consideration be apt to appear not only novel but improper. It may naturally enough appear, that when a man owes you a sum of money, for instance, the right to the money is your's already, and that what he withholds from you by not paying you, is not the legal title to it, possession of it, or power over it, but the physical possession of it, or power over it, only. But upon a more accurate examination, this will be found not to be the case. What is meant by payment, is always an act of investitive power, as above explained; an expression of an act of the will, and not a physical act: it is an act exercised *with relation* indeed *to* the thing said to be *paid*, but not in a physical sense exercised *upon* it. A man who owes you ten pounds, takes up a handful of silver to that amount, and lays it down on a table at which you are sitting. If then, by words or gestures, or any means whatever, addressing himself to you, he intimates it to be his will that you should take up the money, and do with it as you please, he is said to have *paid* you: but if the case was, that he laid it down not for that purpose, but for some other, for instance to count it and examine it, meaning to take it up again himself, or leave it for somebody else, he has *not* paid you: yet the physical acts, exercised upon the pieces of money in question, are in both cases the same. Till he does express a will to that purport, what you have is not, properly speaking, the legal possession of the money, or a right to the money, but only a right to have him, or in his default perhaps a minister of justice, compelled to render you that sort of service, by the rendering of which he is said to pay you: that is, to express such will as above mentioned, with regard to some corporeal article or other of a certain species, and of value equal to the amount of what he owes you: or, in other words, to exercise in your favour an act of investitive power with relation to some such article.

True it is, that in certain cases a man may perhaps not be deemed, according to common acceptation, to have *paid* you, without rendering you a further set of services, and those of another sort: a set of services, which are rendered by the exercising of certain acts of a physical nature upon the very thing with which he is said to pay you; to wit, by transferring the thing to a certain place where you may be sure to find it, and where it may be convenient for you to receive it. But these services, although the obligation of rendering them should be annexed by law to the obligation of rendering those other services, in the performance of which the operation of payment properly consists, are plainly acts of a distinct nature, nor are they essential to the operation: by themselves they do not con-

Next with regard to such of the offences against property, as concern only the enjoyment of the object in question. This object must be either a service, or set of services,* which should have been rendered by some *person*, or else an article belonging to the class of *things*. In the former case, the offence may be styled *wrongful withholding of services*:† in the latter case it may admit of farther modifications, which may be thus conceived: When any object which you have had the physical occupation or enjoyment of, ceases, in any degree, in consequence of the act of another man, and without any change made in so much of that power as depends upon the intrinsic physical condition of your person, to be subject to that power; this cessation is either owing to change in the intrinsic condition of the thing itself, or in its exterior situation with respect to you; that is, to its being situated out of your reach. In the former case, the nature of the change is either such as to put it out of your power to make any use of it at all, in which case the thing is said to be *destroyed*, and the offence whereby it is so treated may be termed *wrongful destruction*: or such only as to render the uses it is capable of being put to of less value than before, in which case it is said to be *damaged*, or to have sustained damage, and the offence may be termed *wrongful endamagement*. Moreover, in as far as the value which a thing is of to you is considered as being liable to be in some degree impaired by any act on the part of any other person exercised upon that thing, although on a given occasion no perceptible damage should ensue, the exercise of any such act is commonly treated on the footing of an offence, which may be termed *wrongful using* or *occupation*.

If the cause of the thing's failing in its capacity of being of use to you, lies in the exterior situation of it with relation to you, the offence may be styled *wrongful detainment* or *detention*.‡ Wrongful detainment, during any given period of time, may either be accompanied with the intention of detaining the thing for ever (that is, for an indefinite time) or not: if it be, and if it be accompanied at the same time with the intention of not being amenable to law for what is done, it seems to answer to the idea commonly annexed to the word *embezzlement*, an offence which is commonly accompanied with breach of trust.‖ In the case of wrongful occupation, the physical faculty of occupying may have been obtained with or without the assistance or consent of the proprietor, or other person appearing to have a right to afford such assistance or consent. If without such assistance or consent, and the occupation be accompanied with the intention of detaining the thing for ever, together with the intention of not being amenable to law for what is done, the offence seems to answer to the idea commonly annexed to the word *theft* or *stealing*. If in the same circumstances a force is put upon the body of any person who uses, or appears to be disposed to use, any endeavours to prevent the act, this seems to be one of the cases in which the offence is generally understood to come under the name of *robbery*.

If the physical faculty in question was obtained with the assistance or consent of a

stitute it, and it may be performed without them. It *must* be performed without them wherever the thing to be transferred happens to be already as much within the reach, physically speaking, of the creditor, as by any act of the debtor it can be made to be.

This matter would have appeared in a clearer light, had it been practicable to enter here into a full examination of the nature of property, and the several modifications of which it is susceptible: but every thing cannot be done at once.

* *Supra*, par. 26.

† Under wrongful withholding of services is included breach of contract: the obligation to render services may be grounded either on contract, or upon other titles; in other words, the event of a man's engaging in a contract is one out of many other investitive events from which the right of receiving them may take its commencement. See ch. xix. [Limits] § 4.

Were the word *services* to be taken in its utmost latitude (negative included as well as positive), this one head would be enough to cover the whole law. To this place, then, are to be referred such services only, the withholding of which does not coincide with any of the other offences, for which separate denominations have been provided.

There are some services, we may observe, the withholding of which may affect the person, and by that means come under the negative branches of the several *genera* of corporal injuries; such as services due from a surgeon, an innkeeper, &c.

‡ In the English law, *detinue* and *detainer*: detinue applied chiefly to moveables; detainer, to immoveables. Under detinue and detainer, cases are also comprised, in which the offence consists in forbearing to transfer the legal possession of the thing: such cases may be considered as coming under the head of wrongful non-investment. The distinction between mere physical possession and legal possession, where the latter is short-lived and defeasible, seems scarcely hitherto to have been attended to. In a multitude of instances they are confounded under the same expressions. The cause is, that probably under all laws, and frequently for very good reasons, the legal possession, with whatever certainty defeasible upon the event of a trial, is, down to the time of that event, in many cases annexed to the appearance of the physical.

‖ In attempting to exhibit the import belonging to this and other names of offences in common use, I must be understood to speak all along with the utmost diffidence. The truth is, the import given to them is commonly neither determinate nor uniform: so that, in the nature of things, no definition that can be given of them by a private person can be altogether an exact one. To fix the sense of them belongs only to the legislator.

proprietor, or other person above spoken of, and still the occupation of the thing is an offence, it may have been either because the assistance or consent was not fairly, or because it was not freely obtained. If not *fairly* obtained, it was obtained by falsehood, which, if *advised*, is in such a case termed *fraud;* and the offence, if accompanied with the intention of not being amenable to law, may be termed *fraudulent obtainment* or *defraudment.** If not *freely* obtained, it was obtained by *force;* to wit, either by a force put upon the body, which has been already mentioned, or by a force put upon the mind. If by a force put upon the mind, or in other words, by the application of coercive motives,† it must be by producing the apprehension of some evil: which evil, if the act is an offence, must be some evil to which, on the occasion in question, the one person has no right to expose the other. This is one case, in which, if the offence be accompanied with the intention of detaining the thing for ever, whether it be or be not accompanied with the intention of not being amenable to law, it seems to agree with the idea of what is commonly meant by *extortion.* Now the part a man takes in exposing another to the evil in question, must be either a positive or a negative part. In the former case, again, the evil must either be present or distant. In the case, then, where the assistance or consent is obtained by a force put upon the body, or where, if by a force put upon the mind, the part taken in the exposing a man to the apprehension of the evil is positive, the evil present, and the object of it his person, and if at any rate the extortion, thus applied, be accompanied with the intention of not being amenable to law, it seems to agree with the remaining case of what goes under the name of *robbery.*

As to dissipation in breach of trust, this, when productive of a pecuniary profit to the trustee, seems to be one species of what is commonly meant by *peculation.* Another, and the only remaining one, seems to consist in acts of occupation exercised by the trustee upon the things which are the objects of the fiduciary property, for his own benefit, and to the damage of the beneficiary. As to robbery, this offence, by the manner in which the assistance or consent is obtained, becomes an offence against property and person at the same time. Dissipation in breach of trust, and peculation, may perhaps be more commodiously treated of under the head of offences against trust.‡ After these exceptions, we have eighteen genera or principal kinds of offences against property, which, when ranged in the order most commodious for examination, may stand as follows, viz. 1. Wrongful non-investment of property. 2. Wrongful interception of property. 3. Wrongful divestment of property. 4. Usurpation of property. 5. Wrongful investment of property. 6. Wrongful withholding of services. 7. Wrongful destruction or endamagement. 8. Insolvency. 9. Wrongful obtainment of services. 10. Wrongful imposition of expense. 11. Wrongful imposition of services. 12. Wrongful occupation. 13. Wrongful detention. 14. Wrongful disturbance of proprietary rights. 15. Theft. 16. Embezzlement. 17. Defraudment. 18. Extortion.‖

We proceed now to consider offences which are complex in their effects. Regularly, indeed, we should come to offences against condition; but it will be more convenient to speak first of offences by which a man's interest is affected in two of the preceding points at once.

XXXVI.

First, then, with regard to offences which affect person and reputation together. When any man, by a mode of treatment which affects the person, injures the reputation of another, his end and purpose must have been either his own immediate pleasure, or that sort of reflected pleasure, which in certain circumstances may be reaped from the suffering of another. Now the only immediate pleasure worth regarding, which any one can reap from the person of another, and which at the same time is capable of affecting the reputation of the latter, is the pleasure of the sexual appetite.§ This pleasure, then, if reaped at all,

* The remaining cases come under the head of usurpation, or wrongful investment of property. The distinction seems hardly hitherto to have been attended to: it turns, like another mentioned above, upon the distinction between legal possession and physical. The same observation may be applied to the case of extortion hereafter following.

† *Vide supra,* par. 27.

‡ Usury, which, if it must be an offence, is an offence committed with consent, that is, with the consent of the party supposed to be injured, cannot merit a place in the catalogue of offences, unless the consent were either unfairly obtained or unfreely: in the first case, it coincides with defraudment; in the other, with extortion.

‖ I. SEMI-PUBLIC OFFENCES. 1. Wrongful divestment, interception, usurpation, &c. of valuables, which are the property of a corporate body, or which are in the indiscriminate occupation of a neighbourhood; such as parish churches, altars, relics, and other articles appropriated to the purposes of religion: or things which are in the indiscriminate occupation of the public at large; such as milestones, market-houses, exchanges, public gardens, and cathedrals. 2. Setting on foot what have been called *bubbles,* or fraudulent partnerships, or gaming adventures; propagating false news, to raise or sink the value of stocks, or of any other denomination of property.

II. SELF-REGARDING OFFENCES. 1. Idleness. 2. Gaming. 3. Other species of prodigality.

§ See ch. v. [Pleasures and Pains.]

must have been reaped either against the consent of the party, or with consent. If with consent, the consent must have been obtained either freely and fairly both, or freely, but not fairly, or else not even freely; in which case, the fairness is out of the question. If the consent be altogether wanting, the offence is called *rape:* if not fairly obtained, *seduction* simply: if not freely, it may be called *forcible seduction.* In any case, either the offence has gone the length of consummation, or has stopt short of that period; if it has gone that length, it takes one or other of the names just mentioned: if not, it may be included alike in all cases under the denomination of a *simple lascivious injury.* Lastly, to take the case, where a man injuring you in your reputation, by proceedings that regard your person, does it for the sake of that sort of pleasure which will sometimes result from the contemplation of another's pain. Under these circumstances, either the offence has actually gone the length of a corporal injury, or it has rested in menacement: in the first case, it may be styled a *corporal insult;* in the other, it may come under the name of *insulting menacement.* And thus we have six genera, or kinds of offences, against person and reputation together; which, when ranged in the order most commodious for consideration, will stand thus: 1. Corporal insults. 2. Insulting menacement. 3. Seduction. 4. Rape. 5. Forcible seduction. 6. Simple lascivious injuries.*

XXXVII.

Secondly, with respect to those which affect person and property together. That a force put upon the person of a man may be among the means by which the title to property may be unlawfully taken away or acquired, has been already stated.† A force of this sort, then, is a circumstance which may accompany the offences of wrongful interception, wrongful divestment, usurpation, and wrongful investment. But in these cases the intervention of this circumstance does not happen to have given any new denomination to the offence.‡ In all or any of these cases, however, by prefixing the epithet *forcible,* we may have so many names of offences, which may either be considered as constituting so many species of the genera belonging to the division of offences against property, or as so many genera belonging to the division now before us. Among the offences that concern the enjoyment of the thing, the case is the same with wrongful destruction and wrongful endamagement; as also with wrongful occupation and wrongful detainment. As to the offence of wrongful occupation, it is only in the case where the thing occupied belongs to the class of immoveables, that, when accompanied by the kind of force in question, has obtained a particular name, which is in common use: in this case it is called *forcible entry:* forcible detainment, as applied also to immoveables, but only to immoveables, has obtained, among lawyers at least, the name of *forcible detainer.*‖ And thus we may distinguish ten genera, or kinds of offences against person and property together, which, omitting for conciseness sake the epithet *wrongful,* will stand thus: 1. Forcible interception of property. 2. Forcible divestment of property. 3. Forcible usurpation. 4. Forcible investment. 5. Forcible destruction or endamagement. 6. Forcible occupation of moveables. 7. Forcible entry. 8. Forcible detainment of moveables. 9. Forcible detainment of immoveables. 10. Robbery.§

XXXVIII.

We come now to offences against *condition.* A man's condition or station in life is constituted by the legal relation he bears to the persons who are about him; that is, as we have already had occasion to show,¶ by *duties,* which, by being imposed on one side, give birth to *rights* or *powers* on the other. These relations, it is evident, may be almost infinitely diversified. Some means, however, may be found of circumscribing the field within which the varieties of them are displayed. In the first place, they must either be such as are capable of displaying themselves within the circle of a private family, or such as require a larger space. The conditions constituted by the former sort of relations may be styled *domestic:* those constituted by the latter, *civil.*

XXXIX.

As to domestic conditions, the legal relations by which they are constituted may be distinguished into, 1. Such as are superadded to relations purely natural: and, 2. Such as,

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* I. Semi-public Offences—none.
II. Self-regarding Offences. 1. Sacrifice of virginity. 2. Indecencies not public.

† *Supra.*

‡ In the technical language of the English law, property so acquired is said to be acquired by *duress.*

‖ Applied to moveables, the circumstance of force has never, at least by the technical part of the language, been taken into account: no such combination of terms as *forcible occupation* is in current use. The word *detinue* is applied to moveables only; and (in the language of the law) the word *forcible* has never been combined with it. The word applied to immoveables is *detainer:* this is combined with the word *forcible;* and what is singular, it is scarcely in use without that word. It was impossible to steer altogether clear of this technical nomenclature, on account of the influence which it has on the body of the language.

§ I. Semi-public Offences. 1. Incendiarism. 2. Criminal inundation.
II. Self-regarding Offences—none.

¶ *Supra,* par. 25, note.

without any such natural basis, subsist purely by institution. By relations purely natural, I mean those which may be said to subsist between certain persons in virtue of the concern which they themselves, or certain other persons, have had in the process which is necessary to the continuance of the species. These relations may be distinguished, in the first place, into contiguous and uncontiguous. The uncontiguous subsist through the intervention of such as are contiguous. The contiguous may be distinguished, in the first place, into *connubial*, and *post-connubial*.* Those which may be termed connubial, are two: 1. That which the male bears towards the female: 2. That which the female bears to the male.† The post-connubial are either *productive* or *derivative*. The productive is that which the male and female above mentioned bear each of them towards the children who are the immediate fruit of their union: this is termed the relation of *parentality*. Now, as the parents must be, so the children may be, of different sexes. Accordingly, the relation of parentality may be distinguished into four species: 1. That which a father bears to his son: this is termed *paternity*. 2. That which a father bears to his daughter: this, also, is termed paternity. 3. That which a mother bears to her son: this is called *maternity*. 4. That which a mother bears to her daughter: this, also, is termed maternity.

Uncontiguous natural relations may be distinguished into *immediate* and *remote*. Such as are immediate, are what one person bears to another in consequence of their bearing each of them one simple relation to some third person. Thus the paternal grandfather is related to the paternal grandson by means of the two different relations, of different kinds, which together they bear to the father: the brother on the father's side, to the brother by means of the two relations of the same kind, which together they bear to the father. In the same manner we might proceed to find places in the system for the infinitely-diversified relations which result from the combinations that may be formed by mixing together the several sorts of relationships by *ascent*, relationships by *descent*, *collateral* relationships, and relationships by *affinity*: which latter, when the union between the two parties through whom the affinity takes place is sanctioned by matrimonial solemnities, are termed relationships by *marriage*. But this, as it would be a most intricate and tedious task, so happily is it, for the present purpose, an unnecessary one. The only natural relations to which it will be necessary to pay any particular attention, are those which, when sanctioned by law, give birth to the conditions of husband and wife, the two relations comprised under the head of parentality, and the corresponding relations comprised under the head of filiality or filiation.

What, then, are the relations of a legal kind which can be superinduced upon the abovementioned natural relations? They must be such as it is the nature of law to give birth to and establish. But the relations which subsist purely by institution, exhaust, as we shall see, the whole stock of relationships which it is in the nature of the law to give birth to and establish. The relations, then, which can be superinduced upon those which are purely natural, cannot be in themselves any other than what are of the number of those which subsist purely by institution: so that all the difference there can be between a legal relation of the one sort, and a legal relation of the other sort, is, that in the former case the circumstance which gave birth to the natural relation serves as a mark to indicate where the legal relation is to fix: in the latter case, the place where the legal relation is to attach is determined, not by that circumstance but by some other. From these considerations it will appear manifestly enough, that for treating of the several sorts of conditions, as well natural as purely conventional, in the most commodious order, it will be necessary to give the precedence to the latter. Proceeding throughout upon the same principle, we shall all along give the priority, not to those which are first by nature, but to those which are most simple in point of description.

* By the terms *connubial* and *post-connubial*, all I mean at present to bring to view is, the mere physical union, apart from the ceremonies and legal engagements that will afterwards be considered as accompanying it.

† The vague and undetermined nature of the fictitious entity, called a relation, is, on occasions like the present, apt to be productive of a good deal of confusion. A relation is either said to be *borne by* one of the objects which are parties to it, to the other, or to *subsist between* them. The latter mode of phraseology is, perhaps, rather the more common. In such case the idea seems to be, that from the consideration of the two objects there results but one relation, which belongs as it were in common to them both. In some cases, this perhaps may answer the purpose very well: it will not, however, in the present case. For the present purpose it will be necessary we should conceive two relations as resulting from the two objects, and *borne*, since such is the phrase, *by* the one of them, to or towards the other: one relation borne by the first object to the second: another relation borne by the second object to the first. This is necessary on two accounts: 1. Because for the relations themselves there are in many instances separate names; for example, the relations of guardianship and wardship: in which case, the speaking of them as if they were but one, may be productive of much confusion. 2. Because the two different relationships give birth to so many conditions: which conditions are so far different, that what is predicated and will hold good of the one, will, in various particulars, as we shall see, not hold good of the other.

There is no other way of avoiding perpetual anticipations and repetitions.

XL.

We come now to consider the domestic or family relations, which are purely of legal institution. It is to these, in effect, that both kinds of domestic conditions, considered as the work of law, are indebted for their origin. When the law, no matter for what purpose, takes upon itself to operate in a matter in which it has not operated before, it can only be by imposing *obligation*.* Now when a legal obligation is imposed on any man, there are but two ways in which it can, in the first instance, be enforced. The one is by giving the power of enforcing it to the party in whose favour it is imposed: the other is by reserving that power to certain third persons, who, in virtue of their possessing it, are styled ministers of justice. In the first case, the party favoured is said to possess not only a *right* as against the party obliged, but also a *power* over him: in the second case, a *right* only, uncorroborated by power. In the first case, the party favoured may be styled a *superior*, and as they are both members of the same family, a *domestic superior*, with reference to the party obliged; who, in the same case, may be styled a *domestic inferior*, with reference to the party favoured. Now, in point of possibility, it is evident, that domestic conditions, or a kind of fictitious possession analogous to domestic conditions, might have been looked upon as constituted, as well by rights alone, without powers on either side, as by powers. But in point of utility† it does not seem expedient: and in point of fact, probably owing to the invariable perception which men must have had of the inexpediency, no such conditions seem ever to have been constituted by such feeble bands. Of the legal relationships, then, which are capable of being made to subsist within the circle of a family, there remain those only in which the obligation is enforced by power Now then, wherever any such power is conferred, the end or purpose for which it was conferred (unless the legislator can be supposed to act without a motive) must have been the producing of a benefit to somebody; in other words, it must have been conferred for the *sake* of somebody. The person, then, for whose sake it is conferred, must either be one of the two parties just mentioned, or a third party: if one of these two, it must be either the superior or the inferior. If the superior, such superior is commonly called a *master;* and the inferior is termed his *servant:* and the

* See ch. xix. [Limits] § 3.

† Two persons, who by any means stand engaged to live together, can never live together long, but one of them will choose that some act or other should be done, which the other will choose should not be done. When this is the case, how is the competition to be decided? Laying aside generosity and good-breeding, which are the tardy and uncertain fruits of long-established laws, it is evident that there can be no certain means of deciding it but physical power: which indeed is the very means by which family, as well as other competitions, must have been decided, long before any such office as that of legislator had existence. This, then, being the order of things which the legislator finds established by nature, how should he do better than to acquiesce in it? The persons who, by the influence of causes that prevail every where, stand engaged to live together, are, 1. Parent and child, during the infancy of the latter: 2. Man and wife: 3. Children of the same parents. Parent and child, by necessity: since, if the child did not live with the parent (or with somebody standing in the place of the parent) it could not live at all: husband and wife, by a choice approaching to necessity: children of the same parents, by the necessity of their living each of them with the parents. As between parent and child, the necessity there is of a power on the part of the parent for the preservation of the child supersedes all farther reasoning. As between man and wife, that necessity does not subsist. The only reason that applies to this case, is, the necessity of putting an end to competition. The man would have the meat roasted; the woman boiled: shall they both fast till the judge comes in to dress it for them? The woman would have the child dressed in green; the man, in blue: shall the child be naked till the judge comes in to clothe it? This affords a reason for giving a power to one or other of the parties: but it affords none for giving the power to the one rather than to the other. How then shall the legislator determine? Supposing it equally easy to give it to either, let him look ever so long for a reason why he should give it to the one rather than to the other, and he may look in vain. But how does the matter stand already? for there were men and wives (or, what comes to the same thing, male and female living together as man and wife) before there were legislators. Looking round him, then, he finds almost every where the male the stronger of the two; and therefore possessing already, by purely physical means, that power which he is thinking of bestowing on one of them by means of law. How, then, can he do so well as by placing the legal power in the same hands which are beyond comparison the more likely to be in possession of the physical? In this way, few transgressions, and few calls for punishment: in the other way, perpetual transgressions, and perpetual calls for punishment. Solon is said to have transferred the same idea to the distribution of state powers. Here, then, was *generalization:* here was the work of genius. But in the disposal of domestic power, every legislator, without any effort of genius, has been a Solon. So much for *reason:*[a] add to which, in point of *motives*,[b] that legislators seem all to have been of the male sex, down to the days of Catherine. I speak here of those who frame laws, not of those who touch them with a sceptre.

[a] Social motives: sympathy for the public: love of reputation, &c.

[b] Self-regarding motives: or social motives, which are social in a less extent: sympathy for persons of a particular description: persons of the same sex.

power may be termed a *beneficial* one. If it be for the sake of the inferior that the power is established, the superior is termed a *guardian;* and the inferior his *ward:* and the power being thereby coupled with a trust, may be termed a *fiduciary* one. If for the sake of a third party, the superior may be termed a *superintendant;* and the inferior his *subordinate.* This third party will either be an assignable individual or set of individuals, or a set of unassignable individuals. In this latter case, the trust is either a public or a semi-public one: and the condition which it constitutes is not of the domestic, but of the civil kind. In the former case, this third party, or *principal,* as he may be termed, either has a beneficial power over the superintendant, or he has not: if he has, the superintendant is his servant, and consequently so also is the subordinate: if not, the superintendant is the master of the subordinate; and all the advantage which the principal has over his superintendant, is that of possessing a set of rights, uncorroborated by power; and therefore, as we have seen,* not fit to constitute a condition of the domestic kind. But be the condition what it may, which is constituted by these rights, of what nature can the obligations be, to which the superintendant is capable of being subjected by means of them? They are neither more nor less than those which a man is capable of being subjected to by powers. It follows, therefore, that the functions of a principal and his superintendant coincide with those of a master and his servant; and consequently that the offences relative to the two former conditions will coincide with the offences relative to the two latter.

XLI.

Offences to which the condition of a master, like any other kind of condition, is exposed, may, as hath been already intimated,† be distinguished into such as concern the existence of the condition itself, and such as concern the performance of the functions of it, while subsisting. First, then, with regard to such as affect its existence. It is obvious enough, that the services of one man may be a benefit to another: the condition of a master may therefore be a beneficial one. It stands exposed, therefore, to the offences of *wrongful non-investment, wrongful interception, usurpation, wrongful investment,* and *wrongful divestment.* But how should it stand exposed to the offences of *wrongful abdication, wrongful detrectation,* and *wrongful imposition?* Certainly it cannot of itself; for services, when a man has the power of exacting them or not, as he thinks fit, can never be a burthen. But if to the powers, by which the condition of a master is constituted, the law thinks fit to annex any obligation on the part of the master; for instance, that of affording maintenance, or giving wages, to the servant, or paying money to any body else, it is evident, that in virtue of such obligation the condition *may* become a burthen. In this case, however, the condition possessed by the master will not, properly speaking, be the pure and simple condition of a master: it will be a kind of complex object, resolvable into the beneficial condition of a master, and the burthensome obligation which is annexed to it. Still, however, if the nature of the obligation lies within a narrow compass, and does not, in the manner of that which constitutes a trust, interfere with the exercise of those powers by which the condition of the superior is constituted, the latter, notwithstanding this foreign mixture, will still retain the name of mastership.‡ In this case, therefore, but not otherwise, the condition of a master may stand exposed to the offences of *wrongful abdication, wrongful detrectation,* and *wrongful imposition.* Next as to the behaviour of persons, with reference to this condition, while considered as subsisting. In virtue of its being a benefit, it is exposed to *disturbance.* This disturbance will either be the offence of a stranger, or the offence of the servant himself. Where it is the offence of a stranger, and is committed by taking the person of the servant, in circumstances in which the taking of an object belonging to the class of things, would be an act of theft, or (what is scarcely worth distinguishing from theft) an act of embezzlement, it may be termed *servant-stealing.* Where it is the offence of the servant himself, it is styled *breach of duty.* Now the most flagrant species of breach of duty, and that which includes indeed every other, is that which consists in the servant's withdrawing himself from the place in which the duty should be performed. This species of breach of duty is termed *elopement.* Again, in virtue of the power belonging to this condition, it is liable, on the part of the master, to *abuse.* But this power is not coupled with a trust. The condition of a master is therefore not exposed to any offence which is analogous to breach of trust. Lastly, on account of its being exposed to abuse, it may be conceived to stand, in point of possibility, exposed to *bribery.* But considering how few, and how insignificant, the persons are who are liable to be subject to the power here in question, this is an offence which, on account of the want of temptation, there will seldom

* *Supra,* note, page 43.

† *Vide supra,* par. 27.

‡ In most civilized nations there is a sort of domestic condition, in which the superior is termed a master, while the inferior is termed sometimes indeed a servant, but more particularly and more frequently an *apprentice.* In this case, though the superior is, in point of usage, known by no other name than that of a master, the relationship is in point of fact a mixed one, compounded of that of *master* and that of *guardian.*

be any example of in practice. We may therefore reckon thirteen sorts of offences to which the condition of a master is exposed; viz. 1. Wrongful non-investment of mastership. 2. Wrongful interception of mastership. 3. Wrongful divestment of mastership. 4. Usurpation of mastership. 5. Wrongful investment of mastership. 6. Wrongful abdication of mastership. 7. Wrongful detrectation of mastership. 8. Wrongful imposition of mastership. 9. Abuse of mastership. 10. Disturbance of mastership. 11. Breach of duty in servants. 12. Elopement of servants. 13. Servant-stealing.

XLII.

As to the *power* by which the condition of a master is constituted, this may be either *limited* or *unlimited*. When it is altogether unlimited, the condition of the servant is styled *pure slavery*. But as the rules of language are as far as can be conceived from being steady on this head, the term slavery is commonly made use of wherever the limitations prescribed to the power of the master are looked upon as inconsiderable. Whenever any such limitation is prescribed, a kind of fictitious entity is thereby created, and, in quality of an incorporeal object of possession, is bestowed upon the servant: this object is of the class of those which are called *rights:* and in the present case is termed, in a more particular manner, a *liberty:* and sometimes a *privilege*, an *immunity*, or an *exemption*. Now those limitations on the one hand, and these liberties on the other, may, it is evident, be as various as the acts (positive or negative) which the master may or may not have the power of obliging the servant to submit to or to perform. Correspondent, then, to the infinitude of these liberties, is the infinitude of the modifications which the condition of mastership (or, as it is more common to say in such a case, that of servitude) admits of. These modifications, it is evident, may, in different countries, be infinitely diversified. In different countries, therefore, the offences characterized by the above names will, if specifically considered, admit of very different descriptions. If there be a spot upon the earth so wretched as to exhibit the spectacle of pure and absolutely unlimited slavery, on that spot there will be no such thing as any abuse of mastership; which means neither more nor less than that no abuse of mastership will there be treated on the footing of an offence. As to the question, Whether any, and what, modes of servitude ought to be established or kept on foot? this is a question, the solution of which belongs to the civil branch of the art of legislation.

XLIII.

Next with regard to the offences that may concern the condition of a servant. It might seem at first sight, that a condition of this kind could not have a spark of benefit belonging to it: that it could not be attended with any other consequences than such as rendered it a mere burthen. But a burthen itself may be a benefit, in comparison of a greater burthen. Conceive a man's situation, then, to be such, that he must, at any rate, be in a state of pure slavery. Still may it be material to him, and highly material, who the person is whom he has for his master. A state of slavery, then, under one master, may be in a beneficial state to him, in comparison with a state of slavery under another master. The condition of a servant, then, is exposed to the several offences to which a condition, in virtue of its being a beneficial one, is exposed.* More than this, where the power of the master is limited, and the limitations annexed to it, and thence the liberties of the servant, are considerable, the servitude may even be positively eligible. For amongst those limitations may be such as are sufficient to enable the servant to possess property of his own: being capable, then, of possessing property of his own, he may be capable of receiving it from his master: in short, he may receive *wages*, or other emoluments, from his master; and the benefit resulting from these wages may be so considerable as to outweigh the burthen of the servitude, and by that means render that condition more beneficial upon the whole, and more eligible, than that of one who is not in any respect under the controul of any such person as a master. Accordingly, by these means the condition of the servant may be so eligible, that his entrance into it, and his continuance in it, may have been altogether the result of his own choice. That the nature of the two conditions may be the more clearly understood, it may be of use to shew the sort of correspondency there is between the offences which affect the existence of the one, and those which affect the existence of the other. That this correspondency cannot but be very intimate, is obvious at first sight. It is not, however, that a given offence in the former catalogue coincides with an offence of the same name in the latter catalogue: usurpation of servantship with usurpation of mastership, for example. But

* It may seem at first, that a person who is in the condition of a slave, could not have it in his power to engage in such course of proceeding as would be necessary, in order to give him an apparent title to be reckoned among the slaves of another master. But though a slave in point of *right*, it may happen that he has eloped, for instance, and is not a slave in point of *fact:* or, suppose him a slave in point of fact, and ever so vigilantly guarded, still a person connected with him by the ties of sympathy, might do that for him which, though willing and assenting, he might not be able to do for himself: might forge a deed of donation, for example, from the one master to the other.

the case is, that an offence of one denomination in the one catalogue coincides with an offence of a different denomination in the other catalogue. Nor is the coincidence constant and certain; but liable to contingencies, as we shall see. First, then, wrongful non-collation of the condition of a servant, if it be the offence of one who should have been the master, coincides with wrongful detrectation of mastership: if it be the offence of a third person, it involves in it non-collation of mastership, which, provided the mastership be, in the eyes of him who should have been master, a beneficial thing, but not otherwise, is wrongful. 2. Wrongful interception of the condition of a servant, if it be the offence of him who should have been master, coincides with wrongful detrectation of mastership: if it be the offence of a third person, and the mastership be a beneficial thing, it involves in it wrongful interception of mastership. 3. Wrongful ablation of servantship, if it be the offence of the master, but not otherwise, coincides with wrongful abdication of mastership: if it be the offence of a stranger, it involves in it ablation of mastership, which, in as far as the mastership is a beneficial thing, is wrongful. 4. Usurpation of servantship coincides necessarily with wrongful imposition of mastership: it will be apt to involve in it wrongful divestment of mastership; but this only in the case where the usurper, previously to the usurpation, was in a state of servitude under some other master. 5. Wrongful collation of servantship (the servantship being considered as a beneficial thing) coincides with imposition of mastership; which, if in the eyes of the pretended master, the mastership should chance to be a burthen, will be wrongful. 6. Wrongful abdication of servantship coincides with wrongful ablation of mastership. 7. Wrongful detrectation of servantship, with wrongful non-collation of mastership. 8. Wrongful imposition of servantship, if it be the offence of the pretended master, coincides with usurpation of mastership: if it be the offence of a stranger, it involves in it imposition of mastership, which, if in the eyes of the pretended master the mastership should be a burthen, will be wrongful. As to abuse of mastership, disturbance of mastership, breach of duty in servants, elopement of servants, and servant-stealing, these are offences which, without any change of denomination, bear equal relation to both conditions. And thus we may reckon thirteen sorts of offences to which the condition of a servant stands exposed; viz. 1. Wrongful non-investment of servantship. 2. Wrongful interception of servantship. 3. Wrongful divestment of servantship. 4. Usurpation of servantship. 5. Wrongful investment of servantship. 6. Wrongful abdication of servantship. 7. Wrongful detrectation of servantship. 8. Wrongful imposition of servantship. 9. Abuse of mastership. 10. Disturbance of mastership. 11. Breach of duty in servants. 12. Elopement of servants. 13. Servant-stealing.

XLIV.

We now come to the offences to which the condition of a guardian is exposed. A guardian is one who is invested with power over another, living within the compass of the same family, and called a ward; the power being to be exercised for the benefit of the ward. Now, then, what are the cases in which it can be for the benefit of one man, that another, living within the compass of the same family, should exercise power over him? Consider either of the parties by himself, and suppose him, in point of understanding, to be on a level with the other; it seems evident enough that no such cases can ever exist.* To the production of happiness on the part of any given person (in like manner as to the production of any other effect which is the result of human agency), three things it is necessary should concur: knowledge, inclination, and physical power. Now as there is no man who is so sure of being *inclined*, on all occasions, to promote your happiness, as you yourself are, so neither is there any man who, upon the whole, can have had so good opportunities as you must have had, of *knowing* what is most conducive to that purpose. For who should know so well as you do what it is that gives you pain or pleasure?† Moreover, as to power, it is manifest that no superiority in this respect, on the part of a stranger, could, for a constancy, make up for so great a deficiency as he must lie under in respect of two such material points as knowledge and inclination. If, then, there be a case where it can be for the advantage of one man to be under the power of another, it must be on account of some palpable and very considerable deficiency, on the part of the former, in point of intellects, or (which is the same thing in other words) in point of knowledge or understanding. Now there are two cases in which such palpable deficiency is known to take place. These are, 1. Where a man's intellect is not yet arrived at that state in which it is capable of directing his own inclination in the pursuit of happiness: this is the case of *infancy*.‡ 2. Where, by some particular known or unknown circumstance, his intellect has either never arrived at that

* Consider them *together* indeed, take the sum of the two interests, and the case, as we have seen (*supra*, par. 40), is then the reverse. That case, it is to be remembered, proceeds only upon the supposition that the two parties are obliged to live together; for suppose it to be at their option to part, the necessity of establishing the power ceases.

† Ch. xix. [Limits] § 1.

‡ See ch. xv. [Cases unmeet] § 3.

state, or having arrived at it, has fallen from it: which is the case of *insanity*.

By what means, then, is it to be ascertained whether a man's intellect is in that state or no? For exhibiting the quantity of sensible heat in a human body, we have a very tolerable sort of instrument, the thermometer; but for exhibiting the quantity of intelligence, we have no such instrument. It is evident, therefore, that the line which separates the quantity of intelligence which *is* sufficient for the purposes of self-government from that which is *not* sufficient, must be, in a great measure, arbitrary. Where the insufficiency is the result of want of age, the sufficient quantity of intelligence, be it what it may, does not accrue to all at the same period of their lives. It becomes, therefore, necessary for legislators to cut the gordian knot, and fix upon a particular period, at which, and not before, truly or not, every person whatever shall be deemed, as far as depends upon age, to be in possession of this sufficient quantity.* In this case, then, a line is drawn, which may be the same for every man, and in the description of which, such as it is, whatever persons are concerned may be certain of agreeing: the circumstance of time affording a mark by which the line in question may be traced with the utmost degree of nicety. On the other hand, where the insufficiency is the result of insanity, there is not even this resource: so that here the legislator has no other expedient than to appoint some particular person or persons to give a particular determination of the question, in every instance in which it occurs, according to his or their particular and arbitrary discretion. Arbitrary enough it must be at any rate, since the only way in which it can be exercised is by considering whether the share of intelligence possessed by the individual in question does or does not come up to the loose and indeterminate idea which persons so appointed may chance to entertain with respect to the quantity which is deemed sufficient.

XLV.

The line, then, being drawn, or supposed to be so, it is expedient for a man who cannot, with safety to himself, be left in his own power, that he should be placed in the power of another. How long, then, should he remain so? Just so long as his inability is supposed to continue: that is, in the case of infancy, till he arrives at that period at which the law deems him to be of full age: in the case of insanity, till he be of sound mind and understanding. Now it is evident, that this period, in the case of infancy, may not arrive for a considerable time; and in the case of insanity, perhaps never. The duration of the power belonging to this trust must therefore, in the one case, be very considerable; in the other case, indefinite.

XLVI.

The next point to consider is, what *may* be the extent of it? for as to what it *ought* to be, that is a matter to be settled, not in a general analytical sketch, but in a particular and circumstantial dissertation. By possibility, then, this power may possess any extent that can be imagined: it may extend to any acts which, physically speaking, it may be in the power of the ward to perform himself, or be the object of, if exercised by the guardian. Conceive the power, for a moment, to stand upon this footing: the condition of the ward stands now exactly upon a footing with pure slavery. Add the obligation by which the power is turned into a trust: the limits of the power are now very considerably narrowed. What, then, is the purport of this obligation? Of what nature is the course of conduct it prescribes? It is such a course of conduct as shall be best calculated for procuring to the ward the greatest quantity of happiness which his faculties, and the circumstances he is in, will admit of: saving always, in the first place, the regard which the guardian is permitted to show to his own happiness; and, in the second place, that which he is obliged, as well as permitted, to show to that of other men. This is, in fact, no other than that course of conduct which the ward, did he but know how, ought, in point of *prudence*, to maintain of himself: so that the business of the former is to govern the latter precisely in the manner in which this latter ought to govern himself. Now to instruct each individual in what manner to govern his own conduct in the details of life, is the particular business of private ethics: to instruct individuals in what manner to govern the conduct of those whose happiness, during non-age, is committed to their charge, is the business of the art of private education. The details, therefore, of the rules to be given for that purpose, any more than the acts which are capable of being committed in violation of those rules, belong not to the art of legislation: since, as will be seen more particularly hereafter,† such details could not, with

* In certain nations, women, whether married or not, have been placed in a state of perpetual wardship: this has been evidently founded on the notion of a decided inferiority in point of intellects on the part of the female sex, analogous to that which is the result of infancy or insanity on the part of the male. This is not the only instance in which tyranny has taken advantage of its own wrong, alleging as a reason for the domination it exercises, an imbecility, which, as far as it has been real, has been produced by the abuse of that very power which it is brought to justify. Aristotle, fascinated by the prejudice of the times, divides mankind into two distinct species: that of freemen, and that of slaves. Certain men were born to be slaves, and ought to be slaves. Why? Because they are so.

† See ch. xix. [Limits] § 1.

any chance of advantage, be provided for by the legislator. Some general outlines might, indeed, be drawn by his authority; and, in point of fact, some are, in every civilized state. But such regulations, it is evident, must be liable to great variation: in the first place, according to the infinite diversity of civil conditions which a man may stand invested with in any given state: in the next place, according to the diversity of local circumstances that may influence the nature of the conditions which may chance to be established in different states. On this account, the offences which would be constituted by such regulations could not be comprised under any concise and settled denominations, capable of a permanent and extensive application. No place, therefore, can be allotted to them here.

XLVII.

By what has been said, we are the better prepared for taking an account of the offences to which the condition in question stands exposed. Guardianship being a private trust, is of course exposed to those offences, and no others, by which a private trust is liable to be affected. Some of them, however, on account of the special quality of the trust, will admit of some further particularity of description. In the first place, breach of this species of trust may be termed *mismanagement* of guardianship. In the second place, of whatever nature the duties are, which are capable of being annexed to this condition, it must often happen, that in order to fulfil them, it is necessary the guardian should be at a certain particular place. Mismanagement of guardianship, when it consists in the not being, on the occasion in question, at the place in question, may be termed *desertion* of guardianship. Third, it is manifest enough, that the object which the guardian ought to propose to himself, in the exercise of the powers to which those duties are annexed, is to procure for the ward the greatest quantity of happiness which can be procured for him, consistently with the regard which is due to the other interests that have been mentioned: for this is the object which the ward would have proposed to himself, and might and ought to have been allowed to propose to himself, had he been capable of governing his own conduct. Now, in order to procure this happiness, it is necessary that he should possess a certain power over the objects on the use of which such happiness depends. These objects are either the person of the ward himself, or other objects that are extraneous to him. These other objects are either things or persons. As to *things*, then, objects of this class, in as far as a man's happiness depends upon the use of them, are styled his *property*. The case is the same with the services of any *persons* over whom he may happen to possess a beneficial power, or to whose services he may happen to possess a beneficial right. Now when property of any kind, which is in trust, suffers by the delinquency of him with whom it is in trust, such offence, of whatever nature it is in other respects, may be styled *dissipation* in breach of trust: and if it be attended with a profit to the trustee, it may be styled *peculation*.* Fourth, for one person to exercise a power of any kind over another, it is necessary that the latter should either perform certain acts, upon being commanded so to do by the former, or at least should suffer certain acts to be exercised upon himself. In this respect, a ward must stand upon the footing of a servant: and the condition of a ward must, in this respect, stand exposed to the same offences to which that of a servant stands exposed: that is, on the part of a stranger, to *disturbance*, which, in particular circumstances, will amount to *theft:* on the part of the ward, to *breach of duty:* which, in particular circumstances, may be effected by *elopement*. Fifth, there does not seem to be any offence concerning guardianship, that corresponds to *abuse of trust:* I mean in the sense to which the last-mentioned denomination has been here confined.† The reason is, that guardianship, being a trust of a private nature, does not, as such, confer upon the trustee any power, either over the person, or over the property, of any party, other than the *beneficiary* himself. If by accident it confers on the trustee a power over any persons whose services constitute a part of the property of the beneficiary, the trustee becomes thereby, in certain respects, the master of such servants.‡ Sixth, bribery also is a sort of offence to which, in this case, there is not commonly much temptation. It is an offence, however, which by possibility is capable of taking this direction: and must therefore be aggregated to the number of the offences to which the condition of a guardian stands exposed. And thus we have in all seventeen of these offences; viz. 1. Wrongful non-investment of guardianship. 2. Wrongful interception of guardianship. 3. Wrongful divestment of guardianship. 4. Usurpation of guardianship. 5. Wrongful investment of guardianship. 6. Wrongful abdication of guardianship. 7. Detrectation of guardianship. 8. Wrongful imposition of guardianship. 9. Mismanagement of guardianship. 10. Desertion of guardianship. 11. Dissipation in prejudice of wardship. 12. Peculation in prejudice of wardship. 13. Disturbance of guardianship. 14. Breach of duty to guardians. 15. Elopement from guardians. 16. Ward-stealing. 17. Bribery in prejudice of wardship.

XLVIII.

Next, with regard to offences to which the condition of wardship is exposed. Those

* *Vide supra*, par. 35. † par. 25. ‡ par. 40.

which first affect the existence of the condition itself are as follows: 1. Wrongful non-investment of the condition of a ward. This, if it be the offence of one who should have been guardian, coincides with wrongful detrectation of guardianship: if it be the offence of a third person, it involves in it non-investment of guardianship, which, provided the guardianship is, in the eyes of him who should have been guardian, a desirable thing, is wrongful. 2. Wrongful interception of wardship. This, if it be the offence of him who should have been guardian, coincides with wrongful detrectation of guardianship: if it be the offence of a third person, it involves in it interception of guardianship, which, provided the guardianship is, in the eyes of him who should have been guardian, a desirable thing, is wrongful. 3. Wrongful divestment of wardship. This, if it be the offence of the guardian, but not otherwise, coincides with wrongful abdication of guardianship: if it be the offence of a third person, it involves in it divestment of guardianship, which, if the guardianship is, in the eyes of the guardian, a desirable thing, is wrongful. 4. Usurpation of the condition of a ward: an offence not very likely to be committed. This coincides at any rate with wrongful imposition of guardianship; and if the usurper were already under the guardianship of another guardian, it will involve in it wrongful divestment of such guardianship.* 5. Wrongful investment of wardship, (the wardship being considered as a beneficial thing.) This coincides with imposition of guardianship, which, if in the eyes of the pretended guardian the guardianship should be a burthen, will be wrongful. 6. Wrongful abdication of wardship. This coincides with wrongful divestment of guardianship. 7. Wrongful detrectation of wardship. This coincides with wrongful interception of guardianship. 8. Wrongful imposition of wardship. This, if the offender be the pretended guardian, coincides with usurpation of guardianship: if a stranger, it involves in it wrongful imposition of guardianship. As to such of the offences relative to this condition, as concern the consequences of it while subsisting, they are of such a nature that, without any change of denomination, they belong equally to the condition of a guardian, and that of a ward. We may therefore reckon seventeen sorts of offences relative to the condition of a ward: 1. Wrongful non-investment of wardship. 2. Wrongful interception of wardship. 3. Wrongful divestment of wardship. 4. Usurpation of wardship. 5. Wrongful investment of wardship. 6. Wrongful abdication of wardship. 7. Wrongful detrectation of wardship. 8. Wrongful imposition of wardship. 9. Mismanagement of guardianship. 10. Desertion of guardianship. 11. Dissipation in prejudice of wardship. 12. Peculation in prejudice of wardship. 13. Disturbance of guardianship. 14. Breach of duty to guardians. 15. Elopement from guardians. 16. Ward-stealing. 17. Bribery in prejudice of wardship.

* This effect, it may be thought, will not necessarily take place: since a ward may have two guardians. One man, then, is guardian by right: another man comes and makes himself so by usurpation. This may very well be, and yet the former may continue guardian notwithstanding. How then (it may be asked) is he divested of his guardianship? The answer is, Certainly not of the whole of it: but, however, of a part of it; of such part as is occupied, if one may so say, that is, of such part of the powers and rights belonging to it as are exercised, by the usurper.

XLIX.

We come now to the offences to which the condition of a parent stands exposed: and first, with regard to those by which the very existence of the condition is affected. On this occasion, in order to see the more clearly into the subject, it will be necessary to distinguish between the natural relationship, and the legal relationship, which is superinduced, as it were, upon the natural one. The natural one being constituted by a particular event, which, either on account of its being already past, or on some other account, is equally out of the power of the law, neither is, nor can be made, the subject of an offence. *Is* a man your father? It is not any offence of mine that can make you not his son. Is he *not* your father? It is not any offence of mine that can render him so. But although he does in fact bear that relation to you, I, by an offence of mine, may perhaps so manage matters, that he shall not be *thought* to bear it: which, with respect to any legal advantages which either he or you could derive from such relationship, will be the same thing as if he did not. In the capacity of a witness, I may cause the judges to believe that he is not your father, and to decree accordingly: or, in the capacity of a judge, I may myself decree him not to be your father. Leaving, then, the purely natural relationship as an object equally out of the reach of justice and injustice, the legal condition, it is evident, will stand exposed to the same offences, neither more nor less, as every other condition, that is capable of being either beneficial or burthensome, stands exposed to. Next with regard to the exercise of the functions belonging to this condition, considered as still subsisting. In parentality there must be two persons concerned, the father and the mother. The condition of a parent includes, therefore, two conditions; that of a father, and that of a mother, with respect to such or such a child. Now it is evident, that between these two parties, whatever beneficiary powers, and other rights, as also whatever obligations, are annexed to the condition of a parent, may be

shared in any proportions that can be imagined. But if in these several objects of legal creation, each of these two parties have severally a share, and if the interests of all these parties are in any degree provided for, it is evident that each of the parents will stand, with relation to the child, in two several capacities: that of a master, and that of a guardian. The condition of a parent, then, in as far as it is the work of law, may be considered as a complex condition, compounded of that of a guardian, and that of a master. To the parent, then, in quality of guardian, results a set of duties, involving, as necessary to the discharge of them, certain powers: to the child, in the character of a ward, a set of rights corresponding to the parent's duties, and a set of duties corresponding to his powers. To the parent, again, in quality of master, a set of beneficiary powers, without any other necessary limitation (so long as they last) than what is annexed to them by the duties incumbent on him in quality of a guardian: to the child, in the character of a servant, a set of duties corresponding to the parent's beneficiary powers, and without any other necessary limitation (so long as they last) than what is annexed to them by the rights which belong to the child in his capacity of ward. The condition of a parent will therefore be exposed to all the offences to which either that of a guardian or that of a master are exposed: and, as each of the parents will partake, more or less, of both those characters, the offences to which the two conditions are exposed may be nominally, as they will be substantially, the same. Taking them then all together, the offences to which the condition of a parent is exposed will stand as follows: 1. Wrongful non-investment of parentality.* 2. Wrongful interception of parentality. 3. Wrongful divestment of parentality. 4. Usurpation of parentality. 5. Wrongful investment of parentality. 6. Wrongful abdication of parentality. 7. Wrongful detrectation of parentality. 8. Wrongful imposition of parentality. 9. Mismanagement of parental guardianship. 10. Desertion of parental guardianship. 11. Dissipation in prejudice of filial wardship. 12. Peculation in prejudice of filial wardship. 13. Abuse of parental powers. 14. Disturbance of parental guardianship. 15. Breach of duty to parents. 16. Elopement from parents. 17. Child-stealing. 18. Bribery in prejudice of filial wardship.

L.

Next with regard to the offences to which the *filial* condition,* the condition of a son or daughter, stands exposed. The principles to be pursued in the investigation of offences of this description, have already been sufficiently developed. It will be sufficient, therefore, to enumerate them without further discussion. The only peculiarities by which offences relative to the condition in question stand distinguished from the offences relative to all the preceding conditions, depend upon this one circumstance; viz. that it is certain every one must have had a father and a mother: at the same time that it is not certain that every one must have had a master, a servant, a guardian, or a ward. It will be observed all along, that where a person, from whom, if alive, the benefit would be taken, or on whom the burthen would be imposed, be dead, so much of the mischief is extinct, along with the object of the offence. There still, however, remains so much of the mischief as depends upon the advantage or disadvantage which might accrue to persons related, or supposed to be related in the several remoter degrees, to him in question. The catalogue, then, of these offences stands as follows: 1. Wrongful non-investment of filiation. This, if it be the offence of him or her who should have been recognised as the parent, coincides with wrongful detrectation of parentality: if it be the offence of a third person, it involves in it non-investment of parentality, which, provided the parentality is, in the eyes of him or her who should have been recognised as the parent, a desirable thing is wrongful. 2. Wrongful interception of filiation. This if it be the offence of him or her who should have been recognised as the parent, coincides with

* At first view it may seem a solecism to speak of the condition of parentality as one which a man can have need to be invested with. The reason is, that it is not common for any ceremony to be required as necessary to a man's being deemed in law the father of such or such a child. But the institution of such a ceremony, whether advisable or not, is at least perfectly conceivable. Nor are there wanting cases in which it has actually been exemplified. By an article in the Roman law, adopted by many modern nations, an illegitimate child is rendered legitimate by the subsequent marriage of his parents. If, then, a priest, or other person whose office it was, were to refuse to join a man and woman in matrimony, such refusal, besides being a wrongful non-investment with respect to the two matrimonial conditions, would be a wrongful non-investment of parentality and filiation, to the prejudice of any children who should have been legitimated.

† In English we have no word that will serve to express with propriety the person who bears the relation opposed to that of parent. The word *child* is ambiguous, being employed in another sense, perhaps more frequently than in this: more frequently in opposition to *a person of full age*, an *adult*, than in correlation to a *parent*. For the condition itself we have no other word than *filiation*: an ill-contrived term, not analogous to *paternity* and *maternity*: the proper term would have been *filiality*: the word filiation is as frequently, perhaps, and more consistently, put for the act of establishing a person in the possession of the condition of filiality.

wrongful detrectation of parentality: if it be the offence of a third person, it involves in it interception of parentality, which, provided the parentality is, in the eyes of him or her who should have been recognised as parent, a desirable thing, is wrongful. 3. Wrongful divestment of filiation. This, if it be the offence of him or her who should be recognised as parent, coincides with wrongful abdication of parentality: if it be the offence of a third person, it involves in it divestment of parentality; to wit, of paternity, or of maternity, or of both; which, if the parentality is, in the eyes of him or her who should be recognised as parent, a desirable thing, are respectively wrongful. 4. Usurpation of filiation. This coincides with wrongful imposition of parentality; to wit, either of paternity, or of maternity, or of both; and necessarily involves in it divestment of parentality, which, if the parentality thus divested were, in the eyes of him or her who are thus divested of it, a desirable thing, is wrongful. 5. Wrongful investment of filiation, (the filiation being considered as a beneficial thing.) This coincides with imposition of parentality, which, if in the eyes of the pretended father or mother the parentality should be an undesirable thing, will be wrongful. 6. Wrongful abdication of filiation. This necessarily coincides with wrongful divestment of parentality; it also is apt to involve in it wrongful imposition of parentality; though not necessarily either to the advantage or to the prejudice of any certain person. For if a man, supposed at first to be your son, appears afterwards not to be yours, it is certain indeed that he is the son of some other man, but it may not appear who that other man is. 7. Wrongful detrectation of filiation. This coincides with wrongful non-investment or wrongful interception of parentality. 8. Wrongful imposition of filiation. This, if it be the offence of the pretended parent, coincides necessarily with usurpation of parentality: if it be the offence of a third person, it necessarily involves imposition of parentality; as also divestment of parentality: either or both of which, according to the circumstance above mentioned, may or may not be wrongful. 9. Mis-management of parental guardianship. 10. Desertion of parental guardianship. 11. Dissipation in prejudice of filial wardship. 12. Peculation in prejudice of filial wardship. 13. Abuse of parental power. 14. Disturbance of parental guardianship. 15. Breach of duty to parents. 16. Elopement from parents. 17. Child-stealing. 18. Bribery in prejudice of parental guardianship.

LI.

We shall now be able to apply ourselves with some advantage to the examination of the several offences to which the marital condition, or condition of a husband, stands exposed. A husband is a man, between whom and a certain woman, who in this case is called his wife, there subsists a legal obligation for the purpose of their living together, and in particular for the purpose of a sexual intercourse to be carried on between them. This obligation will naturally be considered in four points of view: 1. In respect of its commencement. 2. In respect of the placing it. 3. In respect of the nature of it. 4. In respect of its duration. First, then, it is evident, that in point of possibility, one method of commencement is as conceivable as another: the time of its commencement might have been marked by one sort of event (by one sort of *signal*, as it may here be called) as well as by another. But in practice the signal has usually been, as in point of utility it ought constantly to be, a contract entered into by the parties; that is, a set of signs, pitched upon by the law, as expressive of their *mutual consent* to take upon them this condition. Second, and third, with regard to the placing of the obligations which are the result of the contract, it is evident that they must rest solely on one side, or mutually on both. On the first supposition, the condition is not to be distinguished from pure slavery. In this case, either the wife must be the slave of the husband, or the husband of the wife. The first of these suppositions has perhaps never been exemplified; the opposing influence of physical causes being too universal to have ever been surmounted: the latter seems to have been exemplified but too often; perhaps among the first Romans; at any rate, in many barbarous nations. Thirdly, with regard to the nature of the obligations. If they are not suffered to rest all on one side, certain rights are thereby given to the other. There must, therefore, be rights on both sides. Now, where there are mutual rights possessed by two persons, as against each other, either there are powers annexed to those rights, or not. But the persons in question are, by the supposition, to live together: in which case we have shown,* that it is not only expedient, but in a manner necessary, that on one side there should be powers. Now it is only on one side that powers can be: for suppose them on both sides, and they destroy one another. The question is, then, In which of the parties these powers shall be lodged? We have shown, that on the principle of utility they ought to be lodged in the husband. The powers, then, which subsist, being lodged in the husband, the next question is, Shall the interest of one party only, or of both, be consulted in the exercise of them? It is evident, that on the principle of utility the interests of

* *Supra.*

both ought alike to be consulted: since in two persons, taken together, more happiness is producible than in one. This being the case, it is manifest, that the legal relation which the husband will bear to the wife will be a complex one, compounded of that of master and that of guardian.

LII.

The offences, then, to which the condition of a husband will be exposed, will be the sum of those to which the two conditions of master and guardian are exposed. Thus far the condition of a husband, with respect to the general outlines of it, stands upon the same footing as that of a parent. But there are certain reciprocal services, which being the main subject of the matrimonial contract, constitute the essence of the two matrimonial relations, and which neither a master nor guardian, as such, nor a parent, at any rate, have usually been permitted to receive. These must, of course, have been distinguished from the indiscriminate train of services at large which the husband in his character of master is empowered to exact, and of those which in his character of guardian he is bound to render. Being thus distinguished, the offences relative to the two conditions have, in many instances, in as far as they have reference to these peculiar services, acquired particular denominations. In the first place, with regard to the contract, from the celebration of which the legal condition dates its existence. It is obvious, that in point of possibility this contract might, on the part of either sex, subsist with respect to several persons of the other sex at the same time: the husband might have any number of wives; the wife might have any number of husbands: the husband might enter into the contract with a number of wives at the same time; or, if with only one at a time, he might reserve to himself a right of engaging in a similar contract with any number, or with only such or such a number of other women afterwards, during the continuance of each former contract. This latter, accordingly, is the footing upon which, as is well known, marriage is and has been established in many extensive countries; particularly in all those which profess the Mahometan religion. In point of possibility, it is evident that the like liberty might be reserved on the part of the wife: though in point of practice no examples of such an arrangement seem ever to have occurred. Which of all these arrangements is, in point of utility, the most expedient, is a question which would require too much discussion to answer in the course of an analytical process like the present, and which belongs indeed to the civil branch of legislation, rather than to the penal.* In Christian countries, the solemnization of any such contract is made to exclude the solemnization of any subsequent one during the continuance of a former: and the solemnization of any such subsequent contract is accordingly treated as an offence, under the name of *Polygamy*. Polygamy, then, is at any rate, on the part of the man, a particular modification of that offence which may be styled usurpation of the condition of a husband. As to its other effects, they will be different, according as it was the man only, or the woman only, or both, that were in a state of matrimony at the time of the commission of the offence. If the man only, then his offence involves in it, *pro tanto*, that of wrongful divestment of the condition of a wife, in prejudice of his prior wife.† If the woman only, then it involves in it, *pro tanto*, that of wrongful divestment of the condition of a husband, in prejudice of her prior husband. If both were already married, it of course involves both the wrongful divestments which have just been mentioned. And on the other hand also, the converse of all this may be observed with regard to polygamy on the part of the woman. Second, as the engaging not to enter into any subsequent engagement of the like kind during the continuance of the first, is one of the conditions on which the law lends its sanction to the first; so another is, the inserting, as one of the articles of this engagement, an undertaking not to render to, or accept from, any other person the services which form the characteristic object of it: the rendering or acceptance of any such services is accordingly treated as an offence, under the name of *adultery*: under which name is also comprised the offence of the stranger, who, in the commission of the above offence, is the necessary accomplice. Third, disturbing either of the parties to this engagement, in the possession of these characteristic services, may in like manner be distinguished from the offence of disturbing them in the enjoyment of the miscellaneous advantages derivable from the same condition; and on whichever side the blame rests, whether that of the party, or that of a third person, may be termed *wrongful withholding of connubial services*. And thus we have one-and-twenty sorts of offences to which, as the law stands at present in Christian countries, the condition of a husband stands exposed: viz. 1. Wrongful non-investment of the condition of a husband. 2. Wrongful interception of the condition of a husband. 3. Wrongful divestment of the condition of a husband. 4. Usurpation of the condition

* See ch. xix. [Limits] § 4.

† In this case also, if the woman knew not of the prior marriage, it is besides a species of seduction; and, in as far as it affects her, belongs to another division of the offences of this class. *Vide supra*, par. 36.

of a husband. 5. Polygamy. 6. Wrongful investment of the condition of a husband. 7. Wrongful abdication of the condition of a husband. 8. Wrongful detrectation of the condition of a husband. 9. Wrongful imposition of the condition of a husband. 10. Mismanagement of marital guardianship. 11. Desertion of marital guardianship. 12. Dissipation in prejudice of matrimonial wardship. 13. Peculation in prejudice of matrimonial wardship. 14. Abuse of marital power. 15. Disturbance of marital guardianship. 16. Wrongful withholding of connubial services. 17. Adultery. 18. Breach of duty to husbands. 19. Elopement from husbands. 20. Wife-stealing. 21. Bribery in prejudice of marital guardianship.*

LIII.

Next with regard to the offences to which the condition of a wife stands exposed. From the patterns that have been exhibited already, the coincidences and associations that take place between the offences that concern the existence of this condition and those which concern the existence of the condition of a husband, may easily enough be apprehended without farther repetitions. The catalogue of those now under consideration will be precisely the same in every article as the catalogue last exhibited.

LIV.

Thus much for the several sorts of offences relative to the several sorts of domestic conditions: those which are constituted by such natural relations as are contiguous, being included. There remain those which are uncontiguous: of which, after so much as has been said of the others, it will naturally be expected that some notice should be taken. These, however, do not afford any of that matter which is necessary to constitute a condition. In point of fact, no power seems ever to be annexed to any of them. A grandfather, perhaps, may be called by the law to take upon him the guardianship of his orphan grandson: but then the power he has belongs to him not as grandfather, but as guardian. In point of possibility, indeed, power might be annexed to these relations, just as it might to any other. But still no new sort of domestic condition would result from it: since it has been shown that there can be no others, that, being constituted by power, shall be distinct from those which have been already mentioned. Such as they are, however, they have this in common with the before-mentioned relations, that they are capable of importing either benefit or burthen: they therefore stand exposed to the several offences whereby those or any other relations are liable to be affected in point of existence. It might be expected, therefore, that in virtue of these offences, they should be added to the list of the relations which are liable to be objects of delinquency. But the fact is, that they already stand included in it: and although not expressly named, yet as effectually as if they were. On the one hand, it is only by affecting such or such a contiguous relation that any offence, affecting uncontiguous relations, can take place. On the other hand, neither can any offence, affecting the existence of the contiguous relations, be committed, without affecting the existence of an indefinite multitude of such as are uncontiguous. A false witness comes, and causes it to be believed that you are the son of a woman, who, in truth, is not your mother. What follows? An endless tribe of other false persuasions: that you are the grandson of the father and of the mother of this supposed mother: that you are the son of some husband of her's, or, at least, of some man with whom she has cohabited: the grandson of his father and his mother; and so on: the brother of their other children, if they have any: the brother-in-law of the husbands and wives of those children, if married: the uncle of the children of those children; and so on. On the other hand, that you are not the son of your real mother, nor of your real father: that you are not the grandson of either of your real grandfathers or grandmothers; and so on without end: all which persuasions result from, and are included in, the one original false persuasion of your being the son of this your pretended mother.

It should seem, therefore, at first sight, that none of the offences against these uncontiguous relations could ever come expressly into question: for by the same rule that one ought, so it might seem ought a thousand others: the offences against the uncontiguous being merged, as it were, in those which affect the contiguous relations. So far, however, is this from being the case, that in speaking of an offence of this stamp, it is not uncommon to hear a great deal said of this or that uncontiguous relationship which it affects, at the same time that no notice at all shall be taken of any of those which are contiguous. How happens this? Because to the uncontiguous relation are annexed perhaps certain remarkable advantages or disadvantages, while to all the intermediate relations none shall be annexed which are in comparison worth noticing. Suppose Antony or Lepidus to have contested the relationship of Octavius (afterwards Augustus) to Caius Julius Cæsar. How could it have been done? It could only

* I. Semi-public Offences. Falsehoods contesting, or offences against justice destroying, the validity of the marriages of people of certain descriptions; such as Jews, Quakers, Hugonots, &c. &c.

II. Self-regarding Offences. Improvident marriage on the part of minors.

have been by contesting, either Octavius's being the son of Atia, or Atia's being the daughter of Julia, or Julia's being the daughter of Lucius Julius Cæsar, or Lucius Julius Cæsar's being the father of Caius. But to have been the son of Atia, or the grandson of Julia, or the great grandson of Lucius Julius Cæsar, was, in comparison, of small importance. Those intervening relationships were, comparatively speaking, of no other use to him than in virtue of their being so many necessary links in the genealogical chain which connected him with the sovereign of the empire.

As to the advantages and disadvantages which may happen to be annexed to any of those uncontiguous relationships, we have seen already that no powers over the correlative person, nor any corresponding obligations, are of the number. Of what nature, then, can they be? They are, in truth, no other than what are the result either of local and accidental institutions, or of some spontaneous bias that has been taken by the moral sanction. It would, therefore, be to little purpose to attempt tracing them out *a priori* by any exhaustive process: all that can be done is, to pick up and lay together some of the principal articles in each catalogue by way of specimen. The advantages which a given relationship is apt to impart, seem to be referable chiefly to the following heads: 1. Chance of succession to the property, or a part of the property, of the correlative person. 2. Chance of pecuniary support, to be yielded by the correlative person, either by appointment of law, or by spontaneous donation. 3. Accession of legal rank; including any legal privileges which may happen to be annexed to it: such as capacity of holding such and such beneficial offices; exemption from such and such burthensome obligations; for instance, paying taxes, serving burthensome offices, &c. &c. 4. Accession of rank by courtesy; including the sort of reputation which is customarily and spontaneously annexed to distinguished birth and family alliance: whereon may depend the chance of advancement in the way of marriage, or in a thousand other ways less obvious. The disadvantages which a given relation is liable to impart, seem to be referable chiefly to the following heads: 1. Chance of being obliged, either by law, or by force of the moral sanction, to yield pecuniary support to the correlative party. 2. Loss of legal rank; including the legal disabilities, as well as the burthensome obligations, which the law is apt to annex, sometimes with injustice enough, to the lower stations. 3. Loss of rank by courtesy; including the loss of the advantages annexed by custom to such rank. 4. Incapacity of contracting matrimony with the correlative person, where the supposed consanguinity or affinity lies within the prohibited degrees.*

* In pursuance of the plan adopted with relation to semi-public and self-regarding offences, it may here be proper to exhibit such a catalogue, as the nature of the design will admit, of the several genera or inferior divisions of public offences.

I. Offences against the External Security of the State. 1. Treason (in favour of foreign enemies.) It may be positive or negative (negative consisting, for example, in the not opposing the commission of positive.) 2. *Espionage* (in favour of foreign rivals not yet enemies.) 3. Injuries to foreigners at large (including piracy.) 4. Injuries to privileged foreigners (such as ambassadors.)

II. Offences against Justice. 1. Offences against judicial trust: viz. Wrongful non-investment of judicial trust, wrongful interception of judicial trust, wrongful divestment of judicial trust, usurpation of judicial trust, wrongful investment of judicial trust, wrongful abdication of judicial trust, wrongful detrectation of judicial trust, wrongful imposition of judicial trust, breach of judicial trust, abuse of judicial trust, disturbance of judicial trust, and bribery in prejudice of judicial trust.

Breach and abuse of judicial trust may be either intentional or unintentional. Intentional is culpable at any rate. Unintentional will proceed either from inadvertence, or from mis-supposal: if the inadvertence be coupled with heedlessness, or the mis-supposal with rashness, it is culpable: if not, blameless. For the particular acts by which the exercise of judicial trust may be *disturbed*, see B. I. tit. [Offences against Justice.] They are too multifarious, and too ill provided with names, to be examined here.

If a man fails in fulfilling the duties of this trust, and thereby comes either to break or to abuse it, it must be through some deficiency in the three requisite and only requisite endowments, of knowledge, inclination, and power. [See *supra*, par. 27.] A deficiency in any of those points, if any person be in fault, may proceed either from his own fault, or from the fault of those who should act with or under him. If persons who are in fault are persons invested with judicial trust, the offence comes under the head of breach or abuse of trust: if other persons, under that of disturbance of trust.

The ill effects of any breach, abuse, or disturbance of judicial trust, will consist in the production of some article or articles in the list of the mischiefs which it ought to be the original purpose of judicial procedure to remedy or avert, and of those which it ought to be the incidental purpose of it to avoid producing. These are either primary (that is, immediate) or remote: remote are of the 2d, 3d, or 4th order, and so on. The primary are those which import actual pain to persons assignable, and are therefore mischievous in themselves: the secondary are mischievous on account of the tendency they have to produce some article or articles in the catalogue of those of the first order; and are therefore mischievous in their effects. Those of the 3d order are mischievous only on account of the connection they have in the way of productive tendency, as before, with those of the 2d order: and so on.

Primary inconveniences, which it ought to be

LV.

We come now to civil conditions: these, it may well be imagined, may be infinitely various; as various as the acts which a man may be either commanded or allowed, whether for his own benefit, or that of others, to ab-

the object of procedure to provide against, are, 1. The continuance of the individual offence itself, and thereby the increase as well as continuance of the mischief of it. 2. The continuance of the whole mischief of the individual offence. 3. The continuance of a part of the mischief of the individual offence. 4. Total want of amends on the part of persons injured by the offence. 5. Partial want of amends on the part of persons injured by the offence. 6. Superfluous punishment of delinquents. 7. Unjust punishment of persons accused. 8. Unnecessary labour, expense, or other suffering or danger, on the part of superior judicial officers. 9. Unnecessary labour, expense, or other suffering or danger, on the part of ministerial or other subordinate judicial officers. 10. Unnecessary labour, expense, or other suffering or danger, on the part of persons whose co-operation is requisite *pro re natâ*, in order to make up the necessary complement of knowledge and power on the part of judicial officers, who are such by profession. 11. Unnecessary labour, expense, or other suffering or danger, on the part of persons at large, coming under the sphere of the operations of the persons above mentioned.

Secondary inconveniences are, in the purely civil branch of procedure, 1. Misinterpretation or mis-adjudication. In the penal branch, 2. Total impunity of delinquents (as favouring the production of other offences of the like nature.) 3. Partial impunity of delinquents. 4. Application of punishment improper in specie, though perhaps not in degree (this lessening the beneficial efficacy of the quantity employed.) 5. Uneconomical application of punishment, though proper, perhaps, as well in specie as in degree. 6. Unnecessary pecuniary expense on the part of the state.

Inconveniences of the 3d order are, 1. Unnecessary delay. 2. Unnecessary intricacy.

Inconveniences of the 4th order are, 1. Breach, 2. Abuse, 3. Disturbance, of judicial trust, as above; viz. in as far as these offences are preliminary to and distinct from those of the 2d and 3d orders.

Inconveniences of the 5th order are, Breach of the several regulations of procedure, or other regulations, made in the view of obviating the inconveniences above enumerated; viz. if preliminary and distinct as before.

III. OFFENCES against the PREVENTIVE branch of the POLICE. 1. Offences against *phthano-paranomic* trust: (φθανω, to prevent; παρανομια, an offence.) 2. Offences against *phthano-symphoric* trust: (συμφορα, a calamity.) The two trusts may be termed by the common appellation of *prophylactic:* (προ, before-hand, and φυλαττω, to guard against.)

IV. OFFENCES against the PUBLIC FORCE. 1. Offences against military trust, corresponding to those against judicial trust. Military desertion is a breach of military duty, or of military trust. Favouring desertion is a disturbance of it. 2. Offences against that branch of public trust which consists in the management of the several sorts of things appropriated to the purposes of war: such as arsenals, fortifications, dock-yards, ships of war, artillery, ammunition, military magazines, and so forth. It might be termed *polemotamientic:* from πολεμος, war: and ταμιενς, a steward.[a]

V. OFFENCES against the POSITIVE INCREASE of the NATIONAL FELICITY. 1. Offences against *episturo-threptic* trust: (επιστημη, knowledge; and τρεφω, to nourish or promote.) 2. Offences against *eupædagogic* trust: (ευ, well; and παιδαγωγεω, to educate.) 3. Offences against *noso-comial* trust: (νοσος, a disease; and κομιζω, to take care of.) 4. Offences against *moro-comial* trust: (μορος, an insane person.) 5. Offences against *ptocho-comial* trust: (πτωχοι, the poor.) 6. Offences against *antembletic* trust: (αντεμβαλλω, to bestow in reparation of a loss.) 7. Offences against *hedonarchic* trust: (ηδοναι, pleasures; and αρχομαι, to preside over.) The above are examples of the principal establishments which should or might be set on foot for the purpose of making, in so many different ways, a positive addition to the stock of national felicity. To exhibit an exhaustive analysis of the possible total of these establishments, would not be a very easy task: nor on the present occasion is it a necessary one; for be they of what nature and in what number they may, the offences to which they stand exposed will, in as far as they are offences against trust, be in point of denomination the same: and as to what turns upon the particular nature of each trust, they will be of too local a nature to come within the present plan.

All these trusts might be comprised under some such general name as that of *agatho-poieutic* trust: (αγαθοποιεω, to do good to any one.)

VI. OFFENCES against the PUBLIC WEALTH. 1. Non-payment of forfeitures. 2. Non-payment of taxes, including smuggling. 3. Breach of the several regulations made to prevent the evasion of taxes. 4. Offences against fiscal trust: the same as offences against judicial and military trusts. Offences against the original revenue, not accruing either from taxes or forfeitures, such as that arising from the public demesnes, stand upon the same footing as offences against private property. 5. Offences against *demosio-tamientic* trust: (δημοσια, things belonging to the public; and ταμιενς, a steward); viz. against that trust, of which the object is to apply to their several destinations such articles of the public wealth as are provided for the indiscriminate accommodation of individuals: such as public roads and waters, public harbours, post-offices, and packet-boats, and the stock belonging to them; market-places, and other such public buildings; race-grounds, public walks, and so forth. Offences of this description will be apt to coincide with offences against *agatho-poieutic* trust as above, or with offences against *ethno-plutistic* trust hereafter mentioned, according as the benefit in question is considered in itself, or as resulting from

[a] A number of different branches of public trust, none of which have yet been provided with appellatives, have here been brought to view: which, then, were best? to coin new names for them out of the Greek; or, instead of a word, to make use of a whole sentence? In English, and in French, there is no other alternative; no more than in any of the other southern languages. It rests with the reader to determine.

stain from or to perform. As many different denominations as there are of persons distinguished with a view to such commands and allowances (those denominations only excepted which relate to the conditions above spoken of under the name of domestic ones) so many civil conditions one might enumerate. Means, however, more or less explicit, may be found out of circumscribing their infinitude.

What the materials are, if so they may be called, of which conditions, or any other kind of legal possession, can be made up, we have already seen: beneficial powers, fiduciary powers, beneficial rights, fiduciary rights, relative duties, absolute duties. But as many conditions as import a power or right of the fiduciary kind, as possessed by the person whose condition is in question, belong to the head of trusts. The catalogue of the offences to which these conditions are exposed, coincides therefore exactly with the catalogue of offences against trust: under which head they have been considered in a general point of view under the head of offences against trust: and such of them as are of a domestic nature, in a more particular manner in the character of offences against the several domestic conditions. Conditions constituted by such duties of the relative kind, as have for their counterparts trusts constituted by fiduciary powers, as well as rights on the side of the correlative party, and those of a private nature, have also been already discussed under the appellation of domestic conditions. The same observation may be applied to the conditions constituted by such powers of the beneficial kind over persons as are of a private nature: as also to the subordinate correlative conditions constituted by the duties corre-

the application of such or such a branch or portion of the public wealth.

VII. OFFENCES against POPULATION. 1. Emigration. 2. Suicide. 3. Procurement of impotence or barrenness. 4. Abortion. 5. Unprolific coition. 6. Celibacy.

VIII. OFFENCES against the NATIONAL WEALTH. 1. Idleness. 2. Breach of the regulations made in the view of preventing the application of industry to purposes less profitable, in prejudice of purposes more profitable. 3. Offences against *ethno-plutistic* trust (λαος, the nation at large; πλουτιζω, to enrich.)

IX. OFFENCES against the SOVEREIGNTY. 1. Offences against sovereign trust: corresponding to those against judicial, prophylactic, military, and fiscal trusts. Offensive rebellion includes wrongful interception, wrongful divestment, usurpation, and wrongful investment of sovereign trust, with the offences accessary thereto. Where the trust is in a single person, wrongful interception, wrongful divestment, usurpation, and wrongful investment, cannot any of them be committed without rebellion; abdication and detrectation can never be deemed wrongful; breach and abuse of sovereign trust can scarcely be punished: no more can bribe-taking; wrongful imposition of it is scarce practicable. When the sovereignty is shared among a number, wrongful interception, wrongful divestment, usurpation, and wrongful investment, may be committed without rebellion: none of the offences against this trust are impracticable: nor is there any of them but might be punished. Defensive rebellion is disturbance of this trust. Political tumults, political defamation, and political vilification, are offences accessory to such disturbance.

Sovereign power (which, upon the principle of utility, can never be other than fiduciary) is exercised either by rule or without rule: in the latter case it may be termed *autocratic:* in the former case it is divided into two branches, the *legislative* and the *executive.*[a] In either case, where the designation of the person by whom the power is to be possessed, depends not solely upon mere physical events, such as that of natural succession, but in any sort upon the will of another person, the latter possesses an *investitive* power, or right of investiture, with regard to the power in question: in like manner may any person also possess a *divestitive* power. The powers above enumerated, such as judicial power, military power, and so forth, may therefore be exercisable by a man, either directly, *propriâ manu;* or indirectly, *manu alienâ.*[b] Power to be exercised *manu alienâ* is investitive, which may or may not be accompanied by divestitive. Of sovereign power, whether autocratic, legislative, or executive, the several public trusts above mentioned form so many subordinate branches. Any of these powers may be placed, either, 1. in an individual; or, 2. in a body politic: who may be either supreme or subordinate. Subordination on the part of a magistrate is established,

[a] See ch. xix. [Limits] § 3.

[b] In the former case, the power might be termed in one word, *autochirous:* in the latter, *heterochirous:* (αυτος, a man's own; χειρ, a hand; ἑτερος, another's.)

1. Where he is punishable: 2. Where he is made removable: 3. When his orders are made reversible: 4. When the good or evil, which he has it in his power to produce, on the part of the common subordinate, is less in value than the good or evil which the superior has it in his power to produce on the part of the same subordinate.

X. OFFENCES against RELIGION. 1. Offences tending to weaken the force of the religious sanction: including blasphemy and profaneness. 2. Offences tending to misapply the force of the religious sanction: including false prophecies, and other pretended revelations; also heresy, where the doctrine broached is pernicious to the temporal interests of the community. 3. Offences against religious trust, where any such is thought fit to be established.

XI. OFFENCES against the NATIONAL INTEREST in general. 1. Immoral publications. 2. Offences against the trust of an ambassador; or, as it might be termed, *presbeutic* trust. 3. Offences against the trust of a privy counsellor; or, as it might be termed, *symbouleutic* trust. 4. In pure or mixed monarchies, prodigality on the part of persons who are about the person of the sovereign, though without being invested with any specific trust. 5. Excessive gaming on the part of the same persons. 6. Taking presents from rival powers without leave.

sponding to those rights and powers. As to absolute duties, there is no instance of a condition thus created, of which the institution is upon the principle of utility to be justified; unless the several religious conditions of the monastic kind should be allowed of as examples. There remain, as the only materials out of which the conditions which yet remain to be considered can be composed, conditions constituted by beneficial powers over things; conditions constituted by beneficial rights to things (that is, rights to powers over things), or by rights to those rights, and so on; conditions constituted by rights to services; and conditions constituted by the duties corresponding to those respective rights. Out of these are to be taken those of which the materials are the ingredients of the several modifications of property, the several conditions of proprietorship. These are the conditions, if such for a moment they may be styled, which having but here and there any specific names, are not commonly considered on the footing of conditions: so that the acts which, if such conditions were recognised, might be considered as offences against those conditions, are not wont to be considered in any other light than that of offences against property.

Now the case is, as hath been already intimated,* that of these civil conditions, those which are wont to be considered under that name, are not distinguished by any uniform and explicit line from those of which the materials are wont to be carried to the head of property: a set of rights shall, in one instance, be considered as constituting an article of property rather than a condition; while, in another instance, a set of rights of the same stamp is considered as constituting rather a condition than an article of property. This will probably be found to be the case in all languages: and the usage is different, again, in one language from what it is in another. From these causes it seems to be impracticable to subject the class of civil conditions to any exhaustive method: so that for making a complete collection of them there seems to be no other expedient than that of searching the language through for them, and taking them as they come. To exemplify this observation, it may be of use to lay open the structure, as it were, of two or three of the principal sorts or classes of conditions, comparing them with two or three articles of property which appear to be nearly of the same complexion: by this means the nature and generation, if one may so call it, of both these classes of ideal objects, may be the more clearly understood.

The several sorts of civil conditions that are not fiduciary, may all, or at least the greater part of them, be comprehended under the head of rank, or that of profession; the latter word being taken in its most extensive sense, so as to include not only what are called the liberal professions, but those also which are exercised by the several sorts of traders, artists, manufacturers, and other persons of whatsoever station, who are in the way of making a profit by their labour. Among ranks, then, as well as professions, let us, for the sake of perspicuity, take for examples such articles as stand the clearest from any mixture of either fiduciary or beneficial power. The rank of knighthood is constituted, how? by prohibiting all other persons from performing certain acts, the performance of which is the symbol of the order, at the same time that the knight in question, and his companions, are permitted: for instance, to wear a ribbon of a certain colour in a certain manner; to call himself by a certain title; to use an armorial seal with a certain mark on it. By laying all persons but the knight under this prohibition, the law subjects them to a set of duties: and since from the discharge of these duties a benefit results to the person in whose favour they are created, to wit, the benefit of enjoying such a share of extraordinary reputation and respect as men are wont to yield to a person thus distinguished, to discharge them is to render him a service: and the duty being a duty of the negative class, a duty consisting in the performance of certain acts of the negative kind,† the service is what may be called *a service of forbearance*. It appears, then, that to generate this condition there must be two sorts of services: that which is the immediate cause of it, a service of the negative kind, to be rendered by the community at large: that which is the cause again of this service, a service of the positive kind, to be rendered by the law.

The condition of a professional man stands upon a narrower footing. To constitute this condition, there needs nothing more than a permission given him on the part of the legislator to perform those acts, in the performance of which consists the exercise of his profession: to give or sell his advice or assistance in matters of law or physic: to give or sell his services as employed in the executing or overseeing of a manufacture or piece of work of such or such a kind: to sell a commodity of such or such a sort. Here, then, we see there is but one sort of service requisite; a service which may be merely of the negative kind, to be rendered by the law: the service of permitting him to exercise his profession: a service which, if there has been no prohibition laid on before, is rendered by simply forbearing to prohibit him.

Now the ideal objects, which in the cases

* *Supra*, par. 17.

† See ch. vii. [Actions] par. 8.

above specified are said to be conferred upon a man by the services that are respectively in question, are in both cases not articles of property, but conditions. By such a behaviour on the part of the law, as shall be the reverse of that whereby they were respectively produced, a man may be made to forfeit them: and what he is then said to forfeit is in neither case his property; but in one case, his rank or dignity; in the other case, his trade or his profession; and in both cases, his condition.

Other cases there are again, in which the law, by a process of the same sort with that by which it constituted the former of the two above-mentioned conditions, confers on him an ideal object, which the laws of language have placed under the head of property. The law permits a man to sell books; that is, all sorts of books in general. Thus far, all that it has done is to invest him with a condition: and this condition he would equally possess, although every body else in the world were to sell books likewise. Let the law now take an active part in his favour, and prohibit all other persons from selling books of a certain description, he remaining at liberty to sell them as before. It thereby confers on him a sort of exclusive privilege or monopoly, which is called a *copy-right*. But by investing him with this right, it is not said to invest him with any new sort of condition; and what it invests him with is spoken of as an article of property; to wit, of that sort of property which is termed incorporeal:* and so on in the case of an engraving, a mechanical engine, a medicine; or, in short, of a saleable article of any other sort. Yet when it gave him an exclusive right of wearing a particular sort of ribbon, the object which it was then considered as conferring on him was not an article of property, but a condition.

By forbearing to subject you to certain disadvantages, to which it subjects an alien, the law confers on you the condition of a natural-born subject; by subjecting him to them, it imposes on him the condition of an alien: by conferring on you certain privileges or rights, which it denies to a *roturier*, the law confers on you the condition of a *gentilhomme;* by forbearing to confer on him those privileges, it imposes on him the condition of a *roturier*.† The rights, out of which the two advantageous conditions here exemplified are both of them, as it were, composed, have for their counterpart a sort of services of forbearance, rendered, as we have seen, not by private individuals, but by the law itself. As to the duties which it creates in rendering you these services, they are to be considered as duties imposed by the legislator on the ministers of justice.

It may be observed, with regard to the greater part of the conditions here comprised under the general appellation of *civil*, that the relations corresponding to those by which they are respectively constituted, are not provided with appellatives. The relation which has a name, is that which is borne by the party favoured to the party bound: that which is borne by the party bound to the party favoured, has not any. This is a circumstance that may help to distinguish them from those conditions which we have termed domestic. In the domestic conditions, if on the one side the party *to* whom the power is given is called a master; on the other side, the party *over* whom that power is given, the party who is the object of that power, is termed a servant. In the civil conditions, this is not the case. On the one side, a man, in virtue of certain services of forbearance, which the rest of the community are bound to render him, is denominated a knight of such or such an order: but on the other side, these services do not bestow any particular denomination on the persons from whom such services are due. Another man, in virtue of the legislator's rendering that sort of negative service which consists in the not prohibiting him from exercising a trade, invests him at his option with the condition of a trader. it accordingly denominates him a farmer, a baker, a weaver, and so on: but the ministers of the law do not, in virtue of their rendering the man this sort of negative service, acquire for themselves any particular name. Suppose even that the trade you have the right of exercising happens to be the object of a monopoly, and that the legislator, besides rendering you himself those services which you derive from the permission he bestows on you, obliges other persons to render you those farther services which you receive from their forbearing to follow the same trade; yet neither do they, in virtue of their being thus bound, acquire any particular name.

After what has been said of the nature of the several sorts of civil conditions that have names, the offences to which they are exposed may, without much difficulty, be imagined. Taken by itself, every condition which is thus constituted by a permission granted to the possessor, is of course of a beneficial nature: it is, therefore, exposed to all those offences to which the possession of a benefit is exposed. But either on account of a man's

* The reason, probably, why an object of the sort here in question is referred to the head of property, is, that the chief value of it arises from its being capable of being made a source of property in the more ordinary acceptations of the word; that is, of money, consumable commodities, and so forth.

† The conditions themselves having nothing that corresponds to them in England, it was necessary to make use of foreign terms.

being obliged to persevere when once engaged in it, or on account of such other obligations as may stand annexed to the possession of it, or on account of the comparative degree of disrepute which may stand annexed to it by the moral sanction, it may by accident be a burthen: it is on this account liable to stand exposed to the offences to which, as hath been seen, every thing that partakes of the nature of a burthen stands exposed. As to any offences which may concern the exercise of the functions belonging to it, if it happens to have any duties annexed to it, such as those, for instance, which are constituted by regulations touching the exercise of a trade, it will stand exposed to so many breaches of duty; and lastly, whatsoever are the functions belonging to it, it will stand exposed at any rate to *disturbance*.

In the forming, however, of the catalogue of these offences, exactness is of the less consequence, inasmuch as an act, if it should happen not to be comprised in this catalogue, and yet is in any respect of a pernicious nature, will be sure to be found in some other division of the system of offences: if a baker sells bad bread for the price of good, it is a kind of fraud upon the buyer; and perhaps an injury of the simple corporal kind done to the health of an individual, or a neighbourhood: if a clothier sells bad cloth for good at home, it is a fraud; if to foreigners abroad, it may, over and above the fraud put upon the foreign purchaser, have pernicious effects, perhaps, in the prosperity of the trade at home, and become thereby an offence against the national wealth. So again with regard to *disturbance*: if a man be disturbed in the exercise of his trade, the offence will probably be a wrongful *interception of the profit* he might be presumed to have been in a way to make by it: and were it even to appear in any case that a man exercised a trade, or what is less unlikely, a liberal profession, without having profit in his view, the offence will still be reducible to the head of *simple injurious restrainment*, or *simple injurious compulsion*.

§ 4. *Advantages of the present Method.*

LVI.

A few words, for the purpose of giving a general view of the method of division here pursued, and of the advantages which it possesses, may have their use. The whole system of offences, we may observe, is branched out into five classes. In the three first, the subordinate divisions are taken from the same source; viz. from the consideration of the different points, in respect whereof the interest of an individual is exposed to suffer. By this uniformity, a considerable degree of light seems to be thrown upon the whole system; particularly upon the offences that come under the third class: objects which have never hitherto been brought into any sort of order. With regard to the fourth class, in settling the precedence between its several subordinate divisions, it seemed most natural and satisfactory to place those first, the connection whereof with the welfare of individuals seemed most obvious and immediate. The mischievous effects of those offences, which tend in an immediate way to deprive individuals of the protection provided for them against the attacks of one another, and of those which tend to bring down upon them the attacks of foreign assailants, seem alike obvious and palpable. The mischievous quality of such as tend to weaken the force that is provided to combat those attacks, but particularly the latter, though evident enough, is one link farther off in the chain of causes and effects. The ill effects of such offences as are of disservice only by diminishing the particular fund from whence that force is to be extracted, such effects, I say, though indisputable, are still more distant and out of sight. The same thing may be observed with regard to such as are mischievous only by affecting the universal fund. Offences against the sovereignty in general would not be mischievous, if offences of the several descriptions preceding were not mischievous. Nor in a temporal view are offences against religion mischievous, except in as far as, by removing, or weakening, or misapplying one of the three great incentives to virtue, and checks to vice, they tend to open the door to the several mischiefs, which it is the nature of all those other offences to produce. As to the fifth class, this, as hath already been observed, exhibits, at first view, an irregularity, which, however, seems to be unavoidable. But this irregularity is presently corrected, when the analysis returns back, as it does after a step or two, into the path from which the tyranny of language had forced it a while to deviate.

It was necessary that it should have two purposes in view: the one, to exhibit, upon a scale more or less minute, a systematical enumeration of the several possible modifications of delinquency, denominated or undenominated; the other, to find places in the list for such names of offences as were in current use: for the first purpose, nature was to set the law; for the other, custom. Had the nature of the things themselves been the only guide, every such difference in the manner of perpetration, and such only, should have served as a ground for a different denomination, as was attended with a difference in point of effect. This, however, of itself would never have been sufficient; for as on one hand the new language, which it would have been necessary to invent, would have been uncouth, and in a manner unintelligible;

so on the other hand the names, which were before in current use, and which, in spite of all systems, good or bad, must have remained in current use, would have continued unexplained. To have adhered exclusively to the current language, would have been as bad on the other side; for in that case the catalogue of offences, when compared to that of the mischiefs that are capable of being produced, would have been altogether broken and uncomplete.

To reconcile these two objects, in as far as they seemed to be reconcileable, the following course has therefore been pursued. The logical whole, constituted by the sum total of possible offences, has been bisected in as many different directions as were necessary, and the process in each direction carried down to that stage at which the particular ideas thus divided found names in current use in readiness to receive them. At that period I have stopped; leaving any minuter distinctions to be enumerated in the body of the work, as so many species of the genus characterized by such or such a name. If in the course of any such process I came to a mode of conduct which, though it required to be taken notice of, and perhaps had actually been taken notice of, under all laws, in the character of an offence, had hitherto been expressed under different laws, by different circumlocutions, without ever having received any name capable of occupying the place of a substantive in a sentence, I have frequently ventured so far as to fabricate a new name for it; such an one as the idiom of the language, and the acquaintance I happened to have with it, would admit of. These names consisting in most instances, and that unavoidably, of two or three words brought together, in a language too which admits not, like the German and the Greek, of their being melted into one, can never be upon a par, in point of commodiousness, with those univocal appellatives which make part of the established stock.

In the choice of names in current use, care has been taken to avoid all such as have been grounded on local distinctions; ill founded, perhaps, in the nation in which they received their birth, and at any rate not applicable to the circumstances of other countries.

The analysis, as far as it goes, is as applicable to the legal concerns of one country as of another: and where, if it had descended into further details, it would have ceased to be so, there I have taken care always to stop: and thence it is that it has come to be so much more particular in the class of offences against individuals, than in any of the other classes. One, use, then of this arrangement, if it should be found to have been properly conducted, will be its serving to point out in what it is that the legal interests of all countries agree, and in what it is that they are liable to differ: how far a rule that is proper for one, will serve, and how far it will not serve, for another. That the legal interests of different ages and countries have nothing in common, and that they have every thing, are suppositions equally distant from the truth.*

LVII.

A natural method, such as it hath been here attempted to exhibit, seems to possess four capital advantages; not to mention others of inferior note. In the first place, it affords such assistance to the apprehension and to the memory, as those faculties would in vain look for in any technical arrangement.† That arrangement of the objects of any science may, it should seem, be termed a *natural* one, which takes such properties to characterize them by, as men in general are, by the common constitution of man's nature, independently of any accidental impressions they may have received from the influence of any local or other particular causes, accustomed to attend to: such, in a word, as *naturally*, that is, readily, and at first sight, engage, and firmly fix, the attention of any one to whom they have once been pointed out. Now by what other means should an object engage or fix a man's attention, unless by interesting him? and what circumstance belonging to any action can be more interesting, or rather, what other circumstance belonging to it can be at all interesting to him, than that of the influence it promises to have on his own happiness, and the happiness of those who are about him? By what other mark, then, should he more easily find the place which any offence occupies in the system, or by what other clue should he more readily recall it?

LVIII.

In the next place, it not only gives at first glance a general intimation of the nature of each division of offences, in as far as that nature is determined by some one characteristic property, but it gives room for a number of general propositions to be formed concerning the particular offences that come under that division, in such manner as to exhibit a variety of other properties that may belong to them in common. It gives room, therefore, for the framing of a number of propositions concerning them, which, though very general, because predicated of a great

* The above hints are offered to the consideration of the few who may be disposed to bend their minds to disquisitions of this uninviting nature: to sift the matter to the bottom, and engage in the details of illustration, would require more room than could in this place be consistently allowed.

† See Fragment on Government, Pref. p. xlv. edit. 1776. — Pref. p. xlvii. edit. 1823.

number of articles, shall be as generally true.*

LIX.

In the third place, it is so contrived, that the very place which any offence is made to occupy, suggests the reason of its being put there. It serves to indicate not only that such and such acts *are* made offences, but *why* they *ought* to be. By this means, while it addresses itself to the understanding, it recommends itself, in some measure, to the affections. By the intimation it gives of the nature and tendency of each obnoxious act, it accounts for, and in some measure vindicates, the treatment which it may be thought proper to bestow upon that act in the way of punishment. To the subject, then, it is a kind of perpetual apology; showing the necessity of every defalcation, which, for the security and prosperity of each individual, it is requisite to make from the liberty of every other. To the legislator it is a kind of perpetual lesson; serving at once as a corrective to his prejudices, and as a check upon his passions. Is there a mischief which has escaped him? in a natural arrangement, if at the same time an exhaustive one, he cannot fail to find it. Is he tempted ever to force innocence within the pale of guilt? the difficulty of finding a place for it advertises him of his error. Such are the uses of a map of universal delinquency, laid down upon the principle of utility: such the advantages, which the legislator as well as the subject may derive from it. Abide by it, and every thing that is arbitrary in legislation, vanishes. An evil-intentioned or prejudiced legislator durst not look it in the face. He would proscribe it, and with reason: it would be a satire on his laws.

LX.

In the fourth place, a natural arrangement, governed as it is by a principle which is recognised by all men, will serve alike for the jurisprudence of all nations. In a system of proposed law, framed in pursuance of such a method, the language will serve as a glossary by which all systems of positive law might be explained, while the matter serves as a standard by which they might be tried. Thus illustrated, the practice of every nation might be a lesson to every other: and mankind might carry on a mutual interchange of experiences and improvements, as easily in this as in every other walk of science. If any one of these objects should in any degree be attained, the labour of this analysis, severe as it has been, will not have been thrown away.

§ 5. *Characters of the Five Classes.*

LXI.

It has been mentioned as an advantage possessed by this method, and not possessed by any other, that the objects comprised under it are cast into groups, to which a variety of propositions may be applied in common. A collection of these propositions, as applied to the several classes, may be considered as exhibiting the distinctive characters of each class. So many of these propositions as can be applied to the offences belonging to any given class, so many properties are they found to have in common: so many of these common properties as may respectively be attributed to them, so many properties may be set down to serve as *characters* of the class. A collection of these characters it may here be proper to exhibit. The more of them we can bring together, the more clearly and fully will the nature of the several classes, and of the offences they are composed of, be understood.

LXII.

Characters of Class 1; composed of PRIVATE Offences, or Offences against assignable *Individuals*.

1. When arrived at their last stage (the stage of *consummation*)† they produce, all of them, a primary mischief, as well as a secondary.‡

2. The individuals whom they affect in the first instance,‖ are constantly *assignable*. This extends to all; to *attempts* and *prepa-*

* Imagine what a condition a science must be in, when as yet there shall be no such thing as forming any extensive proposition relative to it, that shall be at the same time a true one: where, if the proposition shall be true of some of the particulars contained under it, it shall be false with regard to others. What a state would botany, for example, be in, if the classes were so contrived, that no common characters could be found for them? Yet in this state, and no better, seems every system of penal law to be, authoritative or unauthoritative, that has ever yet appeared. Try if it be otherwise, for instance, with the *delicta privata et publica*, and with the *publica ordinaria*, and *publica extra-ordinaria* of the Roman law.[a] All this for want of method: and hence the necessity of endeavouring to strike out a new one.

Nor is this want of method to be wondered at. A science so new as that of penal legislation, could hardly have been in any better state. Till objects are distinguished, they cannot be arranged. It is thus that *truth* and *order* go on hand in hand: it is only in proportion as the former is discovered, that the latter can be improved. Before a certain order is established, truth can be but imperfectly announced: but until a certain proportion of truth has been developed and brought to light, that order cannot be established. The discovery of truth leads to the establishment of order and the establishment of order fixes and propagates the discovery of truth.

[a] See Heinecc. Elem. p. vii. § 79, 80.

† Ch. vii. [Actions] par. 14.

‡ See ch. xii. [Consequences] par. 3.

‖ That is, by their primary mischief.

rations, as well as to such as have arrived at the stage of consummation.*

3. Consequently they admit of *compensation*:† in which they differ from the offences of all the other classes, as such.

4. They admit‡ also of *retaliation*:‖ in which also they differ from the offences of all the other classes.

5. There is always some person who has a natural and peculiar interest to prosecute them. In this they differ from self-regarding offences: also from semi-public and public ones; except in as far as the two latter may chance to involve a private mischief.

6. The mischief they produce is obvious: more so than that of semi-public offences: and still more so than that of self-regarding ones, or even public.

7. They are every where, and must ever be, obnoxious to the censure of the world: more so than semi-public offences as such; and still more so than public ones.

8. They are more *constantly* obnoxious to the censure of the world than self-regarding offences: and would be so universally, were it not for the influence of the two false principles; the principle of asceticism, and the principle of antipathy.§

9. They are less apt than semi-public and public offences to require different descriptions ¶ in different states and countries: in which respect they are much upon a par with self-regarding ones.

10. By certain circumstances of aggravation, they are liable to be transformed into semi-public offences: and by certain others, into public.

11. There can be no ground for punishing them, until they can be proved to have occasioned, or to be about to occasion, some particular mischief to some particular individual. In this they differ from semi-public offences, and from public.

12. In slight cases, *compensation* given to the individual affected by them, may be a sufficient ground for remitting punishment: for if the primary mischief has not been sufficient to produce any alarm, the whole of the mischief may be cured by compensation. In this also they differ from semi-public offences, and from public ones.

LXIII.

Characters of Class 2; composed of SEMI-PUBLIC Offences, or Offences affecting a whole subordinate *Class* of persons.

1. As such, they produce no primary mischief. The mischief they produce consists of one or other or both branches of the secondary mischief produced by offences against individuals, without the primary.

2. In as far as they are to be considered as belonging to this class, the persons whom they affect in the first instance are not individually assignable.

3. They are apt, however, to involve or terminate in some primary mischief of the first order, which when they do, they advance into the first class, and become private offences.

4. They admit not, as such, of compensation.

5. Nor of retaliation.

6. As such, there is never any one particular individual whose exclusive interest it is to prosecute them: a circle of persons may, however, always be marked out, within which may be found some who have a greater interest to prosecute, than any who are out of that circle have.

7. The mischief they produce is in general pretty obvious; not so much so indeed as that of private offences, but more so, upon the whole, than that of self-regarding and public ones.

8. They are rather less obnoxious to the censure of the world than private offences; but they are more so than public ones: they would also be more so than self-regarding ones, were it not for the influence of the two false principles, the principle of sympathy and antipathy, and that of asceticism.

9. They are more apt than private and self-regarding offences to require different descriptions in different countries: but less so than public ones.

10. There may be ground for punishing them before they have been proved to have occasioned, or to be about to occasion, mischief to any particular individual; which is not the case with private offences.

11. In no cases can satisfaction given to any particular individual affected by them, be a sufficient ground for remitting punishment: for by such satisfaction it is but a part of the mischief of them that is cured. In this they differ from private offences; but agree with public.

LXIV.

Characters of Class 3; consisting of SELF-REGARDING Offences: Offences against *one's self*.

1. In individual instances it will often be

* See *supra*, and B. I. tit. [Accessory Offences.]

† See ch. xv. [Cases unmeet] par. 2, note.

‡ [Admit.] I mean, that retaliation is *capable* of being applied in the cases in question; not that it *ought* always to be employed. Nor is it capable of being applied in every *individual* instance of each offence, but only in some individual instance of each *species* of offence.

‖ See ch xvii. [Properties] par. 8.

§ Ch. ii. [Principles Adverse.]

¶ [Different Descriptions.] It seems to be from their possessing these three last properties, that the custom has arisen of speaking of them, or at least of many of them, under the name of offences against the *law of nature:* a vague expression, and productive of a multitude of inconveniencies. See ch. ii. [Principles Adverse.]

questionable, whether they are productive of any primary* mischief at all: secondary, they produce none.

2. They affect not any other individuals, assignable or not assignable, except in as far as they affect the offender himself; unless by possibility in particular cases; and in a very slight and distant manner the whole state.

3. They admit not, therefore, of *compensation*.

4. Nor of *retaliation*.

5. No person has naturally any peculiar interest to prosecute them; except in as far as in virtue of some *connection* he may have with the offender, either in point of *sympathy* or of *interest*,† a mischief of the *derivative* kind‡ may happen to devolve upon him.§

6. The mischief they produce is apt to be unobvious, and in general more questionable than that of any of the other classes.*

7. They are, however, apt, many of them, to be more obnoxious to the censure of the world than public offences; owing to the influence of the two false principles; the principle of asceticism, and the principle of antipathy. Some of them more even than semi-public, or even than private offences.

8. They are less apt than offences of any other class to require different descriptions in different states and countries.‖

9. Among the inducements¶ to punish them, antipathy against the offender is apt to have a greater share than sympathy for the public.

10. The best plea for punishing them is founded on a faint probability there may be of their being productive of a mischief, which, if real, will place them in the class of public ones: chiefly in those divisions of it which are composed of offences against population, and offences against the national wealth.

LXV.

Characters of Class 4; consisting of PUBLIC Offences, or Offences against *the State* in general.

1. As such, they produce not any primary mischief; and the secondary mischief they produce, which consists frequently of danger without alarm, though great in *value*, is in *specie* very indeterminate.

2. The individuals whom they affect, in the first instance, are constantly unassignable; except in as far as by accident they happen to involve or terminate in such or such offences against individuals.

3. Consequently they admit not of compensation.

4. Nor of retaliation.

5. Nor is there any person who has naturally any particular interest to prosecute them; except in as far as they appear to affect the power, or in any other manner the private interest, of some person in authority.

6. The mischief they produce, as such, is comparatively unobvious; much more so than that of private offences, and more so likewise than that of semi-public ones.

7. They are, as such, much less obnoxious to the censure of the world, than private offences; less even than semi-public, or even than self-regarding offences; unless in particular cases, through sympathy to certain persons in authority, whose private interests they may appear to affect.

8. They are more apt than any of the other classes to admit of different descriptions, in different states and countries.

9. They are constituted, in many cases, by some circumstances of aggravation superadded to a private offence: and therefore, in these cases, involve the mischief, and exhibit the other characters belonging to both classes. They are, however, even in such cases, properly enough ranked in the 4th class, inasmuch as the mischief they produce in virtue of the properties which aggregate them to that class, eclipses and swallows up that which they produce in virtue of those properties which aggregate them to the 1st.

10. There may be sufficient ground for punishing them, without their being proved to have occasioned, or to be about to occasion, any particular mischief to any particular individual. In this they differ from private offences, but agree with semi-public ones. Here, as in semi-public offences, the *extent* of the mischief makes up for the *uncertainty* of it.

11. In no case can satisfaction, given to any particular individual affected by them, be a sufficient ground for remitting punishment. In this they differ from private offences; but agree with semi-public.

LXVI.

Characters of Class 5, or Appendix: composed of MULTIFORM OR ANOMALOUS Offences; and containing Offences by FALSEHOOD, and Offences concerning trust.

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* Because the person, who in general is most likely to be sensible to the mischief (if there is any) of any offence, viz. the person whom it most affects, shows by his conduct that he is not sensible of it.

† See ch. vi. [Sensibility] par. 25, 26.

‡ See ch. xii. [Consequences] par. 4.

§ Among the offences, however, which belong to this class, there are some which, in certain countries, it is not uncommon for persons to be disposed to prosecute without any artificial inducement, and merely on account of an *antipathy*, which such acts are apt to excite. See ch. ii. [Principles adverse] par. 11.

‖ Accordingly, most of them are apt to be ranked among offences against the law of nature. *Vide supra*, Characters of the 1st class, par. 62, note.

¶ [Inducements.] I mean the considerations, right or wrong, which induce or dispose the legislator to treat them on the footing of offences.

1. Taken collectively, in the parcels marked out by their popular appellations, they are incapable of being aggregated to any systematical method of distribution, grounded upon the mischief of the offence.

2. They may, however, be thrown into sub-divisions, which may be aggregated to such a method of distribution.

3. These sub-divisions will naturally and readily rank under the divisions of the several preceding classes of this system.

4. Each of the two great divisions of this class spreads itself in that manner over all the preceding classes.

5. In some acts of this class, the distinguishing circumstance which constitutes the essential character of the offence, will in some instances enter necessarily, in the character of a criminative circumstance, into the constitution of the offence; insomuch that, without the intervention of this circumstance, no offence at all, of that denomination, can be committed.* In other instances, the offence may subsist without it; and where it interferes, it comes in as an accidental independent circumstance, capable of constituting a ground of aggravation.†

CHAPTER XIX.

§ 1. *Limits between Private Ethics and the Art of Legislation.*

I.

So much for the division of offences in general. Now an offence is an act prohibited, or (what comes to the same thing) an act of which the contrary is commanded by the law: and what is it that the law can be employed in doing, besides prohibiting and commanding? It should seem, then, according to this view of the matter, that were we to have settled what may be proper to be done with relation to offences, we should thereby have settled every thing that may be proper to be done in the way of law. Yet that branch which concerns the method of dealing with offences, and which is termed sometimes the *criminal*, sometimes the *penal*, branch, is universally understood to be but one out of two branches which compose the whole subject of the art of legislation; that which is termed the *civil* being the other.‡ Between these two branches, then, it is evident enough there cannot but be a very intimate connection; so intimate is it indeed, that the limits between them are by no means easy to mark out. The case is the same in some degree between the whole business of legislation (civil and penal branches taken together) and that of private ethics. Of these several limits, however, it will be in a manner necessary to exhibit some idea: lest, on the one hand, we should seem to leave any part of the subject that *does* belong to us untouched, or, on the other hand, to deviate on any side into a track which does *not* belong to us.

In the course of this inquiry, that part of it I mean which concerns the limits between the civil and the penal branch of law, it will be necessary to settle a number of points, of which the connection with the main question might not at first sight be suspected. To ascertain what sort of a thing *a* law is; what the *parts* are, that are to be found in it; what it must contain in order to be *complete;* what the connection is between that part of a body of laws which belongs to the subject of *procedure*, and the rest of the law at large:—All these, it will be seen, are so many problems, which must be solved before any satisfactory answer can be given to the main question above mentioned.

Nor is this their only use: for it is evident enough, that the notion of a complete law must first be fixed, before the legislator can in any case know what it is he has to do, or when his work is done.

II.

Ethics at large may be defined, the art of directing men's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view.

III.

What, then, are the actions which it can be in a man's power to direct? They must be either his own actions, or those of other agents. Ethics, in as far as it is the art of directing a man's own actions, may be styled the *art of self-government*, or *private ethics*.

IV.

What other agents, then, are there, which, at the same time that they are under the influence of man's direction, are susceptible of happiness? They are of two sorts: 1. Other human beings, who are styled persons. 2. Other animals, which on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of *things*.§ As to

* Instance; offences by falsehood, in the case of *defraudment*.

† Instance; offences by falsehood, in the case of simple corporal injuries, and other offences against person.

‡ And the *constitutional* branch, what is become of it? Such is the question which many a reader will be apt to put. An answer that might be given is, that the matter of it might without much violence be distributed under the two other heads. But, as far as recollection serves, that branch, notwithstanding its importance, and its capacity of being lodged separately from the other matter, had at that time scarcely presented itself to my view in the character of a distinct one: the thread of my inquiries had not as yet reached it. But in the concluding note of this same chapter, in paragraphs 22 to the end, the omission may be seen in some measure supplied.

§ Under the Gentoo and Mahometan reli-

other human beings, the art of directing their actions to the above end is what we mean, or at least the only thing which, upon the principle of utility, we *ought* to mean, by the art of government: which, in as far as the measures it displays itself in are of a permanent nature, is generally distinguished by the name of *legislation:* as it is by that of *administration*, when they are of a temporary nature, determined by the occurrences of the day.

V.

Now human creatures, considered with respect to the maturity of their faculties, are either in an *adult*, or in a *non-adult* state. The art of government, in as far as it concerns the direction of the actions of persons in a non-adult state, may be termed the art of *education*. In as far as this business is entrusted with those who, in virtue of some private relationship, are in the main the best disposed to take upon them, and the best able to discharge, this office, it may be termed the art of *private education:* in as far as it is exercised by those whose province it is to superintend the conduct of the whole community, it may be termed the art of *public education*.

VI.

As to ethics in general, a man's happiness will depend, in the first place, upon such parts of his behaviour as none but himself are interested in; in the next place, upon such parts of it as may affect the happiness of those about him. In as far as his happiness depends upon the first-mentioned part of his behaviour, it is said to depend upon his *duty to himself*. Ethics, then, in as far as it is the art of directing a man's actions in this respect, may be termed the art of discharging one's duty to one's self: and the quality which a man manifests by the discharge of this branch of duty (if duty it is to be called), is that of *prudence*. In as far as his happiness, and that of any other person or persons whose interests are considered, depends upon such parts of his behaviour as may affect the interests of those about him, it may be said to depend upon his *duty to others;* or, to use a phrase now somewhat antiquated, his *duty to his neighbour*. Ethics, then, in as far as it is the art of directing a man's actions in this respect, may be termed the art of discharging one's duty to one's neighbour. Now the happiness of one's neighbour may be consulted in two ways: 1. In a negative way, by forbearing to diminish it. 2. In a positive way, by studying to increase it. A man's duty to his neighbour is accordingly partly negative and partly positive: to discharge the negative branch of it, is *probity:* to discharge the positive branch, *beneficence*.

VII.

It may here be asked, how it is that upon the principle of private ethics, legislation and religion out of the question, a man's happiness depends upon such parts of his conduct as affect, immediately at least, the happiness of no one but himself: this is as much as to ask, What motives (independent of such as legislation and religion may chance to furnish) can one man have to consult the happiness of another? by what motives, or (which comes to the same thing) by what obligations, can he be bound to obey the dictates of *probity* and *beneficence?* In answer to this, it cannot but be admitted, that the only interests which a man at all times and upon all

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gions, the interests of the rest of the animal creation seem to have met with some attention. Why have they not, universally, with as much as those of human creatures, allowance made for the difference in point of sensibility? Because the laws that are, have been the work of mutual fear; a sentiment which the less rational animals have not had the same means as man has of turning to account. Why *ought* they not? No reason can be given. If the being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have. The death they suffer in our hands commonly is, and always may be, a speedier, and by that means a less painful one, than that which would await them in the inevitable course of nature. If the being killed were all, there is very good reason why we should be suffered to kill such as molest us: we should be the worse for their living, and they are never the worse of being dead. But is there any reason why we should be suffered to torment them? Not any that I can see. Are there any why we should *not* be suffered to torment them? Yes, several. See B. I. tit. [Cruelty to Animals.] The day has been, I grieve to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing, as, in England for example, the inferior races of animals are still. The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor.[a] It may come one day to be recognised, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate? What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason?* nor, Can they *talk?* but, Can they *suffer?*

[a] See Lewis XIVth's Code Noir.

occasions is sure to find *adequate* motives for consulting, are his own. Notwithstanding this, there are no occasions in which a man has not some motives for consulting the happiness of other men. In the first place, he has, on all occasions, the purely social motive of sympathy or benevolence: in the next place, he has, on most occasions, the semi-social motives of love of amity and love of reputation. The motive of sympathy will act upon him with more or less effect, according to the *bias* of his sensibility:* the two other motives, according to a variety of circumstances, principally according to the strength of his intellectual powers, the firmness and steadiness of his mind, the quantum of his moral sensibility, and the characters of the people he has to deal with.

VIII.

Now private ethics has happiness for its end: and legislation can have no other. Private ethics concerns every member; that is, the happiness and the actions of every member of any community that can be proposed: and legislation can concern no more. Thus far, then, private ethics and the art of legislation go hand in hand. The end they have, or ought to have, in view, is of the same nature. The persons whose happiness they ought to have in view, as also the persons whose conduct they ought to be occupied in directing, are precisely the same. The very acts they ought to be conversant about, are even in a *great measure* the same. Where, then, lies the difference? In that the acts which they ought to be conversant about, though in a great measure, are not *perfectly and throughout* the same. There is no case in which a private man ought not to direct his own conduct to the production of his own happiness, and of that of his fellow-creatures: but there are cases in which the legislator ought not (in a direct way at least, and by means of punishment applied immediately to particular *individual* acts) to attempt to direct the conduct of the several other members of the community. Every act which promises to be beneficial upon the whole to the community (himself included), each individual ought to perform of himself: but it is not every such act that the legislator ought to compel him to perform. Every act which promises to be pernicious upon the whole to the community (himself included), each individual ought to abstain from of himself; but it is not every such act that the legislator ought to compel him to abstain from.

IX.

Where, then, is the line to be drawn?—We shall not have far to seek for it. The business is to give an idea of the cases in which ethics ought, and in which legislation ought not (in a direct manner at least) to interfere. If legislation interferes in a direct manner, it must be by punishment.† Now the cases in which punishment, meaning the punishment of the political sanction, ought not to be inflicted, have been already stated.‡ If, then, there be any of these cases in which, although legislation ought not, private ethics does or ought to interfere, these cases will serve to point out the limits between the two arts or branches of science. These cases, it may be remembered, are of four sorts: 1. Where punishment would be groundless. 2. Where it would be inefficacious. 3. Where it would be unprofitable. 4. Where it would be needless. Let us look over all these cases, and see whether in any of them there is room for the interference of private ethics, at the same time that there is none for the direct interference of legislation.

X.

1. First, then, as to the cases where punishment would be *groundless*. In these cases it is evident, that the restrictive interference of ethics would be groundless too. It is because, upon the whole, there is no evil in the act, that legislation ought not to endeavour to prevent it. No more, for the same reason, ought private ethics.

XI.

2. As to the cases in which punishment would be *inefficacious*. These, we may observe, may be divided into two sets or classes. The first do not depend at all upon the nature of the act: they turn only upon a defect in the timing of the punishment. The punishment in question is no more than what, for any thing that appears, ought to have been applied to the act in question. It ought, however, to have been applied at a different time; viz. not till after it had been properly denounced. These are the cases of an *ex-post-facto* law; of a judicial sentence beyond the law; and of a law not sufficiently promulgated. The acts here in question then might, for any thing that appears, come properly under the department even of coercive legislation: of course do they under that of private ethics. As to the other set of cases, in which punishment would be inefficacious; neither do these depend upon the nature of the act, that is, of the *sort* of act: they turn only upon some extraneous *circumstances*, with which an act of *any* sort may chance to be accompanied. These, however, are of such a nature as not only to exclude the application of legal punishment, but in general to

* Ch. vi. [Sensibility] par. 3.

† I say nothing in this place of reward: because it is only in a few extraordinary cases that it can be applied, and because even where it is applied, it may be doubted, perhaps, whether the application of it can, properly speaking, be termed an act of legislation. See *infra*, § 3.

‡ Ch. xv. [Cases unmeet.]

leave little room for the influence of private ethics. These are the cases where the will could not be deterred from any act, even by the extraordinary force of artificial punishment; as in the cases of extreme infancy, insanity, and perfect intoxication: of course, therefore, it could not by such slender and precarious force as could be applied by private ethics. The case is in this respect the same, under the circumstances of unintentionality with respect to the event of the action, unconsciousness with regard to the circumstances, and mis-supposal with regard to the existence of circumstances which have not existed; as also where the force, even of extraordinary punishment, is rendered inoperative by the superior force of a physical danger or threatened mischief. It is evident, that in these cases, if the thunders of the law prove impotent, the whispers of simple morality can have but little influence.

XII.

3. As to the cases where punishment would be *unprofitable*. These are the cases which constitute the great field for the exclusive interference of private ethics. When a punishment is unprofitable, or in other words too expensive, it is because the evil of the punishment exceeds that of the offence. Now the evil of the punishment, we may remember,* is distinguishable into four branches: 1. The evil of coercion, including constraint or restraint, according as the act commanded is of the positive kind or the negative. 2. The evil of apprehension. 3. The evil of sufferance. 4. The derivative evils resulting to persons in *connection* with those by whom the three above-mentioned original evils are sustained. Now with respect to those original evils, the persons who lie exposed to them may be two very different sets of persons. In the first place, persons who may have actually committed, or been prompted to commit, the acts really meant to be prohibited. In the next place, persons who may have performed, or been prompted to perform, such other acts as they fear may be in danger of being involved in the punishment designed only for the former. But of these two sets of acts, it is the former only that are pernicious: it is, therefore, the former only that it can be the business of private ethics to endeavour to prevent. The latter being by the supposition not mischievous, to prevent them is what it can no more be the business of ethics to endeavour at, than of legislation. It remains to show how it may happen, that there should be acts really pernicious, which, although they may very properly come under the censure of private ethics, may yet be no fit objects for the legislator to controul.

XIII.

Punishment, then, as applied to delinquency, may be unprofitable in both or either of two ways: 1. By the expense it would amount to, even supposing the application of it to be confined altogether to delinquency: 2. By the danger there may be of its involving the innocent in the fate designed only for the guilty. First, then, with regard to the cases in which the expense of the punishment, as applied to the guilty, would outweigh the profit to be made by it. These cases, it is evident, depend upon a certain proportion between the evil of the punishment and the evil of the offence. Now were the offence of such a nature, that a punishment which, in point of *magnitude*, should but just exceed the profit of it, would be sufficient to prevent it, it might be rather difficult perhaps to find an instance in which such punishment would clearly appear to be unprofitable. But the fact is, there are many cases in which a punishment, in order to have any chance of being efficacious, must, in point of magnitude, be raised a great deal above that level. Thus it is wherever the danger of detection is, or (what comes to the same thing,) is likely to appear to be, so small, as to make the punishment appear in a high degree uncertain. In this case it is necessary, as has been shown,† if punishment be at all applied, to raise it in point of magnitude as much as it falls short in point of certainty. It is evident, however, that all this can be but guess-work: and that the effect of such a proportion will be rendered precarious, by a variety of circumstances: by the want of sufficient promulgation on the part of the law:‡ by the particular circumstances of the temptation:‖ and by the circumstances influencing the sensibility of the several individuals who are exposed to it.§ Let the *seducing* motives be strong, the offence then will at any rate be frequently committed. Now and then indeed, owing to a coincidence of circumstances more or less extraordinary, it will be detected and by that means punished. But for the purpose of example, which is the principal one, an act of punishment, considered in itself, is of no use: what use it can be of, depends altogether upon the expectation it raises of similar punishment in future cases of similar delinquency. But this future punishment, it is evident, must always depend upon detection. If then the want of detection is such as must in general (especially to eyes fascinated by the force of the seducing motives) appear too improbable to be reckoned upon, the punishment, though it should be inflicted, may come

* See ch. xv. [Cases unmeet] § 4.

† Ch. xvi. [Proportion] par. 18, rule 7.

‡ Ch. xv. [Cases unmeet] § 3. Append. tit. [Promulgation.]

‖ Ch. xi. [Disposition] par. 35, &c.

§ Ch. vi. [Sensibility.]

to be of no use. Here, then, will be two opposite evils running on at the same time, yet neither of them reducing the quantum of the other: the evil of the disease and the evil of the painful and inefficacious remedy. It seems to be partly owing to some such considerations, that fornication for example, or the illicit commerce between the sexes, has commonly either gone altogether unpunished, or been punished in a degree inferior to that in which, on other accounts, legislators might have been disposed to punish it.

XIV.

Second, with regard to the cases in which political punishment, as applied to delinquency, may be unprofitable, in virtue of the danger there may be of its involving the innocent in the fate designed only for the guilty. Whence should this danger, then, arise? From the difficulty there may be of fixing the idea of the guilty action; that is, of subjecting it to such a definition as shall be clear and precise enough to guard effectually against misapplication. This difficulty may arise from either of two sources: the one permanent, to wit, the nature of the *actions* themselves: the other occasional, I mean the qualities of the *men* who may have to deal with those actions in the way of government. In as far as it arises from the latter of these sources, it may depend partly upon the use which the *legislator* may be *able* to make of language; partly upon the use which, according to the apprehension of the legislator, the *judge* may be *disposed* to make of it. As far as legislation is concerned, it will depend upon the degree of perfection to which the arts of language may have been carried; in the first place, in the nation in general; in the next place, by the *legislator* in particular. It is to a sense of this difficulty, as it should seem, that we may attribute the caution with which most legislators have abstained from subjecting to censure, on the part of the law, such actions as come under the notion of rudeness, for example, or treachery, or ingratitude. The attempt to bring acts of so vague and questionable a nature under the controul of law, will argue either a very immature age, in which the difficulties which give birth to that danger are not descried; or a very enlightened age, in which they are overcome.*

XV.

For the sake of obtaining the clearer idea of the limits between the art of legislation and private ethics, it may now be time to call to mind the distinctions above established with regard to ethics in general. The degree in which private ethics stands in need of the assistance of legislation, is different in the three branches of duty above distinguished. Of the rules of moral duty, those which seem to stand least in need of the assistance of legislation, are the rules of *prudence*. It can only be through some defect on the part of the understanding, if a man be ever deficient in point of duty to himself. If he does wrong, there is nothing else that it can be owing to, but either some *inadvertence*† or some *misupposal*,† with regard to the circumstances on which his happiness depends. It is a standing topic of complaint, that a man knows too little of himself. Be it so: but is it so certain that the legislator must know more?‡‖ It is plain, that of individuals the legislator can know nothing: concerning those points of conduct which depend upon the particular circumstances of each individual, it is plain, therefore, that he can determine nothing to advantage. It is only with respect to those broad lines of conduct in which all persons, or very large and permanent descriptions of persons, may be in a way to engage, that he can have any pretence for interfering; and even here the propriety of his interference will, in most instances, lie very open to dispute. At any rate, he must never expect to produce a perfect compliance by the mere force of the sanction of which he is himself the author. All he can hope to do, is to increase the efficacy of private ethics, by giving strength and direction to the influence of the moral sanction. With what chance of success, for example, would a legislator go about to extirpate drunkenness and fornication, by dint of legal punishment? Not all the tortures which ingenuity could invent would compass it: and, before he had made any progress worth regarding, such a mass of evil would be produced by the punishment, as would exceed, a thousand-fold, the utmost possible mischief of the offence. The great difficulty would be in the procuring evidence; an object which could not be attempted, with any pro-

* In certain countries, in which the voice of the people has a more especial controul over the hand of the legislator, nothing can exceed the dread which they are under of seeing any effectual provision made against the offences which come under the head of *defamation*, particularly that branch of it which may be styled the *political*. This dread seems to depend partly upon the apprehension they may think it prudent to entertain of a defect in point of ability or integrity on the part of the legislator, partly upon a similar apprehension of a defect in point of integrity on the part of the judge.

† See ch. ix. [Consciousness.]

‡ On occasions like this, the legislator should never lose sight of the well-known story of the oculist and the sot. A countryman who had hurt his eyes by drinking, went to a celebrated oculist for advice. He found him at table with a glass of wine before him. "You must leave off drinking," said the oculist. "How so?" says the countryman; "*you* don't, and yet methinks your own eyes are none of the best."—"That's very true friend," replied the oculist: "but you are to know, I love my bottle better than my eyes."

‖ Ch. xviii. [Division] par. 2.

bability of success, without spreading dismay through every family,* tearing the bonds of sympathy asunder,† and rooting out the influence of all the social motives. All that he can do, then, against offences of this nature, with any prospect of advantage, in the way of direct legislation, is to subject them, in cases of notoriety, to a slight censure, so as thereby to cover them with a slight shade of artificial disrepute.

XVI.

It may be observed, that with regard to this branch of duty, legislators have, in general, been disposed to carry their interference full as far as is expedient. The great difficulty here is, to persuade them to confine themselves within bounds. A thousand little passions and prejudices have led them to narrow the liberty of the subject in this line, in cases in which the punishment is either attended with no profit at all, or with none that will make up for the expense.

XVII.

The mischief of this sort of interference is more particularly conspicuous in the article of religion. The reasoning, in this case, is of the following stamp. There are certain errors, in matters of belief, to which all mankind are prone: and for these errors in judgment, it is the determination of a Being of infinite benevolence, to punish them with an infinity of torments. But from these errors the legislator himself is necessarily free: for the men who happen to be at hand for him to consult with, being men perfectly enlightened, unfettered, and unbiassed, have such advantages over all the rest of the world, that when they sit down to inquire out the truth relative to points so plain and so familiar as those in question, they cannot fail to find it. This being the case, when the sovereign sees his people ready to plunge headlong into an abyss of fire, shall he not stretch out a hand to save them? Such, for example, seems to have been the train of reasoning, and such the motives, which led Lewis the XIVth into those coercive measures which he took for the conversion of heretics, and the confirmation of true believers. The ground-work, pure sympathy and loving-kindness: the superstructure, all the miseries which the most determined malevolence could have devised.‡ But of this more fully in another place.‖

XVIII.

The rules of *probity* are those, which in point of expediency stand most in need of assistance on the part of the legislator, and in which, in point of fact, his interference has been most extensive. There are few cases in which it *would* be expedient to punish a man for hurting *himself:* but there are few cases, if any, in which it would *not* be expedient to punish a man for injuring his neighbour. With regard to that branch of probity which is opposed to offences against property, private ethics depends, in a manner, for its very existence upon legislation. Legislation must first determine what things are to be regarded as each man's property, before the general rules of ethics, on this head, can have any particular application. The case is the same with regard to offences against the state. Without legislation there would be no such thing as a *state:* no particular persons invested with powers to be exercised for the benefit of the rest. It is plain, therefore, that in this branch the interference of the legislator cannot any where be dispensed with. We must first know what are the dictates of legislation, before we can know what are the dictates of private ethics.§

XIX.

As to the rules of beneficence, these, as far as concerns matters of detail, must necessarily be abandoned in great measure to the jurisdiction of private ethics. In many cases the beneficial quality of the act depends essentially upon the disposition of the agent; that is, upon the motives by which he appears to

* Evil of apprehension: third branch of the evil of a punishment. Ch. xv. § 4.

† Derivative evils: fourth branch of the evil of a punishment. Ib.

‡ I do not mean but that other motives of a less social nature might have introduced themselves, and probably, in point of fact, did introduce themselves, in the progress of the enterprise: But in point of possibility, the motive above mentioned, when accompanied with such a thread of reasoning, is sufficient, without any other, to account for all the effects above alluded to. If any others interfere, their interference, how natural soever, may be looked upon as an accidental and inessential circumstance, not necessary to the production of the effect. Sympathy, a concern for the danger they appear to be exposed to, gives birth to the wish of freeing them from it: that wish shews itself in the shape of a command: this command produces disobedience: disobedience on the one part, produces disappointment on the other: the pain of disappointment produces ill-will towards those who are the authors of it. The affections will often make this progress in less time than it would take to describe it. The sentiment of wounded pride, and other modifications of the love of reputation and the love of power, add fuel to the flame. A kind of revenge exasperates the severities of coercive policy.

‖ See B. I. tit. [Self-regarding Offences.]

§ But suppose the dictates of legislation *are* not what they *ought to be:* what are then, or (what in this case comes to the same thing) what ought to be, the dictates of private ethics? Do they coincide with the dictates of legislation, or do they oppose them, or do they remain neuter? A very interesting question this, but one that belongs not to the present subject. It belongs exclusively to that of private ethics. Principles which may lead to the solution of it may be seen in a Fragment on Government, p. 150. Lond. edit. 1776; and p. 114, edit. 1823.

have been prompted to perform it: upon their belonging to the head of sympathy, love of amity, or love of reputation; and not to any head of self-regarding motives, brought into play by the force of political constraint: in a word, upon their being such as denominate his conduct *free* and *voluntary*, according to one of the many senses given to those ambiguous expressions.* The limits of the law on this head seem, however, to be capable of being extended a good deal farther than they seem ever to have been extended hitherto. In particular, in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him? This, accordingly, is the idea pursued in the body of the work.†

XX.

To conclude this section, let us recapitulate and bring to a point the difference between private ethics, considered as an art or science, on the one hand, and that branch of jurisprudence which contains the art or science of legislation, on the other. Private ethics teaches how each man may dispose himself to pursue the course most conducive to his own happiness, by means of such motives as offer of themselves: the art of legislation (which may be considered as one branch of the science of jurisprudence) teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conducive to the happiness of the whole community, by means of motives to be applied by the legislator.

We come now to exhibit the limits between penal and civil jurisprudence. For this purpose it may be of use to give a distinct though summary view of the principal branches into which jurisprudence, considered in its utmost extent, is wont to be divided.

§ 2. *Jurisprudence, its Branches.*

XXI.

Jurisprudence is a fictitious entity: nor can any meaning be found for the word, but by placing it in company with some word that shall be significative of a real entity. To know what is meant by jurisprudence, we must know, for example, what is meant by a book of jurisprudence. A book of jurisprudence can have but one or the other of two objects: 1. To ascertain what the *law*‡ is: 2. To ascertain what it ought to be. In the former case, it may be styled a book of *expository* jurisprudence: in the latter, a book of *censorial* jurisprudence; or, in other words, a book on the *art of legislation*.

XXII.

A book of expository jurisprudence is either *authoritative* or *unauthoritative*. It is styled authoritative, when it is composed by him who, by representing the state of the law to be so and so, causeth it so to be; that is, of the legislator himself: unauthoritative, when it is the work of any other person at large.

XXIII.

Now *law*, or *the law*, taken indefinitely, is an abstract and collective term; which, when it means any thing, can mean neither more nor less than the sum total of a number of individual laws taken together.‖ It follows, that of whatever other modifications the subject of a book of jurisprudence is susceptible, they must all of them be taken from some circumstance or other of which such individual laws, or the assemblages into which they may be sorted, are susceptible. The circumstances that have given rise to the principal branches of jurisprudence we are wont to hear of, seem to be as follow: 1. The *extent* of the laws in question in point of dominion. 2. The *political quality* of the persons

* If we may believe M. Voltaire,[a] there was a time when the French ladies who thought themselves neglected by their husbands, used to petition *pour être embesoignées:* the technical word which, he says, was appropriated to this purpose. These sort of law-proceedings seem not very well calculated to answer the design: accordingly we hear nothing of them now-a-days. The French ladies of the present age seem to be under no such difficulties.

† A woman's head-dress catches fire: water is at hand: a man, instead of assisting to quench the fire, looks on, and laughs at it. A drunken man, falling with his face downwards into a puddle, is in danger of suffocation: litting his head a little on one side would save him: another man sees this, and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle: another, knowing this, lets him go in without warning. Who is there that in any of these cases would think punishment misapplied?

a Quest. sur l'Encyclop. tom. 7, art. Impuissance.

‡ The word *law* itself, which stands so much in need of a definition, must wait for it awhile (see § 3:) for there is no doing every thing at once. In the mean time, every reader will understand it according to the notion he has been accustomed to annex to it.

‖ In most of the European languages there are two different words for distinguishing the abstract and the concrete senses of the word *law:* which words are so wide asunder as not even to have any etymological affinity. In Latin, for example, there is *lex* for the concrete sense, *jus* for the abstract: in Italian, *legge* and *diritto:* in French, *loi* and *droit:* in Spanish, *ley* and *derecho:* in German, *gesetz* and *recht*. The English is at present destitute of this advantage.

In the Anglo-Saxon, besides *lage*, and several other words, for the concrete sense, there was the word *right*, answering to the German *recht*, for the abstract; as may be seen in the compound *folc-right*, and in other instances. But the word *right* having long ago lost this sense, the modern English no longer possesses this advantage.

whose conduct they undertake to regulate. 3. The *time* of their being in force. 4. The manner in which they are *expressed*. 5. The concern which they have with the article of *punishment*.

XXIV.

In the first place, in point of extent, what is delivered concerning the laws in question, may have reference either to the laws of such or such a nation or nations in particular, or to the laws of all nations whatsoever: in the first case, the book may be said to relate to *local;* in the other, to *universal, jurisprudence*.

Now of the infinite variety of nations there are upon the earth, there are no two which agree exactly in their laws: certainly not in the whole; perhaps not even in any single article: and let them agree to-day, they would disagree to-morrow. This is evident enough with regard to the *substance* of the laws: and it would be still more extraordinary if they agreed in point of *form;* that is, if they were conceived in precisely the same strings of words. What is more, as the languages of nations are commonly different, as well as their laws, it is seldom that, strictly speaking, they have so much as a single *word* in common. However, among the words that are appropriated to the subject of law, there are some that in all languages are pretty exactly correspondent to one another: which comes to the same thing nearly as if they were the same. Of this stamp, for example, are those which correspond to the words *power, right, obligation, liberty*, and many others.

It follows, that if there are any books which can, properly speaking, be styled books of universal jurisprudence, they must be looked for within very narrow limits. Among such as are expository, there can be none that are authoritative: nor even, as far as the *substance* of the laws is concerned, any that are unauthoritative. To be susceptible of an universal application, all that a book of the expository kind can have to treat of, is the import of words: to be, strictly speaking, universal, it must confine itself to terminology. Accordingly the definitions which there has been occasion here and there to intersperse in the course of the present work, and particularly the definition hereafter given of the word *law*, may be considered as matter belonging to the head of universal jurisprudence. Thus far in strictness of speech: though in point of usage, where a man, in laying down what he apprehends to be the law, extends his views to a few of the nations with which his own is most connected, it is common enough to consider what he writes as relating to universal jurisprudence.

It is in the censorial line that there is the greatest room for disquisitions that apply to the circumstances of all nations alike: and in this line, what regards the substance of the laws in question is as susceptible of an universal application, as what regards the words. That the laws of all nations, or even of any two nations, should coincide in all points, would be as ineligible as it is impossible: some leading points, however, there seem to be, in respect of which the laws of all civilized nations might, without inconvenience, be the same. To mark out some of these points will, as far as it goes, be the business of the body of this work.

XXV.

In the second place, with regard to the *political quality* of the persons whose conduct is the object of the law. These may, on any given occasion, be considered either as members of the same state, or as members of different states: in the first case, the law may be referred to the head of *internal;* in the second case, to that of *international** jurisprudence.

Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of those states: the case is the same where the sovereign of the one has any immediate transactions with a private member of the other: the sovereign reducing himself, *pro re natâ*, to the condition of a private person, as often as he submits his cause to either tribunal; whether by claiming a benefit, or defending himself against a burthen. There remain, then, the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed *international*.†

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* The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the *law of nations:* an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D'Aguesseau has already made, I find, a similar remark: he says, that what is commonly called *droit* des *gens*, ought rather to be termed *droit* entre *les gens*.[a]

† In the times of James I. of England, and Philip III. of Spain, certain merchants at London happened to have a claim upon Philip, which his ambassador Gondemar did not think fit to satisfy. They applied for counsel to Selden, who advised them to sue the Spanish monarch in the court of King's Bench, and prosecute him to an outlawry. They did so: and the sheriffs of London were accordingly commanded, in the usual form, to take the body of the defendant Philip, whereever it was to be found within their bailiwick. As to the sheriffs, Philip, we may believe,

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[a] Œuvres, tom. ii. p. 337, edit. 1773, 12mo.

With what degree of propriety, rules for the conduct of persons of this description can come under the appellation of *laws*, is a question that must rest till the nature of the thing called *a law* shall have been more particularly unfolded.

It is evident enough, that international jurisprudence may, as well as internal, be censorial as well as expository; unauthoritative as well as authoritative.

XXVI.

Internal jurisprudence, again, may either concern all the members of a state indiscriminately, or such of them only as are connected in the way of residence, or otherwise, with a particular district. Jurisprudence is accordingly sometimes distinguished into *national* and *provincial*. But as the epithet *provincial* is hardly applicable to districts so small as many of those which have laws of their own are wont to be, such as towns, parishes, and manors; the term *local* (where universal jurisprudence is plainly out of the question) or the term *particular*, though this latter is not very characteristic, might either of them be more commodious.*

XXVII.

Third, with respect to *time*. In a work of the expository kind, the laws that are in question may either be such as are still in force at the time when the book is writing, or such as have ceased to be in force. In the latter case, the subject of it might be termed *ancient;* in the former, *present* or *living* jurisprudence: that is, if the substantive *jurisprudence*, and no other, must at any rate be employed, and that with an epithet in both cases. But the truth is, that a book of the former kind is rather a book of history than a book of jurisprudence; and, if the word *jurisprudence* be expressive of the subject, it is only with some such words as *history* or *antiquities* prefixed. And as the laws which are any where in question are supposed, if nothing appears to the contrary, to be those which are in force, no such epithet as that of *present* or *living* commonly appears.

Where a book is so circumstanced, that the laws which form the subject of it, though in force at the time of its being written, are in force no longer, that book is neither a book of living jurisprudence, nor a book on the history of jurisprudence: it is no longer the former, and it never was the latter. It is evident that, owing to the changes which from time to time must take place, in a greater or less degree, in every body of laws, every book of jurisprudence, which is of an expository nature, must, in the course of a few years, come to partake more or less of this condition.

The most common and most useful object of a history of jurisprudence, is to exhibit the circumstances that have attended the establishment of laws actually in force. But the exposition of the dead laws which have been superseded, is inseparably interwoven with that of the living ones which have superseded them. The great use of both these branches of *science*, is to furnish examples for the *art* of legislation.†

XXVIII.

Fourthly, in point of *expression*, the laws in question may subsist either in the form of *statute*, or in that of *customary* law.

As to the difference between these two branches (which respects only the article of form or expression) it cannot properly be made appear till some progress has been made in the definition of a law.

XXIX.

Last, the most intricate distinction of all, and that which comes most frequently on the carpet, is that which is made between the *civil* branch of jurisprudence and the *penal;* which latter is wont, in certain circumstances, to receive the name of *criminal*.

What is a penal code of laws? What a civil code? Of what nature are their con-

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was in no great fear of them: but, what answered the same purpose, he happened on his part to have demands upon some other merchants, whom, so long as the outlawry remained in force, there was no proceeding against. Gondemar paid the money.[a] This was internal jurisprudence: if the dispute had been betwixt Philip and James himself, it would have been international.

As to the word *international*, from this work, or the first of the works edited in French by Mr. Dumont, it has taken root in the language. Witness Reviews and Newspapers.

* The term *municipal* seemed to answer the purpose very well, till it was taken by an English author of the first eminence, to signify internal law in general, in contradistinction to international law, and the imaginary law of nature. It might still be used in this sense, without scruple, in any other language.

[a] Selden's Table-Talk, tit. Law.

† Of what stamp are the works of Grotius, Puffendorf, and Burlamaqui? Are they political or ethical, historical or juridical, expository or censorial? Sometimes one thing, sometimes another: they seem hardly to have settled the matter with themselves. A defect this to which all books must almost unavoidably be liable, which take for their subject the pretended *law of nature;* an obscure phantom, which, in the imaginations of those who go in chase of it, points sometimes to *manners*, sometimes to *laws;* sometimes to what law *is*, sometimes to what it *ought* to be.[b] Montesquieu sets out upon the censorial plan: but long before the conclusion, as if he had forgot his first design, he throws off the censor, and puts on the antiquarian. The Marquis Beccaria's book, the first of any account that is uniformly censorial, concludes as it sets out with penal jurisprudence.

[b] See ch. ii. [Principles adverse] par. 14.

tents? Is it that there are two sorts of laws, the one penal the other civil, so that the laws in a penal code are all penal laws, while the laws in a civil code are all civil laws? Or is it, that in every law there is some matter which is of a penal nature, and which therefore belongs to the penal code; and at the same time other matter which is of a civil nature, and which therefore belongs to the civil code? Or is it, that some laws belong to one code or the other exclusively, while others are divided between the two? To answer these questions in any manner that shall be tolerably satisfactory, it will be necessary to ascertain what *a law* is; meaning one entire but single law: and what are the parts into which a law, as such, is capable of being distinguished: or, in other words, to ascertain what the properties are that are to be found in every object which can with propriety receive the appellation of *a* law. This, then, will be the business of the third and fourth sections: what concerns the import of the word *criminal*, as applied to law, will be discussed separately in the fifth.*

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* Here ends the original work, in the state into which it was brought in November 1780. What follows is now added in January 1789.

1. The third, fourth, and fifth sections, intended, as expressed in the text, to have been added to this chapter, will not here, nor now, be given; because to give them in a manner tolerably complete and satisfactory, might require a considerable volume. This volume will form a work of itself, closing the series of works mentioned in the preface.

What follows here may serve to give a slight intimation of the nature of the task, which such a work will have to atchieve: it will at the same time furnish, not any thing like a satisfactory answer to the questions mentioned in the text, but a slight and general indication of the course to be taken for giving them such an answer.

2. What is a law? what the parts of a law? The subject of these questions, it is to be observed, is the *logical*, the *ideal*, the *intellectual* whole, not the *physical* one: the *law*, and not the *statute*. An inquiry, directed to the latter sort of object, could neither admit of difficulty nor afford instruction. In this sense, whatever is given for law by the person or persons recognised as possessing the power of making laws, is *law*. The Metamorphoses of Ovid, if thus given, would be law. So much as was embraced by one and the same act of authentication, so much as received the touch of the sceptre at one stroke, is *one* law: a whole law, and nothing more. A statute of George II. made to substitute an *or* instead of an *and* in a former statute, is a complete law; a statute containing an entire body of laws, perfect in all its parts, would not be more so. By the word *law*, then, as often as it occurs in the succeeding pages, is meant that ideal object, of which the part, the whole, or the multiple, or an assemblage of parts, wholes, and multiples mixed together, is exhibited by a statute; not the statute which exhibits them.

3. Every law, when complete, is either of a *coercive* or *uncoercive* nature.

A coercive law is a *command*.

An uncoercive, or rather a *discoercive* law, is the *revocation* in whole or in part, of a coercive law.

4. What has been termed a *declaratory* law, so far as it stands distinguished from either a coersive or a discoercive law, is not, properly speaking, a law. It is not the expression of an act of the will exercised at the time: it is a mere notification of the existence of a law, either of the coercive or the discoercive kind, as already subsisting: of the existence of some document expressive of some act of the will, exercised, not at the time, but at some former period. If it does any thing more than give information of this fact, viz. of the prior existence of a law of either the coercive or the discoercive kind, it ceases *pro tanto* to be what is meant by a declaratory law, and assuming either the coercive or the discoercive quality.

5. Every coercive law creates an *offence*; that is, converts an act of some sort or other into an offence. It is only by so doing that it can *impose obligation*, that it can *produce coercion*.

6. A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws: not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal;* and, *Let the judge cause whoever is convicted of stealing to be hanged.*

They might be styled, the former, a *simple imperative* law; the other, a *punitory;* but the punitory, if it commands the punishment to be inflicted, and does not merely permit it, is as truly *imperative* as the other: only it is punitory besides, which the other is not.

7. A law of the discoercive kind, considered in itself, can have no punitory law belonging to it: to receive the assistance and support of a punitory law, it must first receive that of a simply imperative or coercive law, and it is to this latter that the punitory law will attach itself, and not to the discoercive one. Example; discoercive law. *The sheriff has power to hang all such as the judge, proceeding in due course of law, shall order him to hang.* Example of a coercive law, made in support of the above discoercive one: *Let no man hinder the sheriff from hanging such as the judge, proceeding in due course of law, shall order him to hang.* Example of a punitory law, made in support of the above coercive one: *Let the judge cause to be imprisoned whosoever attempts to hinder the sheriff from hanging one whom the judge, proceeding in due course of law, has ordered him to hang.*

8. But though a simply imperative law, and the punitory law attached to it, are so far distinct laws, that the former contains nothing of the latter, and the latter, in its direct tenor, contains nothing of the former; yet by *implication*, and that a necessary one, the punitory does involve and include the import of the simple imperative law to which it is appended. To say to the judge, *Cause to be hanged whoever in due form of law is convicted of stealing*, is, though not a direct, yet as intelligible a way of intimating to men in general that they must not steal, as to say to them directly, *Do not steal:* and one sees, how much more likely to be efficacious.

9. It should seem, then, that wherever a simply imperative law is to have a punitory one appended

to it, the former might be spared altogether: in which case, saving the exception (which naturally should seem not likely to be a frequent one) of a law capable of answering its purpose without such an appendage, there should be no occasion in the whole body of the law for any other than punitory, or, in other words, than *penal*, laws. And this, perhaps, would be the case, were it not for the necessity of a large quantity of matter of the *expository* kind, of which we come now to speak.

10. It will happen in the instance of many, probably of most, possibly of all, commands endued with the force of a public law, that, in the expression given to such a command, it shall be necessary to have recourse to terms too complex in their signification, to exhibit the requisite ideas, without the assistance of a greater or less quantity of matter of an expository nature. Such terms, like the symbols used in algebraical notation, are rather substitutes and indexes to the terms capable of themselves of exhibiting the ideas in question, than the real and immediate representatives of those ideas.

Take for instance the law, *Thou shalt not steal:* Such a command, were it to rest there, could never sufficiently answer the purpose of a law. A word of so vague and unexplicit a meaning can no otherwise perform this office, than by giving a general intimation of a variety of propositions, each requiring, to convey it to the apprehension, a more particular and ample assemblage of terms. Stealing, for example, (according to a definition not accurate enough for use, but sufficiently so for the present purpose) is *the taking of a thing which is another's, by one who has no* TITLE *so to do*, and *is conscious of his having none*. Even after this exposition, supposing it a correct one, can the law be regarded as completely expressed? Certainly not. For what is meant by *a man's having a* TITLE *to take a thing?* To be complete, the law must have exhibited, amongst a multitude of other things, two catalogues; the one of events to which it has given the quality of *conferring title* in such a case; the other of the events to which it has given the quality of *taking it away*. What follows? That for a man to have *stolen*, for a man to *have had no title to what he took*, either no one of the articles contained in the first of those lists must have happened in his favour, or if there has, some one of the number of those contained in the second, must have happened to his prejudice.

11. Such, then, is the nature of a general law, that while the imperative part of it, the *punctum saliens* as it may be termed, of this artificial body, shall not take up above two or three words, its expository appendage, without which that imperative part could not rightly perform its office, may occupy a considerable volume.

But this may equally be the case with a private order given in a family. Take for instance one from a bookseller to his foreman: *Remove, from this shop to my new one, my whole stock, according to this printed catalogue. Remove, from this shop to my new one, my whole stock*, is the imperative matter of this order; the catalogue referred to contains the expository appendage.

12. The same mass of expository matter may serve in common for, may appertain in common to, many commands, many masses of imperative matter. Thus, amongst other things, the catalogue of *collative* and *ablative* events, with respect to *titles* above spoken of (see No. 9 of this note), will belong in common to all or most of the laws constitutive of the various offences against property. Thus, in mathematical diagrams, one and the same base shall serve for a whole cluster of triangles.

13. Such expository matter, being of a complexion so different from the imperative, it would be no wonder if the connection of the former with the latter should escape the observation: which, indeed, is perhaps pretty generally the case. And so long as any mass of legislative matter presents itself, which is not itself imperative, or the contrary, or of which the connection with matter of one of those two descriptions is not apprehended, so long and so far the truth of the proposition, *That every law is a command or its opposite*, may remain unsuspected, or appear questionable; so long also may the incompleteness of the greater part of those masses of legislative matter, which wear the complexion of complete laws upon the face of them, also the method to be taken for rendering them really complete, remain undiscovered.

14. A circumstance, that will naturally contribute to increase the difficulty of the discovery, is the great variety of ways in which the imperation of a law may be conveyed—the great variety of forms which the imperative part of a law may indiscriminately assume: some more directly, some less directly, expressive of the imperative quality. *Thou shalt not steal. Let no man steal. Whoso stealeth, shall be punished so and so. If any man steal, he shall be punished so and so. Stealing is where a man does so and so; the punishment for stealing is so and so. To judges*, so and so named, and so and so constituted, *belong the cognizance of such and such offences;* viz. *stealing;* and so on. These are but part of a multitude of forms of words, in any of which the command, by which stealing is prohibited, might equally be couched: and it is manifest to what a degree, in some of them, the imperative quality is clouded and concealed from ordinary apprehension.

15. After this explanation, a general proposition or two, that may be laid down, may help to afford some little insight into the structure and contents of a complete body of laws.—So many different sorts of *offences* created, so many different laws of the *coercive* kind: so many *exceptions* taken out of the descriptions of those offences, so many laws of the *discoercive* kind.

To class *offences*, as hath been attempted to be done in the preceding chapter, is therefore to class *laws:* to exhibit a complete catalogue of all the offences created by law, including the whole mass of expository matter necessary for fixing and exhibiting the import of the terms contained in the several laws, by which those offences are respectively created, would be to exhibit a complete collection of the laws in force: in a word, a complete body of law, a *pannomion*, if so it might be termed.

16. From the obscurity in which the limits of a *law*, and the distinction betwixt a law of the civil or simply imperative kind and a punitory law, are naturally involved, results the obscurity of the limits betwixt a civil and a penal *code*, betwixt the civil branch of the law and the penal.

The question, *What parts of the total mass of legislative matter belong to the civil branch, and what to the penal?* supposes that divers political states, or at least that some one such state, are to be found, having as well a civil code as a penal code, each of them complete in its kind, and

marked out by certain limits. But no *one* such state has ever yet existed.

To put a question to which a true answer can be given, we must substitute to the foregoing question some such one as that which follows:

Suppose two masses of legislative matter to be drawn up at this time of day, the one under the name of a civil code, the other of a penal code, each meant to be complete in its kind: in what general way is it natural to suppose that the different sorts of matter, as above distinguished, would be distributed between them?

To this question the following answer seems likely to come as near as any other to the truth.

The *civil* code would not consist of a collection of civil laws each complete in itself, as well as clear of all penal ones.

Neither would the *penal* code (since we have seen that it *could* not) consist of a collection of punitive laws, each not only complete in itself, but clear of all civil ones. But

17. The civil code would consist chiefly of mere masses of expository matter. The imperative matter, to which those masses of expository matter respectively appertained, would be found — not in that same code — not in the civil code — nor in a pure state, free from all admixture of punitory laws; but in the penal code — in a state of combination — involved, in manner as above explained, in so may correspondent punitory laws.

18. The penal code then would consist principally of punitive laws, involving the imperative matter of the whole number of civil laws: along with which would probably also be found various masses of expository matter, appertaining, not to the civil, but to the punitory laws. The body of penal law, enacted by the Empress-Queen Maria Theresa, agrees pretty well with this account.

19. The mass of legislative matter published in French as well as German, under the auspices of Frederic II. of Prussia, by the name of Code Frederic, but never established with force of law,[a] appears, for example, to be almost wholly composed of masses of expository matter, the relation of which to any imperative matter appears to have been but very imperfectly apprehended.

20. In that enormous mass of confusion and inconsistency, the ancient Roman, or, as it is termed by way of eminence, the *civil* law, the imperative matter, and even all traces of the imperative character, seem at last to have been smothered in the expository. *Esto* had been the language of primæval simplicity: *esto* had been the language of the twelve tables. By the time of Justinian (so thick was the darkness raised by clouds of commentators), the penal law had been crammed into an odd corner of the civil — the whole catalogue of offences, and even of crimes, lay buried under a heap of *obligations* — *will* was hid in *opinion* — and the original *esto* had transformed itself into *videtur*, in the mouths even of the most despotic sovereigns.

21. Among the barbarous nations that grew up out of the ruins of the Roman empire, law, emerging from under the mountain of expository rubbish, reassumed for a while the language of command: and then she had simplicity at least, if nothing else, to recommend her.

22. Besides the civil and the penal, every complete body of law must contain a third branch, the *constitutional*.

[a] Mirabeau sur la Monarchie Prussienne, tom. v. liv. 8, p. 215.

The constitutional branch is chiefly employed in conferring, on particular classes of persons, *powers*, to be exercised for the good of the whole society, or of considerable parts of it, and prescribing *duties* to the persons invested with those powers.

The powers are principally constituted, in the first instance, by discoercive or permissive laws, operating as exceptions to certain laws of the coercive or imperative kind. Instance: *A tax-gatherer, as such, may, on such and such an occasion, take such and such things without any other* TITLE.

The duties are created by imperative laws, addressed to the persons on whom the powers are conferred. Instance: *On such and such an occasion, such and such a tax-gatherer shall take such and such things. Such and such a judge shall, in such and such a case, cause persons so and so offending to be hanged.*

The parts which perform the function of indicating who the individuals are, who in every case shall be considered as belonging to those classes, have neither a permissive complexion, nor an imperative.

They are so many masses of expository matter, appertaining in common to all laws, into the texture of which, the names of those classes of persons have occasion to be inserted. Instance; imperative matter: — *Let the judge cause whoever, in due course of law, is convicted of stealing, to be hanged.* Nature of the expository matter: — Who is the person meant by the word *judge*? He who has been *invested* with that office in such a manner, and in respect of whom no *event* has happened, of the number of those to which the effect is given, of reducing him to the condition of one *divested* of that office.

23. Thus it is, that one and the same law, one and the same command, will have its matter divided, not only between two great codes, or main branches of the whole body of the laws, the civil and the penal; but amongst three such branches, the civil, the penal, and the constitutional.

24. In countries where a great part of the law exists in no other shape, than that of what in England is called *common* law, but might be more expressively termed *judiciary*, there must be a great multitude of laws, the import of which cannot be sufficiently made out for practice, without referring to this common law, for more or less of the expository matter belonging to them. Thus, in England, the exposition of the word *title*, that basis of the whole fabric of the laws of property, is no where else to be found. And, as uncertainty is the very essence of every particle of law so denominated (for the instant it is clothed in a certain authoritative form of words it changes its nature, and passes over to the other denomination), hence it is that a great part of the laws in being in such countries remains uncertain and incomplete. What are those countries? To this hour, every one on the surface of the globe.

25. Had the science of architecture no fixed nomenclature belonging to it — were there no settled names for distinguishing the different sorts of buildings, nor the different parts of the same building from each other — what would it be? It would be what the science of legislation, considered with respect to its *form*, remains at present.

Were there no architects who could distin-

guish a dwelling-house from a barn, or a side wall from a ceiling, what would architects be? They would be what all legislators are at present.

26. From this very slight and imperfect sketch may be collected, not an answer to the questions in the text, but an intimation, and that but an imperfect one, of the course to be taken for giving such an answer; and, at any rate, some idea of the difficulty, as well as of the necessity, of the task.

If it were thought necessary to recur to experience for proofs of this difficulty, and this necessity, they need not be long wanting.

Take, for instance, so many well-meant endeavours on the part of popular bodies, and so many well-meant recommendations in ingenious books, to restrain supreme representative assemblies from making laws in such and such cases, or to such and such an effect. Such laws, to answer the intended purpose, require a perfect mastery in the science of law, considered in respect of its form—in the sort of anatomy spoken of in the preface to this work: but a perfect, or even a moderate insight into that science, would prevent their being couched in those loose and inadequate terms, in which they may be observed so frequently to be conceived; as a perfect acquaintance with the dictates of utility on that head would, in many, if not in most, of those instances, discounsel the attempt. Keep to the letter, and in attempting to prevent the making of bad laws, you will find them prohibiting the making of the most necessary laws, perhaps even of all laws: quit the letter, and they express no more than if each man were to say, *Your laws shall become* ipso facto *void, as often as they contain any thing which is not to my mind.*

Of such unhappy attempts, examples may be met with in the legislation of many nations: but in none more frequently than in that newly-created nation, one of the most enlightened, if not the most enlightened, at this day on the globe.

27. Take for instance, the *Declaration of Rights*, enacted by the state of North-Carolina, in convention, in or about the month of September 1788, and said to be copied, with a small exception, from one in like manner enacted by the state of Virginia.[a]

The following, to go no farther, is the first and fundamental article: —

"That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."

Not to dwell on the oversight of confining to posterity the benefit of the rights thus declared, what follows? That — as against those whom the protection, thus meant to be afforded, includes — every law, or other order, *divesting* a man of *the enjoyment of life or liberty*, is void.

Therefore this is the case, amongst others, with every coercive law.

Therefore, as against the persons thus protected, every order, for example, to pay money on the score of taxation, or of debt from individual to individual, or otherwise, is void: for the effect of it, if complied with, is "to *deprive* and *divest him*," *pro tanto*, of the enjoyment of liberty, viz. the liberty of paying or not paying as he thinks proper: not to mention the species opposed to imprisonment, in the event of such a mode of coercion being resorted to: likewise of property, which is itself a "*means of acquiring, possessing, and protecting property, and of pursuing and obtaining happiness and safety.*"

Therefore also, as against such persons, every order to attack an armed enemy, in time of war, is also void: for, the necessary effect of such an order is, "to *deprive* some of them of *the enjoyment of life.*"

The above-mentioned consequences may suffice for examples, amongst an endless train of similar ones.[b]

Leaning on his elbow, in an attitude of profound and solemn meditation, "*What a multitude of things there are,*" exclaimed the dancing-master Marcel, "*in a minuet!*"—May we now add? — *and in a law!*

[a] Recherches sur Les Etats Unis, 8vo. 1788, vol. i. p. 158.

[b] The Virginian Declaration of Rights, said, in the French work above quoted, to have been enacted the 1st of June 1776, is not inserted in the publication entitled "*The Constitutions of the several independent States of America, &c. Published by order of Congress: Philadelphia printed: Reprinted for Stockdale and Walker, London*, 1782: though that publication contains the form of government enacted in the same convention, between the 6th of May and the 5th of July in the same year.

But in that same publication is contained a *Declaration of Rights* of the province of *Massachusetts*, dated in the years 1779 and 1780, which in its first article is a little similar: also one of the province of *Pennsylvania*, dated between July 15th and September 28th, in which the similarity is rather more considerable.

Moreover, the famous *Declaration of Independence*, published by Congress July 5th, 1776, after a preambular opening, goes on in these words: "*We hold these truths to be self-evident: that all men are created equal; that they are endued* by the Creator *with certain unalienable rights*; that *amongst those are life, liberty, and the pursuit of happiness.*"

The Virginian Declaration of Rights is that, it seems, which claims the honour of having served as a model to those of the other Provinces; and in respect of the above leading article, at least, to the above-mentioned general Declaration of Independency. See Recherches, &c. I. 197.

Who can help lamenting, that so rational a cause should be rested upon reasons, so much fitter to beget objections, than to remove them?

But with men who are unanimous and hearty about *measures*, nothing so weak but may pass in the character of a *reason*: nor is this the first instance in the world, where the conclusion has supported the premises, instead of the premises the conclusion.

ESSAY

ON THE

PROMULGATION OF LAWS,

AND

THE REASONS THEREOF;

WITH

SPECIMEN OF A PENAL CODE.

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OF

PROMULGATION OF THE LAWS,

AND

PROMULGATION OF THE REASONS THEREOF.*

I. PROMULGATION OF THE LAWS.

Let us suppose the general code completed, and that the seal of the sovereign has been set to it. What remains to be done?

That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated. But to promulgate a law, it is not only necessary that it should be published with the sound of trumpet in the streets; not only that it should be read to the people; not only even that it should be printed: all these means may be good, but they may be all employed without accomplishing the essential object. They may possess more of the appearance than the reality of promulgation. To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes.

There are many methods of attaining this end: none of them ought to be neglected; but it has been too common to neglect them all. The forgetfulness of legislators in this respect has exceeded every thing which could have been imagined. I speak more particularly of modern legislators. We shall find models deserving of imitation in antiquity; and it is astonishing that the example which should have had the greatest weight among Christian nations, should have had scarcely any influence in this respect. They have borrowed from Moses, laws which possessed only a relative and local utility; but they have not imitated him in that which bears the noblest character of wisdom, and which is suited to all times and all places.

It is said by some naturalists, that the ostrich is among the most stupid of birds, inasmuch as it leaves its eggs in the sand, unmindful that the passing foot may crush them. If this were true, Bacon, who has converted into sources of wisdom so many of the ancient fables, might have turned it into an apologue; and the legislator who, after having framed his laws, abandons their promulgation to chance, and thinks that his task is finished when the most important of his duties has only begun, would have been represented by the ostrich.

It is true, that before laws can be promulgated, they must exist. That which is called unwritten law, which consists of rules of jurisprudence, is a law which governs without existing. The learned may exercise their ingenuity in guessing at it; but the unlearned citizen can never know it. Were these rules to receive an authentic form, and to be promulgated, they would no longer be mere rules, but would become real laws. To render them such, has been one of the great objects of my plan; and the facility of promulgation has been one of the principal objects which I have had in view. It is with this view that I have divided the general code into particular codes, that they may be separated or collected together, according to the powers and wants of the individuals whom they respectively concern.

To promulgate the English laws as they exist at present; to pile the decisions of the judges upon the top of the statutes of parliament, would be chimerical: it would be to present the sea to those that thirst: it would do nothing for the mass of the people, who would not be able to comprehend them. A point, say the mathematicians, has no parts: so neither are there any parts in chaos.

If the laws be good, it is desirable that they should be known; if otherwise, the knowledge of them may be mischievous: for example, if you leave in your code bad coercive laws, persecuting laws, it is well that

* Edited from the French of Dumont, and the original MSS. and printed works of Bentham.

they remain undiscovered by informers. If your laws of procedure favour the impunity of crimes; if they afford means of eluding justice, of evading taxes, of cheating creditors, it is well that they remain unknown. But what other system of legislation besides this will gain by being unknown?

There are some laws which seem to have a natural notoriety: such are those which concern crimes against individuals; as theft, personal injuries, fraud, murder, &c. But this notoriety does not extend to the punishment, which, however, is the motive upon which the legislature relies for procuring obedience to the law. It does not extend even to those circumstances, often so delicate, which must be noticed before the line of demarcation can be traced among so many crimes differently punished, nor even to those actions which are either innocent or meritorious.

The dissemination of the laws ought to be regulated by the number of persons whom they concern. The universal code ought to be promulgated to all. The particular codes ought to be set before the classes to which they respectively refer. A road-book is useful, but it is of most use to those who are to be guided by its regulations, and who wish to travel.

The universal code of all secular books would be the most valuable, and almost the only one necessary for all; if not as a book of law, at least as a book of morals.

The sacred books command men to be honest: a good code would explain in what justice consists, and would exhibit in what manner it was possible to be unjust.

Probity, prudence, benevolence; these are the subjects of morality. The law ought, however, to include all that relates to probity; all that teaches men to live together without injuring each other.

There will then remain for morality, prudence and benevolence: but secure probity, and prudence will have fewer snares to escape, and will walk more securely: prevent men from injuring one another, and benevolence will *have* fewer sufferings to relieve.

Methods of Promulgating the Universal Code.

Schools.

It ought to be made the chief book; one of the first objects of instruction in all schools: it formed the foundation of instruction among the Hebrews; and tradition relates, that the Jewish kings were required to make a copy of the whole law with their own hands.

In those cases in which a certain degree of education is required as a pre-requisite to the enjoyment of a certain employment, the aspirant might be required to produce an exact copy of the code, written with his own hand, or translated into a foreign language.

The most important parts of it might be committed to memory, and repeated as a catechism: that, for example, which contains the definition of offences, and the reasons for their being ranged into classes.

In this manner, before sixteen years of age, without hindrance to any other studies, the pupils in public schools would become more conversant with the laws of their country, than those lawyers at present are, whose hair has grown grey in the contentions of the bar. The change would arise out of the nature of the laws themselves.

The pupils might translate the national code into the dead languages; they might translate them into the living languages; they might turn them into verse, the mother tongue of the laws.

"Teach your children," said an ancient philosopher, "what they ought to know when they are men, and not what they ought to forget." This philosopher would not have condemned the new study I propose.

Churches.

Why should not the reading of the laws form, as it did among the Jews, a part of divine service? Would not the association of ideas be beneficial? Would it not be well to represent the supreme Being as the protector of the laws of property and security? Would it not add dignity to the ceremony, if the laws respecting parents and children were read upon the performance of baptism? and the laws respecting husbands and wives at the time of marriage?

This public reading in places of worship would be, as respects the most ignorant classes, a means of instruction, as little costly as it would be interesting; and the code would be unnecessarily voluminous, if it would not be possible to read it through many times in the year.

Different Places.

The laws which only concern certain places; as markets, theatres, highways; ought to be fixed up in the places themselves, where it is desirable that they should be present to the minds of those who have to observe them. There are few men who would dare to violate a law, speaking as it were to all eyes, and addressing itself to all as to so many witnesses upon whom it would call to bear testimony against the evil doer.

Translations.

If the nation which ought to obey the same laws is composed of different peoples, speaking different languages, it is proper that an authentic translation of the code should be made into each of these languages. It is also proper that it should be translated into the languages of the principal nations of Europe.

The interests of these nations are so mingled, that they have all occasion to understand the laws of the others. Besides, it would prevent a stranger from falling into those faults which he might otherwise commit through ignorance of the law, and also guard him from the snares which otherwise might be laid for him by abusing his ignorance. Hence would arise security for commerce, and confidence in transactions among foreign nations. It is a proceeding called for by candour and honesty.

Have you any thing contrary to the ordinances of the king? is the foolish and insidious question asked at many custom-houses of the stranger, who, perhaps for the first time, enters the kingdom. How should he know those ordinances? He might reply, Does the king himself know them? My reply may constitute either a snare or an offence. Show me your ordinances in my own language, and then, if I deceive you, punish me.

Particular Codes.

In taking up a condition, every citizen should be obliged to provide himself with the code which relates to that condition. The code, according to its extent, should be printed as a book, or on a sheet. In those cases in which the whole code cannot be printed on a sheet, an abridgement or index to it ought so to be. This sheet should be required to be stuck up in a fixed place, and its exhibition in this manner should be made a matter of police, as it respects shops, places of amusement, theatres, &c. The rogues would doubtless be disposed to throw a veil over so unwelcome a witness against them; in the same manner as certain devotees are reported to have done, when they wished not to be seen by their saints.

Laws concerning Contracts.

There is one species of promulgation specially adapted to agreements among individuals and to wills. With regard to things of sufficient value, it might be required that they should be written upon stamped paper, which should bear upon its margin a notice of the laws concerning the transaction to which it referred. This plan is borrowed from English jurisprudence: but the instances in which it has been employed are very few, in comparison with those in which it has been neglected, and in which it would have been equally useful. I have gathered with carefulness this precious seed, that its cultivation may be extended.

II. PROMULGATION OF REASONS.

For writing laws, it is enough to know how to write: for establishing them, it is only necessary to possess power. The difficulty consists in establishing good laws. Now good laws are those for which good reasons are assignable: but it is one thing to have established good laws justifiable by good reasons; another thing to have discovered those reasons, and to have presented them to view in the most advantageous light. A third problem, yet more difficult of solution, is to find a common base for all the laws; one unique and clear principle: to shew their harmony with it; to dispose them in the best order; to give them the greatest simplicity and the greatest clearness of which they are susceptible: to find an isolated reason for a law, is to do nothing. A comparative balance for and against is desirable, since we cannot rely with confidence upon a reason, unless we can be assured that there is nothing stronger to oppose to it in a contrary direction.

To the present time, reasons have been regarded as works of supererogation.* We need not be astonished at this. Legislators have been hitherto directed upon the most important points by a species of instinct: they have felt an evil; they have confusedly sought for a remedy. Laws have been made nearly in the same manner as the first towns were built. To look for a plan among these heaps of ordinances, would be like searching for an order of architecture amidst the huts of a village. Will it be believed, that it has been laid down as a principle that a law ought only to bear a character of absolute authority? Lord Chancellor Bacon, the great restorer of learning, will not allow that reasons should be assigned, because it might lead to disputes concerning the law.† He might, perhaps, have felt that the best reasons he could have given would have been found imperfect: he had no desire to satisfy the people; no inclination to take the pains necessary for satisfying them. Besides this, in his time the wisdom of kings scarcely differed from the divine: *stet pro ratione voluntas*, was their motto.

It must be acknowledged, that at the period at which Bacon lived, the notions respecting the principles of law were too imperfect to serve as the foundation of a reasonable system. He was more qualified than any one to expose the fallacy of the best reasons which could have been assigned for the greater part of the then existing laws; and therefore he might fear to expose them to a trial which they could not sustain. But this is no ground for fear, that laws founded upon reasons based in utility will be liable to be thus overthrown: when such a code shall have been accomplished,

* There are, however, honourable exceptions.

† *Leges decet esse jubentes non disputantes.* — Bac. de augm. scient.

The maxim of Bacon is perfectly just, when applied to the law itself, — which ought only to present a pure and simple expression of the will of the legislator.

should all the lawyers in the world attack it with keenest appetites, what would be the result? They would be like vipers biting at a file.

There would have been many more codes supported by reasons, if those who have made the laws had believed themselves to be as superior in information to their fellow-men, as they felt themselves to be in power. Those who had felt themselves furnished with strength to enter upon the career, would not have renounced this more flattering part of their employment. If there had been no occasion to satisfy the people, they would have been desirous of satisfying themselves: they would have felt that it was not right to assume infallibility at the same moment that they renounced the guidance of reason. Those who are able to convince men, will treat them like men; those who only command, avow their inability to convince.

It is difficult, if not impossible, that the composition and sanction of a code of laws should proceed from the same hand. The situation in which a sovereign is placed, the kind of life to which he is accustomed, the duties he has to fulfil, absolutely exclude him from the knowledge of the details which such a work demands. Engaged in the labyrinths of jurisprudence, a Cæsar, a Charlemagne, a Frederick, would appear no more than an ordinary man. It is therefore impossible that such a work should be the result of the personal knowledge of a sovereign. Suppose a perfect code framed, the sovereign who should recognise its merit, and give it his support, would rank above all other sovereigns. He would not, however, be considered the author of the reasons by which the code was attended: these would have proceeded from the hand which penned them. The compiler of the code and the sovereign would each have their parts to act before the public. "You tell me," might the latter say, "that the laws you have framed are only good and wise, and it is well: subject them to the proof." "Sire," might the compiler reply, "the laws which I have proposed are not the product of caprice; there is not a syllable which I have put there, for which there did not appear to me a good and conclusive reason; not a single regulation which did not appear to me the best that could be adopted under the present circumstances of your people. Permit me, then, to add my reasons throughout the whole of your code: by no other means can you be so completely assured of their merit, or I who have adopted or invented them, or the people who will have to obey them."

Besides, if the name of the sovereign has most influence upon the present generation, that of the compiler will have most with the generations to come. Power, whilst living, may ally itself with the reputation of wisdom; but this union is dissolved by death. The veneration for great talents is increased when the foibles of the individual are forgotten, and when the dread of rivalry no longer exists. The veneration which thus attaches to the man of genius who is dead, will serve to protect his labours against precipitate change.

We proceed to consider, in greater detail, the different advantages which would result from a constant and sustained application of this method. An innovation always requires to be justified: an innovation which extends to the entire system of the laws, requires the strongest reasons for its justification.

We may observe, then, in general, that if the laws were constantly accompanied with a *commentary of reasons*, they would better fulfil the design of the legislator in all respects: they would be more pleasantly studied, more easily known, more constantly retained, and more cordially approved. All these desirable effects are intimately connected among themselves, and the attainment of either is one step towards obtaining the others.

If the study of the law is dry, it arises much less from the nature of the subject, than from the manner in which it has been treated. That which renders books of jurisprudence so dry and wearisome, is the confusion, the want of connection, the appearance of caprice, the difficulty of discovering any reason, and the barbarous nomenclature of the mass of incoherent and contradictory laws. Compilers have made their works an exercise of patience, and have addressed them only to the memory. The laws presented under this austere form appear only to require obedience, and never lay aside their severity. Let the laws be accompanied by justificatory reasons: this will shed a portion of interest over the laws themselves, and make the study of them agreeable. In reading the laws, we shall then learn to think, and shall discover the solution of many enigmas which had previously been inexplicable to us: by this means we shall enlarge and strengthen our minds; we shall be admitted into the counsels, as it were, of the philosophers and sages who have framed the laws, and shall find, in their works, a manual of philosophy and morals. The truths developed in the laws are interesting: and when they shall thus have been clearly arranged, and their connection exhibited, this study will become interesting to the young, instead of repulsive even to those who are compelled to engage in it. When it shall be shown to be connected with reason and philosophy, and shall have been rendered easy of acquisition, it will even become a disgrace not to be acquainted with it.

This exposition of reasons will render the laws more easily understood. A rule, the reason of which is unknown, takes no hold upon the understanding: those things are best comprehended, of which we know the why and the wherefore. The terms of law

may be clear and familiar: add to them the reason of the law, and the light is increased; no doubt rests upon the real intention of the legislator; the mind of the reader holds immediate communion with the mind of the author.

The more clearly the laws are understood, the more easily will they be retained. The reasons annexed will serve as a kind of *technical memory:* they will serve as a species of cement, by which to unite all those regulations which would otherwise appear as fragments and dispersed ruins.

The reasons themselves would serve as a kind of guide in those cases in which the law was unknown: it would be possible to judge beforehand what its regulations would be; and by knowing the principles of the legislator, to place oneself by imagination in his situation; to divine or conjecture his will in the same manner as we conjecture what would be the determination of a reasonable being with whom we had long lived, and with whose maxims we were well acquainted.

But the greatest advantage is that which results from conciliating the approbation of all minds, by satisfying the public judgment, and obtaining obedience to the laws; not from a passive principle of blind fear alone, but with the concurrence of the will also.

When the people are dreaded, reasons are sometimes offered to them. But this extraordinary method rarely succeeds, because it is extraordinary: the people suspect there is some intention to deceive; they are put upon their guard, and yield rather to their mistrust than to their judgment.

Without reasons, all laws may be condemned or defended with equal blindness. If we listen to innovators, the most salutary law will be designated as tyrannical: if we listen to a crowd of lawyers, the most absurd law, if its origin be unknown, will pass for wisdom itself.

Exhibit the reasons of the laws, and you disarm all cheats and fanatics; because thus you will give to all discussions respecting the laws a clear and determinate object. There is the law: there is the reason assigned for that law. Is it a good reason? is it bad? The question is reduced to this simple issue. But those who have studied the progress of political quarrels, know that the object of the heads of parties especially is to avoid this fatal shoal, this examination of utility: personalities, antiquity, law of nature, laws of nations, and a thousand other terms of this kind, have been invented as a means of preventing recourse to this short method of shortening and resolving controversies.

If the laws were founded upon reason, they would infuse themselves, so to speak, into the minds of the people: they would form part of the logic of the people; they would extend their influence over their moral nature: the code of public opinion would be formed by analogy upon the code of the laws, and by the agreement between the man and the citizen: obedience to the laws would come to be hardly distinguishable from the feeling of liberty.

The commentary of reasons would be of great utility in the application of the laws: it would be a compass for the judges and all government functionaries. The reason assigned would unceasingly direct back to the intention of the legislator, all those who wandered from it. A false interpretation would not square with this reason: unintentional errors would become almost impossible: prevarications could not be hidden: the whole course of the law would be enlightened, and the citizens would judge the judges.

In a point of view still more enlarged, the adoption of this plan is recommended by its influence upon the perfection of the law. The necessity of furnishing a sufficient reason for every law, would be a preservative against a blind routine on the one hand, and a restraint to every thing arbitrary on the other. If you are required to state your reason for each proposition, it will be necessary to think, instead of to copy; to possess clear ideas, and to admit nothing without proof. There will no longer be any opportunity for preserving in the laws fantastic distinctions, useless regulations, unnecessary restraints: inconsistencies will become too prominent: the disproportion between good and evil will become too offensive. The most defective parts will continually tend towards amelioration upon the plan of the most perfect. Those parts which have attained the highest possible degree of perfection will never lose it: a good reason for their existence will always prove a safeguard, which will defend them against precipitate and capricious changes: a phalanx so strong will daunt the most audacious innovator. The strength of the reason will become the strength of the law: it will act as an anchor to prevent the vessel from being driven about by the force of the winds, or being insensibly drawn aside by the currents.

It may be said that the laws, and especially the most essential laws, are founded on such palpable truths, that it is unnecessary to prove them. The end of reasoning is conviction; but if complete conviction already exist, for what purpose employ reasoning to produce it?

There are truths which it is necessary to prove; not for their own sakes, because they are acknowledged, but that an opening may be made for the reception of other truths which depend upon them. It is necessary to demonstrate certain palpable truths, in order that others, which may depend upon them, may be adopted. It is in this manner we provide for the reception of first principles, which,

once received, prepare the way for the admission of all other truths. All the world acknowledges that assassination is an evil action: its punishment ought to be severe: every body is agreed again. If it is necessary to analyze the mischievous effects of assassination, it will be necessary as a step towards bringing men to acknowledge the fitness of the law which distinguishes between different species of assassination, that it may only punish them according to their respective degrees of malignity; that those actions which bear the exterior characters of assassination, but do not produce its bitter fruits, may either not be punished, or only punished in a less degree: for example, suicide, duelling, infanticide, murder after violent provocation, &c.

In the same manner it is necessary to expose the evil of theft; not that men may be led to agree that theft is an evil, but that they may be led to acknowledge a multitude of other truths which, without this demonstration, would still be neglected. It is necessary that a variety of actions may be collected together under this head of crime, which have been hitherto neglected, and for detaching others which have no sufficient relation with crimes of this class: in a word, it is necessary for the purpose of collecting all the true and genuine species, and rejecting all the spurious, in order to establish the grounds for appointing different degrees of punishment.

Why should the laws of one state be unknown in every other? They have been thrown together at hazard, without connection, and without arrangement. There is no common measure among them. Without doubt, there are cases in which diversity of situation may demand diversity of legislation; but these cases can only exist in a few instances, and those much fewer than is usually imagined. In this respect, it will be proper to distinguish between an absolute and a temporary necessity: an absolute necessity is founded upon circumstances that cannot change; a temporary necessity is founded upon accidental circumstances, which may change.

If there be one method better calculated than another to bring nations more nearly together, this which I propose, of a system of laws founded upon reasons clearly announced, is one. The free communication of knowledge will propagate this system in all directions the instant it is created: such a system of legislation will prepare for itself a universal dominion.

Since philosophers have begun to compare the laws of different nations; when they have been able to divine any reason, to observe any relation of resemblance or of contrast, it has been a species of discovery. If legislators had been guided by the principle of utility, these researches would have been without an object: the laws derived from the same principle, tending towards the same object, would no longer present systems more ingenious than solid, in which we have to seek to find any reason at all; and in which, when any one fancies he finds a reason for a law, he thinks the law is justified.

Montesquieu has often misled his readers: he employs all his mind, that is to say, a mind of the first order, in discovering, amid the chaos of laws, the reasons which may have influenced the legislators. He has been desirous of lending them a wisdom of intention in institutions the most contradictory and the most extravagant. But when we agree with him that he has discovered their true motives, at what conclusion do we arrive? They acted upon a reason; but was this a good reason? If it were good in some respects, was it the best reason? If they had made a law directly opposed to it, would they not have done better? Such is the examination which always remains to be made: such is the examination to which he scarcely ever descends.

The science of legislation, though it has made but little progress, is much more simple than one would be led to believe, after reading Montesquieu. The principle of utility directs all reasons to a single centre: the reasons which apply to the detail of arrangements are only subordinate views of utility.

In the civil law, reasons should be drawn from four sources; that is to say, from the four objects, according to which the legislator ought to regulate his conduct in the distribution of private laws: *subsistence*, *abundance*, *equality*, *security*.

In penal laws, the reasons should be drawn from the nature of the evil of offences, and from that of the remedies of which they are susceptible. These remedies are of four kinds: *preventive* remedies, *suppressive* remedies, *satisfactive* remedies, *penal* remedies.

In the law of procedure, the reasons should equally derive their source from the different ends which ought to be kept in view: *correctness* of *judgment*, *quickness*, and *economy*.

In financial law, the reasons should be drawn from two principal objects: *saving* in expense, in order to avoid the evil of constraint; *choice* of the tax, in order to avoid its accessory inconveniencies.

There are some parts of the law in which the custom of assigning reasons has been followed to a certain point; in matters of *police*, of *finance*, and *political economy*. Their objects are modern: it has been necessary to create every thing, nothing relating to them being found in the ancient laws. What has been done, has been not only an invention, but a positive opposition to ancient usages and prejudices. Hence it has been necessary to combat them; it has been necessary that authority should justify itself. Such was the

origin of those preambles to their laws, which procured so much credit to M. Turgot and M. Neckar.

But there are much more important branches of legislation, in which it has not been customary to assign any reasons: the civil code, the penal code, the code of procedure. If it has not been done, it is not that they have not dared to do it, but because they knew not how. Lawyers have among themselves a peculiar language, technical reasons, conventional fictions, a logic current at the bar: but they have an indistinct perception that the public will not receive it with the same complacency as themselves; that they will not be satisfied with the same jargon.

If the chancellors of kings had been such men as Turgot and Neckar, they, like them, would have felt more pride in giving their reasons than in making their edicts. In making laws, it is only necessary to occupy a certain position: in order to make a reasonable law, and to give reasons for it, it is requisite that the party be worthy of that position.

But an isolated reason is a mere trifle: the reasons for the laws, if they are good, are so connected, that unless they have been prepared for the whole body, they cannot with certainty be given for any part. Hence, in order to present in the most advantageous manner the reason for a single law, it is necessary that the plan of a system of reasons for all the laws should have been formed. It is necessary previously to have laid the foundation of a reasonable system of morality, to have analyzed the principle of utility, and to have separated it from the two false principles of sympathy and antipathy.

To give a reason for a law, is to show that it is conformable to the principle of utility.

In accordance with this principle, the repugnance which a certain action inspires is not a sufficient ground for its prohibition. Such a prohibition would only be founded upon the principle of antipathy.

The satisfaction which another action affords to us, is not a sufficient ground for a law authorising its performance. Such a law would be only founded upon the principle of sympathy.

The principal business of the laws, the only business which is evidently and incontestibly necessary, is the preventing of individuals from pursuing their own happiness, by the destruction of a greater portion of the happiness of others. To impose restraints upon the individual for his own welfare, is the business of education; the duty of the old towards the young; of the keeper towards the madman: it is rarely the duty of the legislator towards the people.

It is not a merely speculative idea which is thus recommended: a system of penal laws has been thus sketched out, and accompanied with a commentary of reasons, by which even the least important regulations are justified. I am so convinced of the necessity of this exposition of reasons, that I would not dispense with one of them at any price. To confide in what is called a *feeling of justice*, *a feeling of truth*, is a source of error. I have seen, upon a thousand occasions, that the greatest mistakes are concealed in all those feelings which are not brought to the touchstone of examination. If this feeling, this first guide, the *avant courier* of the mind, be correct, it will always be possible to translate it into the language of reason. Pains and pleasures, as I have repeatedly shown, are the only clear sources of ideas in morals. These ideas may be rendered familiar to all the world. The catechism of reasons is worthless, if it cannot be made the catechism of the people.

I add here, as an example of this theory, the first chapter of the Penal Code. I have not, however, given the whole of it, nor inserted all the forms and references which it ought to have, if it formed a part of the code itself. This species of precision would be superfluous here. This example may also serve as a recapitulation of this essay, by showing how its principles may be put in execution, and in what manner its theories may be carried into practice.

SPECIMEN OF A PENAL CODE.*

Of Simple Personal Injuries.

Simple† *Corporal Injury* is either positive or negative. There is positive simple corporal injury, when, without lawful cause,[a] an individual has caused,[b] or contributed[c] to cause, to another, a corporal pain, either light or weighty,[d] which is not followed by any ulterior corporal evil.[e] There is simple corporal injury,[f] when, without lawful cause, an individual, seeing another in danger, abstains from helping him,[g] and the evil happens in consequence.

EXPLANATIONS.

[a] *Without lawful cause.* Refer to the general head, "Grounds of Justification."

[b] *Caused.* It is of no consequence, neither in what manner, nor by what means, the mischief has been done: whether the person have been beaten or wounded; whether air, water, light, or fire, have been employed; whether some hideous and disagreeable object have been presented to the sight, to the touch, or to the tase; whether, by force or otherwise, a mischievous drug have been administered; whether a dog, or some other animal, have been employed to gratify the offender's malice, or an innocent person; whether it have been done by the sufferer himself, as by inducing him to walk into a snare or into a ditch; whether the necessary means of relief have been removed from his reach, the bread from the hungry man, the medicine from the sick: these means, and all others which have mischief for their object, are included in the definition of a simple personal injury.

[c] *Contributed.* Refer to the general title of "Co-delinquents."

[d] *Light or weighty.* Every thing which takes place against the will of the party injured, even the slightest touch: hence the mischief of this offence may vary, from the slightest uneasiness to the most painful tortures.

[e] *Ulterior.* If any ulterior mischief happen, the offence no longer belongs to this head; it becomes an irreparable corporal injury, or an imprisonment, &c.

[f] *Negative.* Refer to the general head of "Negative offences."

[g] *Abstains from helping him.* Every man is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience. This obligation is stronger, in proportion as the danger is the greater for the one, and the trouble of preserving him the less for the other. Such would be the case of a man sleeping near the fire, and an individual seeing the clothes of the first catch fire, and doing nothing towards extinguishing them: the crime would be greater if he refrained from acting not simply from idleness, but from malice or some pecuniary interest.

PUNISHMENTS.

1. *Fine.* At the discretion of the tribunal.
2. *Imprisonment.* At the option and discretion of the tribunal.
3. *Security for good Conduct.* This also at option and discretion.
4. *In very grave cases, Banishment from the presence of the party injured, for a time or for ever.* This also at option and discretion.
5. *Costs.* At option and discretion.

N.B. Each of these articles requires references to the different sections of the general head of "Punishments;" there, the phrases *at option and discretion* should be explained.

At option, is a concise method of expressing that it will be lawful for the judge either to employ this punishment or not.

At discretion, signifies that the judge ought to employ a certain portion of this punishment, with this limitation, that he should employ so much or so little, as shall be conformable to the general rules prescribed to him under the general head of "Punishments."‡

AGGRAVATIONS.

1. *Superiority of Age.* When the offended person is older than the offender.
2. *Sex.* When the party injured is a female, and the delinquent a male.

The extra-portion of the punishment ought to consist of a characteristic penance, at the choice of the tribunal, with greater or less publicity, at its discretion.

3. *Weakness.* When the party injured is the inferior, either as respects natural strength or difference of weapons, so that he had no chance of defending himself with success.

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* Edited from the French of Dumont, and the original MSS. and printed works of Bentham. R. S.

† See Introduction to Morals and Legislation, chap. xviii. [Division of Offences] Simple Corporal Injuries, in order to distinguish them from Irreparable Corporal Injuries, and from Mental Injuries, &c.

‡ It is impossible to give all these explanations at once: that every difficulty might be removed, it would be necessary to publish the whole Penal Code. The reader is requested to observe, that this example is intended principally to show the use of a commentary of reasons.

4. *Numbers.* When, on account of the number of aggressors, resistance was unequal or impossible.

5. *Parental Relation.* When the party injured stands in the relation of father or mother, grandfather or grandmother, to the delinquent.

The delinquent in such case should always, in addition to the ordinary punishment, undergo a penance, more or less public, upon the stool of repentance, with his hands tied above his head, and an inscription stating his offence.

6. *Quasi-paternity.* When the delinquent is a minor, and the party injured his guardian, his preceptor, or his master.* He who brings us up is a second parent. This circumstance will still have some force; but it will be less when the delinquent has attained his majority.

If there be no ground of extenuation, an extra portion of characteristic punishment should be awarded, as for a like injury done to a parent.

7. *Premeditation.* The longer an offence is premeditated, the greater is the aggravation. It is written, "*Let not the sun go down upon your wrath.*"

8. *Nocturnal Irruption.* This is the case when the premeditated offence is committed at night, after being concealed on the premises to wait a favourable opportunity, or when the offender has broken in, or has attempted to break into the dwelling of the party injured.

The extra portion of punishment should be characteristical at the *option* of the tribunal, and attended with more or less publicity at *discretion.*

9. *Ambuscade.* As when an offender makes a sudden attack upon his adversary when unprepared; as if, for example, he hide himself behind a wall, a hedge, or in a hollow way, or spreads his snare by night.

10. *Violation of Asylum.*

11. *Violation of Sleep.*

12. *Clandestinity.* As when the delinquent endeavours to hide himself, or to evade, by other means, the pursuit of justice.

13. *Disguise.* As when the delinquent, either by wearing a mask, or other clothes than his own, seeks to render himself unknown.

As an extra-punishment, he may be exposed to a penance, more or less public, in an iron mask, or in a dress similar to that in which he had disguised himself.†

14. *Salary.* When the delinquent has been hired to commit the crime.

A characteristic punishment would be a more or less public exhibition of the delinquent, with the wages of his iniquity suspended about his neck.

There are some cases in which this punishment ought not to be inflicted, unless the offence is a very grave one. The first is, when it has not been premeditated, and when the suborner can shew some provocation received: the second is, when the suborner, thus provoked, is the weaker, or of a superior rank to the party injured.

15. *Project of Coercion.* When the object of the offence is to compel the party injured to do or not to do a certain thing; the offence nevertheless not being a theft or an act of clandestine or violent destruction.

Extra punishment, characteristic punishment, the extortion press, the cap of repentance: these at option of the tribunal.

Fine, even to the whole of his property; confinement, banishment, forced labour, limited or perpetual: these *at discretion.*

EXTENUATIONS.

When the delinquent has really received, or sincerely believes himself to have received, a provocation from the party injured, this may be a source of extenuation. That which constitutes the provocation is a wrong: this wrong may be of a *legal* or *moral* kind.

EXPLANATIONS.

The sincere persuasion of even an imaginary wrong, furnishes some degree of extenuation. It is of no consequence whether the erroneous supposition in this case rest upon a point of fact or a point of law. It turns upon a point of fact, when you believe that you have received a certain damage from your adversary, and he has really not done it to you: it turns upon a point of law, when you believe that he has no right to do you a certain damage, and he really has the right to do it.

It is of no consequence to whom the wrong in question immediately refers: whether to the party himself provoked, or to any person particularly dear to him; or to the public in general, for the interests of the public ought to be dear to every one; or to the person himself who gave the provocation, for each individual should be dear to every man: consequently, if you think you see any one plunging into vice, and the vexation with which you resent his evil conduct lead you to strike him, it is a less crime than if you had struck him in the course of a quarrel arising out of your own interests.

The wrong done may be either moral or legal. A legal wrong is one which is punish-

* This would only refer to those persons who have the chief care of the minor, being entrusted by the parent or guardian. It should not be extended to persons who are only charged with certain details of his instruction, and who have only an occasional charge of him, as a writing or dancing-master, unless by a clause having this special object. See further, upon this subject, the laws respecting masters and servants, day-labourers, apprentices, and slaves.

† Other aggravations will be found under the different titles, Theft, Destruction, Personal Insults, Lascivious Attacks, Offences against Justice, Offences against the Law of Nations, Offences against Government, Offences against Religion.

able by the laws: a moral wrong may be any act, whether punishable by the laws or not, which being hurtful to the party injured, is liable to be punished by the censure of the world: for example, an act of violence, of perfidy, or of ingratitude.

GENERAL OBSERVATION.

The extenuation furnished by provocation, is greatest in proportion to the following circumstances: 1. The gravity of the wrong. 2. The recentness of its date. 3. The difficulty which the injured party might have in obtaining legal redress.

EXPLANATIONS.

The gravity of the wrong, upon this occasion, ought not to be estimated simply according to the evil of such an offence to society in general, but with a view to its tendency particularly to excite resentment: consequently, a personal insult, or an act of defamation, constitutes a stronger provocation than a theft.

The date of a provocation requires some particular remarks. At the same distance of time, a provocation may be more or less lively, according to its magnitude: that which weighs down the heart may be yet recent; whilst another, which is lighter in comparison, may be forgotten. However, as a boundary is requisite, a provocation ought not to be esteemed recent, if more than a month have elapsed between the time of its receipt, and the occurrence of the fact to which it is alleged to have given rise.

A provocation should be dated, not from the time when it occurred, but from the time when it came to the knowledge of the party injured; and even every circumstance adding much to the malignity of the action, and only becoming known after the other parts had been known, should be deemed a renewal of the provocation: thus, if after having learned that a man had beaten your son; — a month afterwards you should learn that your son had lost an arm in consequence of the blows; or that a man with arms had fallen upon your son, who was disarmed, and that he had struck him after he asked for quarter: if you should attack this man in consequence, and beat him, the provocation in this case ought to be deemed recent.

Thus a train of distinct provocations, which are all recent with respect one to another, and of which the last is recent with relation to the fact in question, ought all to be esteemed recent in relation to this fact. This succession is what properly constitutes the unity of the quarrel.

SECOND EXTENUATION.

If a man, in defending his person or his property from attack, does more injury to his adversary than was necessary for its defence, the surplus is an injury; but an injury susceptible of excuse, in consequence of the provocation. This is even the most favourable case, since it is not only recent, but immediate.

In judging whether an attack could be repulsed with less evil to the aggressor, it is necessary to place oneself in the place of the attacked, and to recollect, that in the agitation of his mind he could not coolly consider all his means of defence, and choose precisely that which should accomplish his purpose with the least possible evil to his adversary. There is a great difference in this respect between the quiet of the closet and the bustle of action.

Suppose that a man suddenly assail you with a stick, and that there is at your door a stick and a bar of iron: you seize the bar of iron and strike the man a dangerous blow, or kill him. This ought to be deemed justifiable self-defence, unless it could be proved that you had deliberately taken the bar of iron in preference to the stick, with the intention of killing him, or wounding him more than was necessary for your security.

COMMENTARY OF REASONS UPON THIS LAW.

First Question. Why are the slightest injuries of this kind rendered punishable?

Answer. Because there is always a reason for punishing it. There is no sensation, how indifferent soever it may appear, which may not become an intolerable torment from its duration or its repetition. Let any one be allowed to touch your person in any manner whatsoever without being called to account for it: he may abuse this liberty so much as to render your life a burthen to you: you become in effect his slave: you will live in a state of perpetual fear, and the feeling of your inferiority will never quit you.

On the other hand, if the offence is slight, the punishment may be so also; and how small soever the injury may be, the punishment may be diminished in proportion; because the judge may exercise his powers of discretion in this respect on the side of gentleness.

Second Question. Why are negative offences of this class rendered punishable, as well as positive offences?

Answer. Because in the one case, as well as the other, the punishment is well grounded, is efficacious, is necessary.

Third Question. Why is an ulterior punishment added to that which is included in the obligation to render compensation for the evil done?

Answer. Without this additional punishment, it will not, in every case, be certain that the amount of punishment exceeds the profit of the offence How can it be ascer-

tained that the compensation directed by the judge entirely accomplished its purpose? If it be not complete, the offended party, so to speak, loses; and the offender gains. Besides, there are differences in fortune, with regard to which a proportion is with difficulty established. It is much for one to receive a certain sum: it is very little for another to pay it. The rich would be led to persuade themselves, that for a certain price they might satisfy their resentment towards those of an inferior rank.

Fourth Question. Why is a fine found among the articles of punishment?

Answer. Because money levied by way of fine produces a double advantage: as punishment, by its effect on the delinquent; as a tax, which tends to diminish by its amount the taxes imposed upon the honest citizens.

Fifth Question. Why employ imprisonment?

Answer. To provide for the case in which the delinquent shall not have wherewith to pay a fine. Also to provide for the case of a delinquent secretly supported by a party: a punishment purely pecuniary would not at all affect him.

Sixth Question. Why require security?

Answer. In order to prevent or stifle all design which the offender may have of avenging himself upon his adversary for having brought him to justice, and delivered him up to punishment.

Seventh Question. Why employ banishment from the presence of the injured party?

Answer. Because there are some cases in which this punishment would be necessary, still farther to humble the offender; and there are other cases in which the offended party ought to be spared further suffering. Offences of this class are very various. There is no degree of torment so frightful, which may not belong to them. It may therefore happen that the sight of the offender may prove a source of suffering to the offended person for a long period, and even for ever. If one of the two must avoid the other, it is more fitting the inconveniences of the removal should fall upon the guilty, rather than upon his innocent antagonist whom he has already injured.

Eighth Question. Why is age a circumstance of aggravation?

Answer. In order that the text of the law itself may be a lesson of morality; insomuch that young persons, seeing that the law itself shows a particular regard to their superiors in age, may contract a disposition always to treat them with particular respect. It is by age that men acquire experience; and by experience, wisdom. The respect of the youngest for the eldest will therefore prove reciprocally profitable.

Ninth Question. Why is a particular protection extended to females?

Answer. A moral object is again in view: it is proper to inspire them with a most delicate sense of honour; and this object is attained by increasing the guilt of every injury done towards them. Besides, the law ought to inspire men with a disposition of peculiar regard for females, because they are not all beautiful, and beauty does not last for ever; whilst the men have a constant superiority over the women, on account of their superior strength. There may also, perhaps, be a superiority of mental strength, either derived from nature or acquired by exercise.

Tenth Question. Why should an injury of this class done to a parent be punished with greater severity?

Answer. For a moral end. An habitual disposition in children and minors to respect their parents, is useful even to themselves; that they may the more readily submit themselves to the guidance of those who know best what is most suitable for them, and who desire their welfare: it is useful to the parents, to whom it serves as a recompense for their expenses, their fears, and the cares of education: it is also useful to the state; because it encourages men to marry, and form families, which constitute the wealth and strength of a state.

Some of these reasons, independently of the consideration of age, apply to guardians, teachers, and masters.

Eleventh Question. Why is premeditation a source of aggravation?

Answer. The greater the pertinacity a man displays in his resentments, the more danger is to be apprehended from him: the longer his desire of vengeance continues, the more probable is it that it will be gratified. If a man who is irritated against you, throw about fire and flame; if his irritation continue for one day only, you will be secure if you are protected for a day: but if he persevere in his intentions of avenging himself during ten days, the danger to which you are exposed from him is ten times as great as in the former case. Those who hear of your quarrel with him understand this, and experience a secret uneasiness, when they recollect that they have so dangerous a character among them. They may not understand the precise reason of what they feel; but this is the cause of the difference in the public feeling towards persons who entertain projects of revenge for a longer or a shorter time.

2. Besides, the longer a man is governed by hostile feelings upon a given occasion, the stronger proof he gives of perverse anti-social dispositions. The punishment must be more severe which is to operate upon a hardened character: that which would be sufficient to soften and correct a naturally benevolent mind, would have no effect upon an implacable and barbarous heart. Such characters must be restrained by greater terrors.

Twelfth Question. Why are the different circumstances of attack by night, lying in ambush, and violation of domicile, when accompanied by premeditation, considered as aggravations?

Answer. These different circumstances all tend to increase the danger and terror of the individual attacked; but especially when the domicile is violated; when a man sees himself forced in his last entrenchment, in his interior asylum, which holds all that is most dear to him, and in which he retires to sleep with confidence. If your adversary await you out of doors, you can take precautions against him: you are safe while you remain at home; but if doors and walls do not stop him, you have security nowhere. Such is the reflection which arises in every mind, and produces general alarm.

But if a quarrel begin at night, *nocturnity* is not a circumstance of aggravation. Even nocturnal irruption into the house would neither be so dangerous nor so alarming, when the individual, warned by threats, was able to take measures for escape or defence.

Thirteenth Question. Why is clandestinity made a source of aggravation?

Answer. Because it augments the mischief of the offence: it adds terror to suffering, and may render a man the most miserable of beings, by making him dread a succession of similar injuries, to which he could see no end, as he could possess no defence against an invisible enemy. In ordinary cases, where we know the author of an offence, we may have the protection of the laws: we may be sure, that if the evil is not repaired, at least that it shall not be augmented, it will not remain unpunished. But if the delinquent can hide himself behind a curtain, so as neither to be known nor suspected, he has all the profit of the crime: he laughs at the laws, and makes a jest of the terrors they ought to inspire. It is necessary, therefore, to take from him the desire to have recourse to inventions of this kind, by presenting to him the frightful prospect of an extraordinary degree of punishment, in case his subtleties should be detected. His artifices will appear less seductive, when accompanied with such fears.

Fourteenth Question. Why is disguise distinguished, as respects its punishment, from other means of clandestinity?

Answer. Disguise may increase terror to an extreme degree: a deformed mask, a long crape, a white veil which dresses up a phantom, may have the strongest effect upon the imagination; particularly upon weak and superstitious persons or invalids; upon women and children. This circumstance also furnishes a favourable opportunity for the use of a characteristic and striking punishment.

Fifteenth Question. Why is the circumstance of wages an aggravation?

Answer. First, Because it increases the alarm and danger: when a man beats another in his own quarrel, this violence inspires fears only in those who quarrel with *him;* but when a man, for the sake of money, engages in the quarrel of another, all who may chance to have a dispute with any one may dread the bravo by profession. Many persons who now believe themselves secure, because those with whom they have quarrelled are weak and timid, will live in a state of continual alarm, when they learn that there are men who sell their strength and courage to those who will buy them; and that their enemies may be able to do, by means of these strangers, what they could not do of themselves. The danger will appear the greater, in proportion as their enemies are rich, and are able to offer great rewards for such services; a circumstance which would tend to redouble the inevitable inconveniences of the unequal distribution of wealth, and which would add to the facility with which the rich might humble and oppress the poor.

Secondly: One such action indicates the vilest and most depraved character: the motive of pecuniary interest has clearly overpowered all the social motives, and it is only the dread of an extraordinary degree of punishment which can restrain so atrocious a fool.

Sixteenth Question. Why is provocation a source of extenuation?

Answer. This circumstance diminishes the mischief of the crime, as respects the evil of the second order. When a man, provoked to a certain degree, does mischief, he may be dangerous; but it is only when thus provoked. As long as we conduct ourselves towards him, as every body ought to behave to such persons, we have nothing to fear from him: we must have secretly formed the design of offending him, if we are alarmed at the vengeance which such provocation would call down.

Even an imaginary provocation, provided that the error has been real, is a source of extenuation, for the same reasons as a real provocation: the extent of the extenuation, however, is less in this case; but only from the difficulty of ascertaining the point of fact, namely, the sincerity of him who has believed himself to be provoked, without having been so.

Seventeenth Question. Why is excess in self-defence a source of extenuation?

Answer. This circumstance operates in the same manner as the preceding but with more force. The man who in his own defence does greater mischief than his own defence required, need only be dreaded by those who attack him.

ESSAY

ON

THE INFLUENCE OF TIME AND PLACE

IN

MATTERS OF LEGISLATION.

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OF THE

INFLUENCE OF TIME AND PLACE

IN

MATTERS OF LEGISLATION.*

INTRODUCTION.

"THUS far, then," I think I hear a reader say, "you have proceeded in your inquiries: thus far you have determined, or endeavoured to determine, what is expedient to be done in the way of law. But *where*, and *when*, to be performed? for some country and some period of time you must necessarily have had in view. If expedient in any country and at any time, it must be expedient in some individual country, at some individual period of time, that shall be assigned. Suppose, then, that country, suppose that period to have been assigned: let it have been your own, or not your own; let it have been this, or that, or any other. Will the laws, then, which you propose for the given country (what concerns the article of time need not any longer be repeated) would they be equally good for every other? If not, what is the influence of place and time on the expediency of what you propose? To give the question at once a universal form: What is the influence of the circumstances of place and time in matters of legislation? what are the coincidences, and what the diversities, which ought to subsist between the laws established in different countries and at different periods, supposing them in each instance the best that can be established?"

I will reduce the question at once to that form in which the solution of it has the most immediate relation to practice, and if just, will be productive of the most immediate benefit. I take England, then, for a standard; and referring every thing to this standard, I inquire, What are the deviations which it would be requisite to make from this standard, in giving to another country such a tincture as any other country may receive without prejudice, from English laws? I take my own country for the standard, partly because to that country, if to any, I owe a preference; but chiefly because it is that, with the circumstances of which I have the best opportunity to be informed.

This, then, is the hypothesis: — The laws which I would propose are established in this my country; and they are, of course, according to my conception of them, the best that can be devised. In this magnificent and presumptuous dream I indulge myself without controul; and in it, for the purpose of the argument, I must be allowed to indulge myself. This, then, is one term in the comparison: but there wants another. The problem, as it stands at present, is: the best possible laws for England being established in England; required, the variations which it would be necessary to make in those of any other given country, in order to render them the best laws possible with reference to that other country. But the problem, it is evident, must in strictness admit of as many solutions as there are countries which, in the point in question, are different from England and from each other. To make the tour of the globe in this manner, would evidently be an endless task. All that can be done here, is to pitch upon some one country in particular for an example: we might choose Russia, since, for a single empire, that includes the most ample tract, over which any system of laws could, according to the present divisions of territory, by possibility be extended. But what likelihood is there that laws passed in England should be received in Russia? We might choose Canada; for to that country, conquered by the arms of England, laws framed in England have been in contemplation to be transferred. But the differences of all kinds that can influence the inquiry

* The substance of this Essay has appeared in Dumont's Traités. It is now first published in English from the original MSS. of Bentham.

are too inconsiderable between England and Canada to furnish that instruction which another example may afford. That it may be as instructive as possible, this second country should, in regard to the circumstances in question, form as strong a contrast with England as possible. Such an example we seem to have in the province of Bengal: diversity of climate, mixture of inhabitants, natural productions, face of the country, present laws, manners, customs, religion of the inhabitants; every circumstance, on which a difference in the point in question can be grounded, as different as can be: add to which, that between these two countries, a transfer of the kind in question has actually been made, or attempted to be made, in reality. In regard to almost any two other examples that could have been chosen, the question would have been a mere question of speculation: in regard to this, whatever just remark may happen to be made, is of immediate use, and applies immediately to practice. To Bengal, then, let us direct the principal measure of our attention; not precluding ourselves from casting, every now and then, for the sake of variety, a transient glance towards other countries, according as chance may present them to our view. To a lawgiver, who having been bred up with English notions, shall have learnt how to accommodate his laws to the circumstances of Bengal, no other part of the globe can present a difficulty.

These being the two countries between which the comparison is to be drawn, let us see upon what principles it is to be made.

It is our destiny, as soon as ever we have got a glimpse of perfection, to leave it by the way. Complete perfection requires universal accuracy: universal accuracy requires infinite detail. It would be something, however, to trace, though it were ever so general an outline, of the model of perfection; and like Moses, the Jewish lawgiver, to point out, though we enter not, the Promised land. To draw up in a perfect manner a statement of the difference between the laws that would be the best for England, and the laws that would be best for Bengal, would require three things: First, the laws which it is supposed would be the best for England, must be exhibited *in terminis:* next, the leading principles upon which the differences between those and the laws for Bengal appear to turn, must be displayed: lastly, those principles must be applied to practice, by travelling methodically over the several laws which would require to be altered from what they are in the one case, in order to accommodate them to the other. According to this plan, were it rigorously pursued, a complete code of laws for England, accompanied with a collection of all the laws for Bengal which would require to be different from those which are for England, would form a part only of the matter belonging to the present head.

The impracticability of this plan is such, as need not be insisted upon. On this plan I would, however, wish the reader to fix his eye; for though it would be impossible to travel over the whole extent of it upon paper, he may upon occasion travel over any or every part of it with what degree of attention he thinks proper, in his own mind.

CHAPTER I.

PRINCIPLES TO BE FOLLOWED IN TRANSPLANTING LAWS.

THE laws which would be the best for England, the country from which the laws are to be transferred, being given, the next object of consideration is, By what principles are the variations necessary to be made in these laws, in order to accommodate them to the circumstances of Bengal, the country into which they are to be transferred, to be determined.

It has already been shown, that the end and business of every good law may, for shortness' sake, be reduced to this universal expression: the prevention of mischief. Now mischief, of whatever kind, is ultimately reducible to pain, or, what may be deemed equivalent to it, loss of pleasure. What, then? have different countries different catalogues of pleasures and of pains? The affirmative, I think, will hardly be maintained: thus far at least, human nature may be pronounced to be every where the same. If the difference lies not in the pains and pleasures themselves, it must lie, if any where, in the things that are, or are liable to be, their causes. In this point, in effect, we shall find it to lie, upon a little examination. The same event, an event of the same description, nay, even the same individual event, which would produce pain or pleasure in one country, would not produce an effect of the same sort, or if of the same sort, not in equal degree, in another.

The pathological powers of any exciting cause depend upon two particulars: 1. Upon the state and condition of the person himself, whose interests are in question. 2. Upon the state and condition of the external object, the action of which is the exciting cause. Now the circumstances the union of which constitutes the state and condition of a man, in as far as he is liable to be affected by an exciting cause, as well as those which constitute the state and condition of any object which is exterior to him, in as far as the action of such object is liable to become, with reference to him, an exciting cause, are the same circumstances of which the detail has been given under the title of *Circumstances influencing Sensibility.* In the catalogue, then,

of these circumstances, we shall find the sum total of the principles of which we are in search: the principles which, in our inquiry concerning the influence of place and time on matters of legislation, are to serve as a guide.*

The plan upon which this inquiry is to be conducted is already, then, completely drawn: the great task of invention has been performed: what remains is little more than manual labour. To assist him in the execution of it, the legislator should be provided with two sets of tables. Those of the first set would exhibit a number of particulars relative to the body of laws which has been pitched upon for a standard, as contemplated in different points of view: for example, a table of offences; tables of justifications, aggravations, extenuations, and exemptions; a table of punishments; a table of the titles of the civil code; a table of the titles of the constitutional code, and so on. Those of the other set will be: a general table of the circumstances influencing sensibility; tables or short accounts of the moral, religious, sympathetic and antipathetic biases of the people for whose use the alterations are to be made; a set of maps, as particular as possible; a table of the productions of the country, natural and artificial; tables of the weights, measures and coins in use; tables of its population, and the like.† These tables, if a man would work with accuracy, he should have, not metaphorically only, but literally and materially, before his eyes.

Upon the plan thus chalked out, I proceed to exhibit the alterations above spoken of, following the order of the matters in the original code which is supposed to be the standard. In this course it cannot, for the reasons assigned already, be expected that I should travel long: nor even in it that I should glean up the whole of the matter as I go. All that can consistently be done, is to give a set of examples, which in point of order shall exemplify the method that has been chosen, and in point of multitude and of variety shall afford a tolerably satisfactory illustration of the principles under the direction of which they have been brought to light. I proceed, then, according to the order of the offences.‡

1. *Simple Corporal Injuries.*—These would not admit of many modificasions, on account of difference of place. Mere corporal sensibility, of whatever differences it may admit in degree, is in kind much the same all the world over. Yet a wound in a hot and unhealthy climate may be much more dangerous than the same wound would be in a temperate and healthy climate.‖ Stripping a man stark naked, might cause death in Siberia, in circumstances in which it would be only play in the East Indies.

2. *Irreparable Corporal Injuries.*—Under this head it would be necessary to consider whether any, and what, indulgence should be given to the practice of emasculation. There would be more reason, it should seem, for such indulgence, where the services of persons thus mutilated are looked upon as a necessary guard to conjugal fidelity, than where the only use of them is to afford a somewhat higher gratification than could, perhaps, otherwise be procured to the ear of a musical dilettante.

3. *Wrongful Confinement and Wrongful Banishment.*—The effects of these two injurious acts are liable to great diversity, from differences in point of climate, manners, or religion. A night's confinment in the prison called the Black-hole, in the hot climate of Calcutta, after producing the most excruciating torments, proved fatal to nearly all the persons who were confined in it. In a winter's

* See Introduction to Morals and Legislation, chap. vi.

† For a list of articles or heads, comprising a statement of the wealth and commerce of any country, see the Abbè Morellet's Prospectus d'un Nouveau Dictionaire de Commerce, p. 45. Paris 1769, 8vo.

‡ The table of the circumstances influencing sensibility is of continual use. It is applicable to a variety of the most important purposes, of which this now before us is but one. It was first thought of as a necessary implement to the estimating the mischief of an offence: then for the purpose of adjusting the quantum of satisfaction: then again for estimating the force of a lot of punishment: in all these cases, the country of the party injured, the party who is to be punished, on whom punishment is to be inflicted, being given. Montesquieu had already taken the principal part of them into consideration, with a view, more or less explicit, of giving a different adjustment to the laws, in consideration of the different exigencies of the inhabitants of different countries: placing in the front of his inquiries those *secondary* circumstances, as I have styled them, which only operate through the medium of those others which I have termed primary. Before Montesquieu, a man who had a distant country given him to make laws for, would have made short work of it. "Name to me the people," he would have said; "reach me down my Bible, and the business is done at once. The laws they have been used to, no matter what they are, mine shall supersede them: manners, they shall have mine, which are the best in nature; religion, they shall have mine too, which is all of it true, and the only one that is so." Since Montesquieu, the number of documents which a legislator would require is considerably enlarged. "Send the people," he will say, "to me, or me to the people; lay open to me the whole tenor of their life and conversation; paint to me the face and geography of the country; give me as close and minute a view as possible of their present laws, their manners, and their religion."

‖ In a hot country, the slightest scratch is sometimes followed by *tetanus* or locked jaw, which generally proves mortal. See Dr. Lind's Essay on the Diseases incident to hot climates.

night in Siberia, the same number of persons might perhaps have undergone a confinement of the same length in a similar space, without any very remarkable inconvenience.

Confinement inflicted upon a Gentoo, might under certain circumstances be attended with the forfeiture of his caste; a possession to him much dearer than life: even banishment, if the effects of it were to seclude him from the necessary means of observing his religious ceremonies, might be attended with a similar effect. Either species of coercion might, at any rate, wound his conscience, inflicting thereby a simple mental injury of the severest kind. The Gentoos seem to stand at the summit of the scale of sensibility on this line. Descending, we find the Mahometan, the Jew, the Greek Christian, the Catholic Christian, all exposed to suffer from similar causes, according to their respective notions of religious duty: the Mahometan, by being hindered from performing his ablutions, or forced upon a diet inconsistent with his fasts; the Jew, in like manner, by being forced at any time into a forbidden diet; the Greek, by being put under a coercion of the same kind during any of his times of fasting; the Catholic, from a similar cause, or from the being prevented from hearing mass; even the pious Protestant might suffer in some degree, by finding himself deprived, for a length of time, of the comforts of a spiritual communion: these being so many circumstances demanding particular attention in the choice of punishments to be inflicted on such individuals.

4. *Simple Mental Injuries.*—Those sights, those discourses, which would give pain to the inhabitant of one country, would not, in every instance, be productive of a similar sensation to the inhabitant of another. This difference, too, like so many others, turns upon the point of religion. The sectary of every religion, at least the vulgar, that is, the great bulk of every sect, is exposed to the dread of invisible agents: but the names and attributes of those agents are different: the mind of a Gentoo may be filled with unspeakable terror from the apprehension of a visit from Peshushe; while an ignorant Christian is afraid of witches, devils, ghosts, and vampires.

The votary of every sect may receive a cruel wound from any discourse or exhibition which tends to reflect contempt on any of the objects of his veneration. Protestants feel little in comparison but for Christ Jesus, and for that Blessed Spirit which is often figured as a dove. The Catholic, to the list of Divine Persons adds the Virgin Mary; and every martyr and every saint who is added to the calendar, makes an almost equal addition to the sphere of his sensibility. The Mahometan has his apostles besides Mahomet; and the Gentoo his deities besides Brama.

Among the higher classes of Mahometans and Gentoos, for a man to intrude himself into the presence of a married woman, would to the husband be an unpardonable injury; a bare request to see her, an affront. Such injuries, to which the European would be insensible, might in Asia, with perfect propriety be referred to the denomination now before us. More than this, the idea which it would be proper to annex to these several offences will vary much in different countries, in virtue of the various circumstances to which it will be respectively proper to give the effect of justification, exemption, extenuation, or aggravation.

The differences of castes in Hindostan furnish a copious stock of extenuations and aggravations to different classes of offences.

The extraordinary extent, if one may so say, of the surface of their moral as well as religious sensibility, exposes them to a proportional variety of injuries: hence so many peculiar grounds of defence and *provocation*. We are told, that "on the Malabar side of the coast, if a Hallachore chance to touch a man of a superior tribe, he draws his sabre and cuts him down on the spot, without any check from his own conscience, or from the laws of his country."*

A prejudice so strong, though altogether unjust and ferocious, would require great forbearance on the part of the legislator: it would require art to soften and to combat it. But it would be better to yield to it altogether for a time, than uselessly to compromise his authority, and expose his laws to hatred.

5. *Semi-public Offences.*—Different countries are subject to different calamities, according to their situation, climate, productions, means of defence, &c.: hence results a great variety in the laws of police.

In those countries which are nurseries of the plague, many precautions may be requisite, which would be needless against that horrible distemper in other countries. Such precautions would give rise to a correspondent train of offences. It might become an offence, for example, to pass from one town to another; to enter a port; to leave a vessel before the prescribed time; or to disembark a bale of goods, &c.

In Great Britain, it could scarcely be in the power of any authority, short of the supreme, to do any thing in the way of engrossing or otherwise, towards producing or enhancing the calamity of famine. In islands of less extent and fertility, or under governments more liable to abuse, the danger might not be so ideal. In Bengal, the famine by which so many millions were swept off in the year

* Scrafton's Reflections on the Government of Indostan.—Verelst's View of the English Government in Bengal. See Verelst, p. 72.—East India Reports of the House of Commons, 1772.

1769, was owing, let us hope, to no other cause than the inclemency of the seasons, or the insuperable difficulties attending a new system of government: but without legislative precautions, a similar effect might perhaps be produced by the abuse of delegated power in that distant member of the British Empire.

In mountainous countries, great mischief is sometimes done by falls of snow, which, in the neighbourhood of the Alps, are called *avalanches*, and by which whole villages are sometimes overwhelmed. A sudden concussion given to the air, by means so inconsiderable as the discharge of a pistol, will sometimes, it is said, be sufficient to give rise to a catastrophe of this sort. I forget what traveller it is who says, that on this account the discharge of fire-arms is made penal in some parts of that mountainous region.

In maritime countries, the coasts of which consist of a loose sand, there are often found different sorts of plants, chiefly of the *rush* kind, which, by the matted contexture of their roots, communicate to the soil a degree of tenacity, by means of which it is enabled to afford a more effectual resistance to the encroachments of the water. By the laws of various countries in Europe, the destruction of such plants is prohibited, under penalties which would be altogether useless in different situations.

In the Dutch and Flemish provinces, the extreme vigilance with which it is necessary to guard against the incursions of the sea, will naturally give occasion to various regulations, for which there would be no use in a more elevated situation.

In towns where the coldness of the climate requires that the houses should be substantial, and the dearness of ground-rent renders the style of building lofty, the danger that may attend the fall of such as happen to be ruinous, gives occasion to regulations which would be unnecessary in those sultry regions where an ordinary house is little more than a large umbrella.

In some parts of Spanish America, the fear of earthquakes prevents the inhabitants, it is said, from giving to their buildings that degree of solidity which, on other accounts, they would deem eligible. In such hazardous situations, the superintending care of the legislator might, perhaps not improperly, second the prudence of the individual.

In hot climates, the letting into a country a mass of stagnant water might, in certain situations, be productive of an injury to public health, from which the inhabitants of more temperate regions are in a great measure secure.

Sicily and other parts of Italy are exposed to a wind called the Sirocco, which, by the excessive heat and languor it occasions, is extremely troublesome. Certain parts of the East are occasionally afflicted with a wind called Samiel, the influence of which is said to be almost instantaneously fatal. If, in any of those countries, there was a wood, or a hill, or even a wall, which could in any degree answer the purpose of screening the neighbourhood from the blast, the removal of such a fence might be guarded against by penalties which, in our temperate regions, would have no such utility to justify them.

In Arabia, and other countries where water is scarce, the exposing or dissipating the water of a single spring might expose thousands to perish with thirst, and render the communication between one district and another almost impracticable.

In Russia, the destroying or putting down a few inns might be productive of effects almost equally mischievous. In England, hundreds of much better houses of the like sort are put down every year, without occasioning the least sensation.

6. *Self-regarding Offences against the Person.* — In the northern climates, drunkenness makes men stupid: in the southern, mad: in the one, it is folly; in the other, wickedness. To speak at random, in the one situation, penalties against drunkenness should be slight; in the other, they should be severe. In Mahometan countries, the strict prohibition supposed to be laid by the Koran against the use of intoxicating liquors, makes some amends perhaps, for the mischievous effect of that barbarous religion.

7. *Offences against Reputation.* These offences vary according to the state of opinions and manners. Among other traits which discover the manners of the ancient Greeks, we learn, from what Xenophon relates regarding himself, that crimes against nature could be esteemed but a joke.* Even now, wherever the Mahometan religion prevails, such practices seem to be attended with but little disrepute. In England, not only the letter of the law makes them capital, as in other parts of Europe, but the law is carried into execution with a degree of zeal which no other species of criminality is sufficient to inspire. But were it even altogether unpunishable by law, a groundless imputation of this nature would be an injury scarcely less atrocious than at present, since the consequence of being reputed guilty would be attended with a degree of infamy which can be compared to nothing so properly as that which attends forfeiture of caste among the Hindoos.

In England, to say of a farmer that he had sown rye-grass and clover in the same field, would be of as little prejudice to him, as to say that he had sown either of those plants alone. In Judea, while the Mosaic institutions were in vigour, such an imputation would

* Anabasis—and see the Memorabilia.

have been a very serious injury: Levit. xix. 19; Deut. xxi. 9, 10, 11. A Spanish grazier would as soon hear of his having bred a mule, as of his having bred a horse: the purity of a Jewish grazier would have been shocked at the imputation.

Universally, the degree of damage which a man sustains by an act of defamation, depends not at all upon the aspect borne by the dictates of utility to the practice he is charged with, but to the aspect which is borne to the practice by the political, moral, and religious sanctions: by the moral, principally and immediately; and by the other two, chiefly in virtue of the degree in which the moral is subject to their influence.

8. *Offences against the Person and Reputation together.*—It is evident enough, that the idea annexed to the denomination of a lascivious injury must be liable to considerable variation, according as the manners of the people, in this respect, are more or less reserved. Different parts of the female body are veiled in different countries with different degrees of care. In Asia, the whole person is invisible. In Sparta, the young women appeared in public with an open and flowing robe. Among ourselves, propriety as to dress changes with the fashions.

The idea of obscenity, how strange soever it may appear, seems not to be invariably annexed to the same parts and the same functions. Among lettered nations, indeed, men's notions in this respect seem to be pretty uniform: but among unlettered nations, however civilized in other respects, the case is different. In Otaheite, the few notions of modesty which are discoverable, seem to be transferred from the functions by which the species is continued, to those by which the individual is preserved. Atkins the traveller observed an instance of this among a tribe of negroes:* as often as the king drank, two of his attendants "held up a cloth before his face, that he might not be seen." Wine, however, is no friend to modesty: when his majesty had "got drunk, this respect was laid aside." The same notions of delicacy have been established in other African tribes, if we may give credit to several more ancient travellers, who are quoted by Barbeyrac in his Notes on Puffendorff:† "The inhabitants of Senegal," they tell us, "are as much ashamed of their mouth, as of any other part of the body: and therefore they ordinarily go with a cover upon it, which they only take off for the purpose of eating." This custom may perhaps derive its origin from some superstition. The inhabitants of the Maldives carefully hide themselves during their repasts, fearful lest their food should be charmed whilst they are eating it.

9. *Offences against Property.*—It is evident that these are liable to infinite diversity, in as far as the events, which it is expedient should be admitted into the list of those constitutive of title, are liable to differ. Other differences will necessarily arise, from a thousand sources, too tedious to particularize: to enlarge upon this head would be impossible, without prematurely engaging in the intricacies of the civil branch of jurisprudence.

The name of *usury* will in different countries, according to the greater or less plenty of money, be given to contracts of very different descriptions: in England, six per cent. is deemed excessive; in Bengal, twelve per cent. is deemed moderate; it is the usual interest, just as it was among the ancient Romans.

The offence of *extortion* will require to be differently defined in different political situations. If a clerk in a merchant's counting-house were to present his compliments, and state to the prime minister of England, that a present of money would not be unacceptable, the statement would be laughed at. But such has not always been the case in Bengal: an equally civil and cautiously worded message, directed to Mahomed Reza Pawn, appears not have been altogether unattended to.‡

The kind of government occasions a great variety in the definition of this kind of offence. Greater precautions are requisite to protect the subjects in a conquered country, or under an absolute government, than among the citizens of a free state. On the other hand, a conquering republic is more oppressive to the conquered country than a conquering monarch: a monarch may be rapacious; but he is interested in preventing the exactions of his officers: in a republic, on the other hand—in the Senate of Rome, for example—there existed a tacit collusion among those that possessed authority.

Some religious professions expose their followers to pecuniary extortion: those of the Mahometans and Hindoos are particularly subject to this abuse; but they have not equalled the Catholic church in this particular, which, whilst preaching poverty, nearly succeeded in becoming the sole proprietor of all property. In Protestant countries, this field of extortion has been shut up: if the priest assists his flock in the way to heaven, it is well; but he is not believed to possess the power of preventing them going thither without him.

10. *Offences against Condition.*—The powers annexed to conditions of the domestic kind, are constituted by the justifications annexed to various offences; or, to speak more plainly,

* Voyage to Guinea. 8vo., 2d edit. 1737; p. 199.

† B. VI. chap. i. § 31.

‡ East India Reports, Ho. Com. 1772.

by exceptive clauses subjoined to the laws establishing the circumstances constitutive of the parties' title to the condition in question, as circumstances justificative of such acts as, were it not for such exceptions, would be unlawful: these differ in different countries.

In most Christian countries, it must be some very extraordinary behaviour on the part of a wife, that can render it allowable in a husband to keep her under confinement: to a Mahometan (I speak always of those who are rich enough to live in this style) not to be allowed to keep his wives in confinement, would be intolerable.

The matrimonial condition is not the same in reality in Mahometan and Christian countries. Here, the woman contracts with her husband nearly upon a principle of equality; there, marriage is impressed with a character of servitude: here, the woman preserves her liberty; there, at least among the more opulent, she is kept in a state of seclusion. Among Christians, polygamy consists in having more than one wife; among Mahometans, in having more than four wives: among Asiatics, the husband is more the master than the guardian of his wife; in Europe, the husband is as much the guardian as the master.

After the death of her husband, the wife does not regain her liberty as among us: in Hindostan, among the Mahometans at least, the next heir of the deceased husband becomes the guardian of the widow; and, without the privileges of the husband, he succeeds to his authority as her jailor.*

I have said, among most European nations: in Spain, we find a slight tincture of Asiatic manners, left by foreign conquerors, after the religion that seems to have introduced them had been extirpated; a tincture originally foreign, and now almost worn out: in Russia, we find manners originally Asiatic, softening by culture into European.

The examples thus given will suffice to show the manner in which the principles ought to be applied; with what care it is necessary to proceed, that established opinions may not be violently shocked; and in what manner the laws may be adapted to the imperious, and oftentimes unchangeable circumstances of the people to be governed.

The subjects of public offences, of constitutional law and procedure, have not yet been glanced at; nor will it be necessary at present to pursue them. The influence of local circumstances is generally recognised as to the two former; and with regard to all of them, it would not be easy to bring the points of difference to view in so striking a manner.

* House of Commons Reports on East India Affairs, 1781.

CHAPTER II.

REGARD TO BE PAID TO SUBSISTING INSTITUTIONS

Looking over the examples above given, we shall find reason for dividing them into two classes: the first class, consisting of those which are physical, in which the influence of the circumstance operating as a ground of variation is insurmountable: the other, consisting of those which are moral, in which that influence is not necessarily and absolutely insurmountable, however difficult, inexpedient, or unsafe, it may be to act in opposition to it.

To the first class belong the circumstances of climate and the texture of the earth, in as far as the condition of things exterior to man is determined by them.

To the other class belong the circumstances of government, religion, and manners, including the several primary circumstances, through the intervention of which these secondary ones display their efficacy.

But it may be said, that the articles of climate and texture of the earth, but particularly the former, have a certain influence over the articles of government, manners, and religion: and since it will be impossible to change the one, it will be impossible to alter the other. Hence, these physical circumstances may be found opposing insurmountable obstacles to a certain kind of legislation.

The influence of these physical circumstances is incontestible: but are they necessarily pernicious? are they not subject to the art of the legislator? The whole of history proves, that there is no circumstance connected with climate or texture of the earth incompatible with the happiness of man; and that, wherever men can live, there they may possess a government, a religion, and manners, that will render them happy. The world has been a field of change: Egypt no longer worships the goddess Isis, and India may cast off its devotion to Bramah: Italy has nourished the most warlike of people; and the effeminacy of the modern Italians cannot therefore be considered the effect of their climate: Greece has been once covered with republics, and there is therefore no reason to believe it doomed to be for ever the habitation of slaves.

Mahomet impressed upon the peaceful tribes of Arabia a warlike enthusiasm, overturning, with a handful of fanatics, the laws, the religion, the customs, the inveterate prejudices of a multitude of people. Could we suppose this extraordinary man possessing the same power of will, endowed with more knowledge and more genius, would it be too much to say, that he might have bestowed on these nations, laws more consonant with their happiness, and less hostile to the human race?

If this example be not deemed conclusive, we may turn to the example of Peter the Great. What he has not done in point of legislation, is not to be attributed to the effects of climate: this did not set the bounds to his success; he accomplished all that he designed, and if his mind had been embued with a perfect system of legislation, he would have found greater facility in its establishment, than in establishing an imperfect one. The greatest obstacles with which he met, arose from his own faults.

But there are yet more delicate and more important questions, which turn upon the suitability of the changes, and the manner of their accomplishment.

Take the form of government in the country to be regulated, and compare it with that of the standard country in any point whatsoever: that of the former is, in the point in question, either exactly upon a par with the latter, or superior to it, or inferior. That it should be superior, is scarce consistent with the supposition; for then the law of the standard country is not in that point what it is supposed to be, the best imaginable. If the former be inferior, then comes in the question, Which is likely to be the greater evil? the evil depending upon such inferiority, or the evil, if any, which might be produced by the measures requisite to remove the other? the evil of the disease, or the evil of the remedy? This question is complicated, and includes many others; the evil of the remedy is, perhaps, likely to be but temporary; while the evil of the disease, and thence the benefit of the remedy, is likely to be perpetual. Here, then, comes in another question: What portion of present comfort is it worth while to sacrifice for the sake of any, and what, chance of future benefit? and the magnitude of each being given, for what length of time is it worth while to sacrifice a present comfort of the given magnitude, to a given chance of succeeding benefit?

That, in many instances, it must be extremely difficult to ascertain, to which of these cases the expediency of a given law belongs, and that to arrive at entire certainty may be absolutely impossible, is not to be denied: but the use of breaking down the question into these subordinate questions, is not the less undeniable. It is always something to see where the difficulty lies, although it should be insuperable; and to point out the only means by which the best solution can be given, although that solution should not be so satisfactory as could be wished. It is something to get certain principles, leaving facts in the uncertainty that belongs to them. By showing the real uncertainty of the most conclusive arguments that can be offered on the subject, it will prevent us from giving to less conclusive arguments, more than their due weight: it will enable us to unravel the web of sophistry, and to humble the pride of declamation: it will be of service, in as far as the caution that accompanies a salutary doubt, is preferable to the rashness that may be the result of misconception. Such sort of instruction, indeed, brings little thanks to him who gives it: to be in doubt is to be unsatisfied; to be unsatisfied is to be uneasy. People in general had rather be decided, and in the wrong, than in the right and undecided. Declamation has here, then, as on many other topics, the advantage over argument; and a man's chance of persuasion will be in proportion, rather to the energy of his expressions than to the justness of his views.

That even in regard to forms of government, there should be many points that are indifferent, may easily be conceived. The same may happen with respect to religion, as with respect to every thing that concerns the temporal interests of society.

It is still more evident, that the case may easily be the same with regard to manners. It may even happen, that the law which prevails in the country to be regulated, shall be better for that country than it would be in the standard country: while the law that obtains with relation to the same point in the standard country, is better for that country than it would be in the country to be regulated.

Thus, suppose that in the standard code it were found advisable that, in such part as relates to procedure, an institution somewhat similar to that at present in force in England, with relation to juries, should have place: it might happen, that in Bengal, such a plan could not in any part of it be adopted with any advantage, or that, if it could, yet, in several points, a variety of additions, defalcations, or alterations, would require to be made. Why? Because in England, in certain causes, the requisite degree of impartiality and intrepidity taken together, might with better reason be expected from juries than in a judge: whereas in Bengal, in the same causes, the same degree of those qualities taken together, might with better reason be expected from a judge than from a jury, at least if constituted in precisely the same way as in the former case. This difference, however would depend in good measure upon a certain inferiority which at present there appears to be in Bengal, with respect to the form of government on the one hand, and the nationa. manners on the other: insomuch, that were the time ever to come, when such inferiority should disappear, the reasons for the difference between the institutions would become less forcible, and perhaps vanish altogether. At present, it has been said, the passion of avarice has implanted among the inhabitants of English race in Bengal, two evil propen-

sities: a propensity to practise extortion, to the prejudice of the subjected Asiatics; and a propensity to practice peculation, to the prejudice of the public revenue. Hence arises a sort of tacit convention and combination on the part of every man, to support, assist, and protect every other in the practice of the like enormities. A jury, then, if taken at hazard from the body of English inhabitants, would never convict a man of either of those offences, how manifest soever were his guilt. But a judge not having any such concerns with the natives, as could lead to the practice of extortion, nor being invested with any such trust as could give room to peculation; having the eyes of mankind fixed upon every part of his conduct, and being raised by his rank and fortune above the level of ordinary society, would have strong motives to restrain him from engaging, and no adequate motives to induce him to engage, in any such combination. So long, then, as such a state of manners continues, you must either have no laws against extortion or peculation, or no juries, or juries *de medietate*, composed partly of English and partly of Asiatics, if a mixture of that sort can by any set of expedients be made practicable, and eligible upon the whole. Whether the facts be as here suggested, I pretend not to inquire: I state them merely in the way of supposition, to answer the purpose of a feigned case, for which purpose their truth is altogether immaterial: it is sufficient if they have such a colour of truth as not to appear absolutely improbable.

If this be allowed, it is then not a case utterly improbable that the standard of perfection in matters of law may with regard to certain points be different in different countries, for a time at least, even where the influence of physical grounds of variation is out of the question. The case may be the same with regard to religion politically considered; but is more particularly apt to be so with regard to those ordinary and continually repeated points of behaviour, which come under the head of manners and way of life. It may be better, that in Bengal at least, among people of Asiatic race, the husbands should be disposed to expect that their wives should keep confined, and that the women should be disposed to submit to such confinement: while, in England, it may be better that the husband should not be disposed to entertain any such expectation, nor the wife to comply with it. If that be the case, there will be no reason why, by any new laws, we should seek to make an alteration in these ancient manners.

I state this again hypothetically as before. Montesquieu seems to be decided in the affirmative. "Those who read," says he,* "of the treacheries, assassinations, poisonings, and all sorts of enormities, which the liberty of the female sex is the occasion of at Goa, and in the other settlements of the Portuguese in the Indies, where religion allows but of one wife, comparing them at the same time with the innocence and purity of manners that characterize the same sex in Turkey, Persia, the Mogul Empire, China, and Japan, will be satisfied that it is oftentimes as necessary to separate women from men, when a man has but one of them, as when he has a number."

How the case may have stood among the Portuguese, I cannot say: but the English have also their settlements in that country; and English wives have at least as much liberty as could possibly have been enjoyed by Portuguese; yet who ever heard of any such abominations, as Montesquieu has been speaking of, among the former? If this example had occurred to Montesquieu, he would not have attributed these things to the influence of climate; and a more general view of his subject would perhaps have rendered him less dogmatic.

Thus much must be allowed at any rate, that, in order to judge of the regard that ought to be paid to subsisting institutions these institutions must be examined. In making such an examination, there are two questions which are constantly to be kept in view: what are the present institutions relative to the point in question? and how far the expediency of giving them continuance, follows from their existence? These two questions, distinct as they are, are very often confounded. But the more these points are in danger of being confounded, the greater is the care that ought to be taken to keep them distinct: in the first place, in one's own mind; in the next place, in the language made use of to express them. Unfortunately, nothing has been more common among writers than to confound them. Indeed, it is almost next to impossible so to turn the phrase in each case as to keep them separate: all that one can do, is to give warning of the distinction once for all. This source of misapprehension could not but occur in the course of the examples given in the last preceding chapter; but being now noticed, it is to be hoped it will be removed. I there gave them as circumstances, the influence of which required to be attended to; without meaning to determine, whether it were advisable to give way to it without reserve. There being such and such laws already subsisting, it deserves consideration, how far a new set of laws, inconsistent with them, ought to be established: there being such and such a religion and state of manners already prevailing, to which the new laws would be repugnant, it deserves consideration, how far the establishment of such laws is to be wished for. This was a

* Liv. xvi. ch. 11.

question I meant, in many cases, merely to bring to view, without deciding upon it.

To show how natural it is to fall into this confusion, I will quote an instance out of Montesquieu; which, however, is but one out of a thousand. "When a country," says he,* "is so circumstanced, that the climate of itself produces more inhabitants than the country can support, it is idle to make laws in the view of promoting population." Here, then, he lays down a rule; immediately on the back of it, he produces three examples, for the purpose, one should naturally suppose, of justifying the rule. If the rule which he has given is conformable to his sentiments, one should think that the examples he gives of what has been done, in conformity to that rule, are so too. But in the instances I am about to mention, one can hardly imagine this to have been the case. "In China and Tonquin, a father is permitted to expose his new-born children. In China and Tonquin, again, the father is permitted to sell his daughters, though at a marriageable age. In Formosa, a woman, before she is five and thirty, is not permitted to bear children, though able and willing to support them: it being the duty of the priestess to search all women under that age who are suspected of the crime of pregnancy, and if guilty, to force an abortion, by stamping on their bodies." How immense the distance between the policy of the rule, and the policy of the several laws which are brought to view, as if they were so many applications of the rule! Judging from the rule itself, it is folly, by turning a pleasure into a task, to render the lives of the present race uncomfortable, for the sake of giving birth to contingent beings, who would be produced without it. Judging from the first example, it is right to permit a parent to take away life from a being, who cannot suffer from the apprehension of the loss of it; and to whom, if he retained it, it would only be a burthen. Judging from the second example, it is right to permit a parent to consign his daughter, in whom education has moderated the bitterness of such a change, to the arms of a man, whom it is uncertain whether she will like. Judging from the third, a stranger is permitted or required to invade the peace of a family, to violate the person of a woman, and endanger her life, by a most cruel outrage, and all without a motive.

It is difficult to form a clear idea of what Montesquieu intended: he appears to have confounded the question of fact with the question of fitness. He has laid down a maxim, and has cited three customs, which have only a very distant connection with it; and yet he seems to have placed them all upon the same level.

* Chap. xvi. liv. 23.

CHAPTER III.

RULES RESPECTING THE METHOD OF TRANSPLANTING LAWS.

Of the circumstances which make the laws that would be expedient in one country ineligible in another, some are grounded in nature, some in prejudice: some depend on the state and condition of objects that are extrinsic with regard to the mind of man, some on the state and condition of the mind of man itself. The establishment of such laws as, were it not for the influence of these circumstances, would be the best, is, in the first case, impossible; in the latter, in some instances, equally impossible: in others possible, but not worth the while, considering the hazard: in some, perhaps, neither impossible nor unworth the while, supposing the business to be planned with sagacity, and conducted with the utmost tenderness and circumspection.

When attempts have been made to transplant, without revision, the laws of one country into another, and the consequences of such attempts have proved pernicious, it has been partly, indeed, because the laws were bad there, but partly also because they would have been bad any where. They were bad in the soil that gave them birth: how should they be tolerable in another? In an immense heap of rubbish, there may have been some diamonds: without attempting a separation, dirt and diamonds have been shot down together. The law is every where an immense labyrinth: to traverse its recesses, would be a tax on indolence as well as a test of talents; the severest tax that can be imposed on the one, the severest test that the other can be exposed to. It is a work of labour: this labour they never have had the courage to engage in for their own selves; how should they ever for the sake of others?

Not that the laws of barbarous nations should therefore be eternal, while those of the most civilized demand a change.

Laws need not be of the wild and spontaneous growth of the country to which they are given: prejudice and the blindest custom must be humoured; but they need not be the sole arbiters and guides. He who attacks prejudice wantonly and without necessity, and he who suffers himself to be led blindfold a slave to it, equally miss the line of reason.

Legislators who, having freed themselves from the shackles of authority, have learnt to soar above the mists of prejudice, know as well how to make laws for one country as for another: all they need is to be possessed fully of the facts; to be informed of the local situation, the climate, the bodily constitution, the manners, the legal customs, the religion, of those with whom they have to deal. These are the data they require: possessed of these

data, all places are alike. If they are more at home in their own country than elsewhere, it is only because the requisite stock of facts in the former situation is already possessed by them, without their being obliged to wait the time which, in a foreign country, it would require to seek them out.

The following rules, if given for the purpose of information, would be idle; but by way of memento, they may have their use. They are chiefly a recapitulation of the preceding disquisitions:

1. No law should be changed, no usage at present prevailing should be abolished, without special reason; unless some specific assignable benefit can be shown as likely to be the result of such a change.

2. The changing of a custom repugnant to our own manners and sentiments. to one which is conformable to them, for no other reason than such repugnancy or conformity, is not to be reputed as a benefit. The satisfaction is for one, or a small number; the pain is for all, or a great number: the first and sufficient reason. Besides, where shall these changes founded in caprice be stopped. If my taste is a sufficient reason for me, an opposite taste may be as sufficient a reason for another. The emperor who would proscribe one letter of the alphabet, should recollect that his successor may determine to restore it: Queen Elizabeth, who was so anxious about the dress of the clergy, should have remembered that it might as easily be altered in the following reign.*

3. In all matters of indifference, let the political sanction remain neuter, and let the authority of the moral sanction take its course.

The only difficulty lies in ascertaining what is, and what is not indifferent. Here the great use of a complete catalogue of pains and pleasures appears: it furnishes the only elements for the solution of this difficulty. If there result from an action, an evil, neither of the first nor second order, it belongs to the class of things indifferent.†

When it was sought to engage Frederic the Great in the question, which then agitated the town of Neufchatel, respecting the eternity of punishment, he replied, that if the Neufchatelans were pleased with being damned eternally, he did not wish to deprive them of the satisfaction.

4. The easiest innovation to introduce, is that which is effected merely by refusing to a coercive custom the sanction of the law; especially where the coercion imposed upon one party, is not attended with profit to another.

In Catholic countries, it is sufficient for the destruction of all that is injurious to liberty, in convents, &c. to refuse the sanction of the laws to monastic vows.

In India, the wife often resolved to burn herself upon the death of her husband: if the act were altogether voluntary, and she were persuaded she should find her account in it, it might be represented as tyrannical to oppose her; but such permission should not be granted till after she had undergone an examination, and the fact of her consent were indubitably ascertained.

5. The clear utility of the law will be as its abstract utility, deduction made of the dissatisfaction and other inconvenience occasioned by it. Hot-headed innovators, full of their own notions, only pay attention to abstract advantage. They reckon discontent for nothing: their impatience to enjoy, is the greatest obstacle to their success. This was the great error of Joseph II. The greater part of the changes he proposed were good abstractedly; but as he had not considered the dispositions of the people, he rendered his best designs abortive by his imprudence. How often are men the dupe of words! What is the public good, but the happiness and contentment of the public?

6. The value of dissatisfaction will be in the compound ratio of three things:

1. The *multitude* of the persons dissatisfied;
2. The *intensity* of the dissatisfaction in each person;
3. The *duration* of the dissatisfaction on the part of each.

These are the bases of calculation, if we would operate with success: the smaller the number of the discontented, the greater the chance of success; but this is not a reason for employing less humanity in the manner of treating them. If only one person were rendered unhappy by the change, he would yet be worthy of the notice of the legislator, who ought at least to free his measures from insult and contempt, to create new hopes, to collect those which revive, and to publish amnestics for the past. Really useful changes possess a fund of reason, which will tend at all times to produce a conviction of their utility.

Every species of dissatisfaction should be relieved by its particular remedy. A pecuniary loss requires pecuniary compensation: a loss of power may be compensated either by an indemnity in money or in honour. Dissappointed expectation may be softened by those arrangements which open a new career to hope.

7. As a means of obviating dissatisfaction, indirect legislation should be preferred to direct; gentle means, to violent: example, instruction, and exhortation should precede,

* Dr Hunter used to relate the anecdote of a surgeon, who having to operate on a fractured hand, and having cut off four fingers, afterwards cut off the fifth, which was uninjured. Hunter asked his reason for so doing. "Because," said he, "if this little finger had been left, it would have looked ridiculous." This anecdote may serve as an apologue for many operators in legislation.

† Introduction to Morals and Legislation, ch. xii. [Consequences of a Mischievous Act.]

or follow, or, if possible, stand in the place of law.

Ought inoculation to have been established by law? No, without doubt. Even supposing it had been possible, the effect would have been dreadful: it would have carried alarm and dismay into a multitude of families. The practice, however, has become universal in England, from the force of example and public discussion alone.

Catherine II. was very skilful in the art of ruling minds. She did not make laws obliging the Russian nobility to enter the military service, which they disliked; but by determining all their ranks, by fixing all precedencies even among civilians, according to the grades in the army, she combated their indolence by their vanity; and the nobles of the most distant provinces sought to obtain the new distinctions, that they might not be superseded by those whom they had hitherto esteemed beneath them.

8. In choosing, among many laws, which shall be introduced first, select that which, being established, will facilitate the introduction of the others.

9. The slowness of its operation is, as far as it goes, an objection to a measure; but if this slowness may be a means of obviating a dissatisfaction, which expeditious measures would excite, the former may be preferable.

When the prejudices of the people are violent and obstinate, the legislator is in great danger of running into extremes. One extreme is, to take fire at the prejudice, and resolve upon its extirpation, without weighing the good and bad effects of such a measure in the balance of utility: the other is to suffer these prejudices to be made use of, as a pretext for that indolence and pusillanimity which would leave the evil without remedy.

These prejudices have generally some *salvo* for good government and good morals. It is the province of the legislator to find out this salvo, if there be one, and make use of it; and, in the mean time, if it be worth while, to try what instruction and other gentle means will do, towards getting the better of the prejudice.

It was in this manner, as has been observed by Rousseau,* that Francis I. overthrew the employment of seconds in duels: "Quant à ceux, dit il, qui aurant la lâcheté d'employer des seconds, &c." He opposed honour to honour; and as the individuals fought to prove their courage, no one dared to call in those auxiliaries, whose assistance was thus marked as throwing a suspicion upon that courage itself.

But if nothing of the kind will do, and it be found impossible to untie the gordian knot, it must e'en be cut. The welfare of all must not be sacrificed to the obstinacy of a few, nor the happiness of ages to the quiet of a day.

Prejudices that appear unsurmountable at first view, may be got over with a little management.

Among the inhabitants of Hindostan, a man of a certain rank would think himself eternally dishonoured, were he obliged to make his appearance in a court of justice. What does that signify? Persons of that description are always rich: send a special commission to examine them, and make them pay the expense.

Among the Hindoos, persons of a certain rank would sooner submit to any inconvenience than take an oath. What does that signify? Persons of that description may as well be trusted upon their word, as others upon their oath. Do they say what is not true? It is as easy to punish them for simple falsehood, as to punish others for perjury. Do not Quakers among us depose upon their affirmation? and do not Peers, in certain cases, affirm upon their honour?

Neither Mahometans nor Gentoos can bear that any officer of justice, any more than any other person of the male sex, should visit the apartments, much less the persons, of their women. Justice, on this account, is not worth purchasing at such a price. What does that signify? Appoint women to the office.

An Englishwoman would cry out, and with equal justice, against the tyranny of subjecting her person to the brutal inquisitiveness of male examiners. How many Englishwomen, deriving protection against such treatment, from the odium which it would excite, return from Calais to Dover swaddled up with lace like Egyptian mummies? But is it absolutely necessary, because female delicacy is not to be violated, that the public should be defrauded? that modesty should be turned into a cloak for avarice? Either the payment of a tax upon these luxuries ought not to be commanded, or the non-payment ought not to go unpunished.

Among the various castes or tribes of the Hindoos, there is one of which the members are called *Decoits*. To these Decoits, Brama has revealed, that it is proper they should steal every thing they can lay their hands on, and, if necessary, rob and murder every body that comes in their way. What is to be done with them? Are they, out of respect to their conscience, to be permitted to labour in this their vocation? No, verily; for if it was the pleasure of Brama that these people should apply their industry to robbery, it was also the pleasure of Brama that they should bear the consequences of the industry, that shall have been employed by honest men to save themselves from being robbed.

In another country in Asia, it is reported that there lived a tribe of people, from whom the word *assassin* has its name. If one of

* Lettre a D'Alembert sur les Spectacles.

these were commanded by their chief (who found frequent occasion to issue such commands) to go and cut the throat of any one he named, obedience was sure to follow. The terror of this titled murderer spread far and near: kings were not safe upon their thrones. But at last a Tartar chief found means to apply the only remedy that probably occurred to him against such a public pestilence, possibly the only one it admitted of; and the whole race was exterminated by him.

Mr. Hastings, in considering how to deal with the Decoits, recommends a milder, yet not less effectual remedy: let the men and their families, says he, be made slaves: domestic slavery, considered as a punishment, has little severity in it (as Montesquieu already had observed) in a country where political freedom is unknown: as a preventive remedy, nothing could be more effectual.

Montesquieu* says, that in changing customs and manners, customs and manners only should be employed, not laws. Why? Because, says he, laws are the particular institutions of the legislator; customs and manners, those of the nation in general. The maxim itself has some truth in it: but the reason is good for nothing. For what act or what habit is it, that a law can be made against, and that might not be the act of the nation in general, were it not for the law? To understand what there is of truth in the maxim, and what are the true reasons of it, let us turn to his example: for without his examples, one should seldom know what to make of his rules.

Peter the Great made a law, obliging the Russians to cut off their beards, and wear their clothes short like Europeans; and to enforce it, he posted guards in the streets, to cut off the skirts of all such coats as should be found longer than the standard. The measure, says Montesquieu, was tyrannical: the change which he wanted to bring about, he should have effected, not by making a law, but by setting an example.

In the making of this law, his object was either to gratify his own taste merely, by putting the people into a dress he liked to see, instead of one he did not like to see; or it was to polish them, that is, to bring the national character as near as he could to the European, which he looked upon as better calculated to make them happy. The latter supposition is the more probable, as well as the more honourable; and it is that in which Montesquieu himself seems disposed to acquiesce. In the former supposition, the law being a coercive one, was improper; the punishment annexed to it, and the hardship produced by it, being *groundless:* and the law may well indeed be styled what Montesquieu styles it, tyrannical. On the other supposition, it was a measure of indirect legislation, levelled at all those mischievous points of behaviour, to which he imagined his subjects would be the less prone, were they to take the maxims of Europeans for their model. The proposed change being effected, he might then thus say to the people that were about him: Ye are Europeans: this is now a European country; see, every thing about you is European: look even at the common people; their countenances, their dresses are European: ye yourselves are European; behave yourselves, then, like Europeans: ye are European husbands; treat your wives, then, as European gentlemen treat theirs: ye are European landlords; treat your vassals, then as European gentlemen treat their tenants: ye are European gentlemen: think it, then, as great a disgrace for any of you to be seen drunk, as it is for an European gentleman: ye are European gentlemen; betake yourselves, then, to the profitable studies, the innocent and elegant amusements, of European gentlemen. Much more might he have added in the same strain.

Could he have effected the desired change of character, without effecting this change in dress? could he have effected the change in dress, merely by dressing himself as he wished to see his subjects dress, or by other means less coercive than this law? In either of these cases, the law and the hardship attendant upon it was not useless indeed, as Montesquieu calls it *(inutile)*, but, however, needless. Was the benefit attendant upon the proposed change of manners, or rather of so much of that change as was owing solely to the change of dress, worth the purchasing at the expense of all that hardship? If not, the law was then *unprofitable.* Such is the slow and minute, but sure and satisfactory, method of estimating the tendency of a law upon the principle of utility.

In all such matters, the cautious statesman will avoid the tone of peremptoriness and decision: his conclusions will always, in the first instance, be hypothetical. If such and such events are the likeliest to take place: But are they? This is a matter which ought to be stated as accompanied with the degree of uncertainty that belongs to it. Beware of those who, by the vehemence of their assertions, by the confidence of their predictions, make up for the weakness of their reasons.

Whatever degree of advantage the law in question was calculated to produce, the price paid for that benefit must be acknowledged to have been a high one: the observances prescribed being constant and habitual, the idea of compulsion would be incessantly before their eyes; and this compulsion could not but appear tyrannical, as it would seem

* Esprit des Lois.

to be imposed, either for no reason at all, or for a reason which would seem worse than none.

The British parliament, in 1745, made a law to compel the Scottish Highlanders to lay aside their national costume. The design of this law was political: the people were strongly attached to this ensign of distinction, and regarded with contempt the inhabitants of the Low country, who had long since adopted the English dress.

The Pretender, by exhibiting himself among them, dressed in the ancient costume, had charmed these mountaineers; and they followed his standard in crowds. After the rebellion was quelled, it was wished that this national garb, which recalled old ideas, and served as the signal of a party, should disappear: but this act, which incessantly called up the idea of restraint, was unsuccessful, and only served to recall what it was desired should be forgotten. After half a century of experience, its inutility and danger have been perceived, and this tyrannical law has been repealed; and England has no soldiers more faithful or more intrepid than these mountaineers, whose energy would most probably have been destroyed, if their ancient customs had unfortunately been overcome by force.

The general result of these rules is, that the legislator, in producing great changes, ought to be calm, collected, and temperate in well-doing: he ought to fear to enkindle the passions, and to excite an opposition which may irritate even himself. If it is possible, he ought never to drive his enemies to despair; but, surrounding his labours with a triple rampart of confidence, enjoyment, and hope, to spare, to conciliate, to provide for all interests; indemnifying those that lose, and making an alliance, so to speak, with time, the true auxiliary of all useful changes, the chemist which amalgamates contraries, dissolves obstacles, and unites discordant parties. When he possesses real strength, it is not necessary that he should exert it, that it may be perceived: while it is only half discovered, he is sure of success: every one knows his own interest consists in joining as speedily as possible with the strongest party; and none will join in useless resistance, unless their self-love has been wounded.

CHAPTER IV.

LAWS APPEAR THE WORSE FOR BEING TRANSPLANTED.

We have seen the danger that attends the introduction of a large body of laws at once into any country, those laws being the best imaginable: we have seen the cautions which in the management of such a business require to be observed. The danger, and the caution which will be requisite in surmounting it, will of course be greater in proportion to the divergency of the laws in question from the line of perfection. But this is not all: the danger, in short, the mischief, for it is more than danger, is much greater than in that proportion where the new laws are such as are already in force in another nation.

Would you see the worth of any established body of law in its genuine colours, transplant it into a foreign clime: the vicious parts of it (that is, speaking of any system as yet in being, the great bulk of it,) no longer veiled by partiality, will display themselves in their genuine weakness and impropriety.

The people of every country are attached to their own laws; to those parts of them, at least, under which they have been bred, and to which they have been taught to pay an habitual acquiescence: if the people are not, the lawyers are, whose voice in a matter of this sort goes the greatest part of the way towards forming what appears to be the voice of the people: they were born under them; they have been used to them; they know no better: if they know but little of their own laws, they know nothing at all of any others: whatever benefit they derive from political society, they derive from them; and the benefits that are not to be had from them, are looked upon as unattainable: they are assiduously taught, and the people are ready enough to believe, that the oppressions they suffer from the same quarter are the price (and the necessary price) of those benefits. The patience of nations under the abuses which are the growth of their own country, and their impatience under whatever are imported from a foreign country, have their source in the same natural and unavoidable mixture of ignorance and prejudice: they will endure abuses they have been accustomed to, but they will not endure new ones: they will sit easy under the yoke of their own prejudices; but they will not sit easy under the prejudices of another people.

When a body of very imperfect laws, such as are the best of those of which the groundwork has been laid in barbarous ages, is imported in the lump from one country into another, it will be found that opposite judgments will be entertained of it by the two nations: the one will be disposed to think a great deal better of it; the other, if possible, a great deal worse of it, than it deserves.

To a man who has learnt by rote what the law in such or such a case happens to be, without considering why and for what reason it ought to be so; such is his regard for the whole together, such is his regard for every individual part, that abuses and defects the most flagrant, become equally sacred with institutions the most salutary and indispensable.

The constitutional branch of the law of England, taking it in its leading principles, would probably be found the best beyond comparison that has hitherto* made its appearance in the world; resting at no very great distance, perhaps, from the summit of perfection. Thus it stands at least in the opinion of judicious and impartial minds; which opinion will, I believe, appear the more just, the more it is considered; more particularly when considered with reference to the circumstances and situation of that favoured people, whose happiness it is to have stumbled upon so invaluable a possession. Between this part of the law, and some of the principles that govern the system of procedure, particularly in what concerns criminal matters, there is a pretty strict connection and dependence. The honour due to those parts, which however superior in importance, are in point of truth but as one out of a hundred, is extended by an easy process of the imagination (or rather of the affections) to the other ninety-nine. Examine it piece by piece, we should find it a vast bundle of inconsistencies; the wisdom of one page being constantly disgraced by the folly of the next. But this incongruity does not show itself to the distant and admiring multitude, against whose censure its very immensity, which is one of its greatest blemishes, forms a most effectual defence. Do you comprehend the whole of it? No: then pretend not to sit in judgment over any part of it. Such is the rebuke which the sage professor is ever ready to give to the uninstructed layman: such is the opiate which the uninitiated layman is ever ready to administer to himself.

This predilection, how effectually soever it may have veiled from the eyes of Englishmen the defects of English laws, while the dominion of those laws has been confined within the limits of the country which gave them birth, is not so strong, but that the experience of their effects, when transplanted into Bengal, has been able to overcome it: experience too fatal not to be severely felt, and too manifest to be dissembled, has demonstrated their inapitude. Those, however, who have seen the inapitude of this system, because they could not fail to see it, and who have cried out under it, because the burthen of it was become intolerable, complaining of it as unfit to be established *there*, have scarce ventured to go farther. Bad as they found the system there, they have not ventured to insinuate, scarcely, perhaps, have they so much as allowed themselves to suspect, that it is chargeable with any intrinsic defects, and that it was bad with reference to the country which gave it birth. The most striking feature, in the original polity of that distant country, is the despotism of its leading principles: the most striking feature in that of the English government, is the strictness of its procedure. Hence it seems to have been concluded, and that too hastily, that laws that are competent to a free country must for that reason be incompetent to an arbitrary one. From this observation, an hypothesis has been formed for reconciling the experienced incompetency of the English laws as applied to Bengal, with their supposed competency as applied to England. Laws which are fit for a free country (it has been said) are, for that very reason, unfit for a country where the government is arbitrary and despotical. That this observation is just, as applied to certain parts of the law, is not to be denied: but that it is applicable to the greater part of them, or even to more than a very small part, is what I am much disposed to question.

In opposition to these notions, I would venture to lay down the following propositions: 1st, That the English law is a great part of it of such a nature, as to be bad every where: 2d, But that it would not only be, but appear worse in Bengal than in England: 3d, That a system might be devised, which, while it would be better for Bengal, would also be better even for England.

To enable us to form a judgment as to the truth of these propositions, let us take a general, though rapid view of the English law, with a view to the following particulars:—

1. The manner in which it has taken its rise.
2. The nature and texture of it, as it stands at present in England.
3. The effects which it either promises to have, or has been found to have, in consequence of the attempts that have been made to introduce it into Bengal.

These several points cannot always be kept distinct in the mode of treating them; but it will be proper that the distinction there is between them should be constantly kept in view.

The English law, like every other body of law which has grown up together (as it were by accretion) without a plan, is distinguishable into statute and customary law. The statute law, framed with great attention to the circumstances, and for the most part with great regard to the welfare, of England, was framed without any regard to the interests, circumstances, or welfare of countries, the acquisition of which had never been foreseen. The customary, or, as it is called, the common law, in which accident, rather than design, has mixed up a few principles which are inestimable, has been made up with scarce any regard for the welfare of any country, even of that which has given it birth. To prove this (for a proof suited to the present purpose must be given in a few lines, or not at all,) I shall not dig into the dark ruins of remote antiquity, nor send my readers to wander among the discordant cle-

* Written 1782.

ments of British, Saxon, Danish, Norman, and German jurisprudence. A single trait is sometimes sufficient to mark with force and verity the character of an individual: the character of a body of laws may be learned from the general complexion of it. Let us interrogate the great oracle of British law, Sir Edward Coke. In the first volume of his Institutes, he has furnished us with a list of the topics or heads of argument, which, according to him, furnish the several grounds of decision, which are recognised in the courts of justice. They are twenty in number: of these, the principle of utility, the *argumentum ab inconveniente*, as he phrases it, it must be confessed, is one. But in what style is it introduced? It stands neither the first nor the last, nor in any post of honour: it is shuffled in, without distinction, towards the middle. To judge from this account, what is the chance, then, that the rule of law, on which the decision is grounded in any given instance, shall be of the number of those, in the framing of which the welfare of the people has been kept in view? To judge from this account, it should be as one to twenty. The farther we penetrate into the recesses of English law (taking utility for our guide,) the better shall we be convinced that the account given of it by this its warmest panegyrist, is not an unsuitable one; and that, for the greater part of it, it is a piece of cobweb work, spun out of fantastic conceits and verbal analogies, rather than a mass of substantial justice cast in the mould of reason.

That the assertion may not appear entirely gratuitous, let us run over a few of the most prominent points in the English law with a rapid pace, considering all along how far it answers what ought to be the purposes of its institution in England; and thence, or otherwise, how far it is likely to answer the like purposes in Bengal. I shall say nothing here of the numerous defects and inconsistencies of the penal branch of the law; of the want of symmetry that prevails throughout the whole; of the absolute want of names for so many extensive and important heads of delinquency; of the total want of authoritative definitions for the few offences that have a name; of the multitude of crying injuries which are left without redress; of the impunity of so many mischievous practices, and the unmerited punishment annexed to so many acts, of which the mischief is light or undiscernible: of the utter want of plan in the adjustment of punishment to offences; of the neglect of every rule of proportion; of the want of variety and appositeness in the species of punishment that are employed; of the lavish and unnecessary use that is made of the invariable, unequable, incommensurable, uncharacteristic, unfrugal, unpopular, uncompensatory, irremissible punishment of death; the total want of method and comprehension in the very imperfect attention that is paid to the several grounds of justification, aggravation, extenuation, and exemption; the want of fixed and settled principles for ascertaining the quantity and quality of the compensation, or other satisfaction which the several sorts of injuries have a claim to. These details would lead me into too wide a field for the present purpose; and what is more, these are defects of which the ruder penal systems, already established in Bengal, would probably be found to possess a still more ample share. The points I would rather choose for examples are those in which the inaptitude of the English law must appear the more striking; inasmuch as the practice of the Asiatic courts, in relation to those points, is, or for any thing that hinders may be, less unconformable to the rules of reason. A few of these points I shall now run over; keeping the outlines of the method I have pitched upon in view, but without imposing on myself the duty of touching upon every head, or of making out the connection between one head and another. The defects I shall have occasion to bring to view will be found to arise from various causes: sometimes from the deformities which grew up with the law in its cradle; sometimes from the additional deformities which have been produced in it by the circumstances which have happened to accompany its migration.

It has been said that Christianity is part and parcel of the common law of England; and, under the authority of this dictum, those who have dared freely to examine the evidences of Christianity, and when unconvinced by them to express their opinions, have been punished: transferred to Bengal, this law would lay the foundation for the persecution of all the Mahometan and Hindoo population.

Such is the excellency of the English laws, say its panegyrists, "that there is no right but has its remedy:" the opposite conclusion is, that where there is no remedy, there is no right; and upon this principle the English common law constantly acts with regard to every thing but land. Are you an antiquary? Your Otho may be stolen from you, and you can only recover the value of the copper. Are you a connoisseur? You may lose your Raphael, and be paid for the canvas and the colour by the yard. Are you a lover? The miniature of your mistress may be snatched from you by a rival, and you only receive for it the price that would be paid by a broker. This is bad enough in England, where we are accustomed to it: transplanted to Bengal, the evil would of course be increased.

Under English law, the greater the injury done to you, the less chance have you of reparation: if your adversary injure you slightly, you may compel him to make you amends by damages: if he kill you, his purse is saved,

at least from making compensation to your family.*

If, then, you have any purpose of revenge or avarice to answer by keeping a man in confinement, do so; but let the place be unhealthy, and keep him there till his death: the law will not allow his family to touch your fortune in this case; only let his death be slow.

Transplanted to an Asiatic climate, what scope does such a law afford to the exercise of Asiatic ingenuity! The days, how broiling! the nights, how damp! the peons, how obedient! the cutcheries, how close! the marshes, of the Ganges, how conveniently pestilential!

"The more atrocious the crime, the more remediless the party injured." Take a lawyer unawares; propose this maxim to him on a sudden, and ask him whether he ever heard of any thing so obviously unjust: he will probably answer, without hesitation, in the negative. A maxim like this, he would perhaps tell you, could have obtained no where but in a nation of idiots; was fit only for that imaginary scene depictured for the amusement of children, in which the pig is roasting the cook, and the thief hanging the judge: yet to this maxim a real and very extensive regard is paid by the law of England. If a man give you a black eye, you may make him pay for it; but if he put out your eye, you get nothing, and whatever is taken from him goes nominally to the king: really to John Stokes or Jack Nokes, who has no concern at all in the matter. If a man kill your pig, you get the value of it; but if he kill your wife or your child, you get nothing: if any thing is got out of him, it goes to a stranger as before. A man sets your house on fire: if by misfortune, you receive amends; if through malice, you receive nothing.

Lawyers have been found to defend this: for, say they, "So long as satisfaction is made, what signifies who gets it?" To know whether they are sincere, pass a law, that whosoever owes any thing to these reasoners, shall pay it to the king.

The Mahometan law, bad as it is, is at least unsullied by this abomination. It inclines, in certain cases, towards the opposite extreme; substituting satisfaction to punishment, instead of superadding it.

In a country where there is no king, who is to get the forfeiture? This would make a curious question, as lawyers feelingly call it, wherever the legislator has left the print of his improvidence. Had the death of Lord Pigot been deemed murder, the forfeitures of the delinquent council would have afforded noble pickings for the gentlemen of the long robe, a rich bone of technical contention. What became of the spoils of the Bramin Nundocomar, whom the English judges hanged, on pretence that a set of men in London had made forgery a felony, without benefit of Braminship?

The standing principle of the good old common law is, that the king is every thing. Is a criminal to be punished? it is because he has broken the king's peace. Is civil justice to be administered? it is that the ears of Majesty may find rest. But in Bengal there is no king; to be consistent, there ought to be no offences: at any rate, no efficient means of punishing the high officers of government are provided there.

If that country has hitherto escaped absolute destruction; if the lust of power, and the thirst of riches, have hitherto been kept within any tolerable bounds; we must attribute it to the force of the moral, not to that of the political sanction; to manners, and not to laws.

If we regard the character of the different tribunals in England, and refer to their origin, we shall find that the present jurisdictions have been obtained by encroachments upon one another: but the result of the method in which their powers have been obtained has been, that the whole system of procedure has been built upon the foundation of fiction, and is full of formalities, delays, embarrassments, and expense; of which it is impossible, in the course of a chapter, to give the details. The character of the English judges has, in general, been above all suspicion and reproach; but the course of procedure has been far from possessing that clearness, brevity, and economy, which it ought to have.

What, then, must have been the sensations of the poor Hindoo, when forced to submit to all these wanton and ridiculous vexations? Unable to attribute to an European mind the folly adequate to the production of such a mass of nonsense and of gibberish, he must have found himself compelled to ascribe it to a less pardonable cause; to a deliberate plan for forcing him to deliver himself up, without reserve, into the hands of the European professional blood-suckers, carrying on the traffic of injustice under the cloak of law.

The most remarkable circumstance connected with these absurdities in English procedure is, that the judges are aware of the evils, and every now and then act upon a different system; but where the English judge acts rightly, once in a hundred times, the Cawzee and the Bramin were in the habit of acting rightly every day.

* Few men, I suppose, can have lived many years in the world, without meeting with various instances in which iniquity has triumphed under cover of this law: but in general, as there is no redress to be had, the injury is seldom publicly proved, and the public hears little of the matter. When there is a matter of honest difference in the way of trade, the law does not leave the representatives irresponsible, nor the suffering party without redress. It is only when the suffering is occasioned by villany, that it manifests this indifference.

But not only were the English common-law courts introduced into Hindostan with all their fictions; they were plagued also with a court of chancery, with its interminable delays.

You are the father of a family: you call on me and say, Two of my children have a dispute about a plaything: each of them claims it as his own: advise me, then, what shall I do to settle the matter between them? what shall I do to come at the truth? I look grave, and answer you as follows: I fear, indeed, there is something wrong on one side, or the other; I am afraid that one or other of them does not speak truth: falsehood should not be permitted to gain its ends. If I were in your place, I would endeavour to sift the matter to the bottom: I will tell you, then, how you shall manage. You must not think of sending for either of them and examining him unawares, nor of bringing them face to face; so far from it, should either of them happen to come into the room where you are, of his own accord, you must take care and not say a syllable to him about the matter. I'll tell you what you must do: let your youngest son tell his story upon paper, putting what questions to his brother he thinks proper: give the other boy a reasonable time to contrive his answer; first six weeks, then a month, then three weeks, then a fortnight. If his answer should be evasive, then go on the same course with him again: perhaps the youngest may, by this time, think of some questions which he omitted to put the first time; or a fresh string of questions may be made requisite by the answers to the first: this will make another string of adjournments necessary. Meantime, the eldest perhaps will be for telling his story, and putting his questions in return: by this means, the time for deliberation will be doubled. When affairs are come to this pass, you may either read what they have written yourself, or you may desire their uncle to inquire of the people of the family, whether any body heard any thing of what passed, taking care not to speak to either of the boys themselves: when their uncle has told you what he has learnt, then the matter will be ripe for your decision. By this time, twice as much as the money in dispute will have been spent in pens and paper: all memory of what passed at the time when the dispute arose will be at an end: your children will have become skilled in the evils of falsehood and evasion: the time of the servants will have been taken up in carrying letters and messages backwards and forwards: your own time will have been wasted in poring over all this idle scrawl: a fixed enmity will have taken root between your children: your relations and servants will have taken their parts on one side, or on the other; and thus the truth will be fully brought to light, and the whole family will enjoy uninterrupted peace and harmony. After I had made my speech, would not you think me in a delirium? From the beginning to the end, would you think there was the least particle of common sense? This, however, is, without the least sophistication, the exact progress of what is called a suit in equity: a suit which, unless justice were denied,* might be brought for a pecuniary demand as trifling as that which has been here supposed. When I say exact, I mean, as far as it goes; but according to a very simple pattern, stripped of a thousand incidents, by fewer or more of which a suit can scarcely fail to be diversified. Not a syllable here of pleas, replications, demurrers, bills of interpleader, bills of revivor, exceptions to reports, rehearings, motions, and the like. In the patriarchal government, no type could be found of mysteries like these. I know very well, that a state is larger than a family: I know very well, that a judge is not to be expected to feel the same impartial tenderness for suitors, as a father for his children: but it lies upon those who think they can defend the current practice, to show why the same methods which are sure to defeat the purposes of justice in the one case, are necessary to effect them in the other.

And who would think it? This mass of absurdity is the work of modern refinement, not of ancient barbarism. The times are clearly marked in history when an English judge had it in his power to do justice. It was then thought no more a hardship to compel a man to attend to his own concerns, than to attend to the concerns of other people. Each party was ready to relate and to answer, to examine and be examined, in the presence of the judge. Advocates there were a few: attornies there were none. Not a farthing of expense upon either party, till it was seen which of them had deserved it: if the one had complained without cause, he was fined for his vexatiousness; if the other had contested the claim without reason, he was fined for his litigiousness. Why, then, were these simple and pure forms abandoned? why were they not re-established, when new tribunals were instituted in another country, instead of transferring this system of possible equity and certain misery to Bengal?

CHAPTER V.

INFLUENCE OF TIME.

WE now come to speak of the influence of time on the expediency of a law, or set of laws. The question on this head divides itself into two: the laws that are the best possible for

* In fact, where the demand does not exceed ten pounds, this species of justice is denied; and that openly and without shame: ask a man of equity for what reason? his answer is, "*de minimis non curat lex*," the subsistence of a family for half a year is not worth caring about.

a given place, at the time present being found; would the same laws, had they happened to be found in time past, have been the best possible for that time past? and the like, with relation to the time future. This, we see, when considered with a view to any direct influence it can have, is a mere question of speculation: nobody can transfer our present laws to time past; we cannot transfer them to time future. Nevertheless, as a right way of thinking on this head may contribute, perhaps, in a manner more or less remote, to guard us against mistakes in practice, a few words on this head may not be altogether thrown away.

Time, as we have already had occasion to observe, is nothing of itself. To learn what influence, it possesses, we must inquire, what influence may be exercised by those causes of a superior order into which that influence is resolvable. In regard to causes purely physical, the field of variation, at least as to any correspondent variation of influence, cannot be very considerable: as to the nature of the soil, lands once marshy may be drained; lands once dry may be overflowed; rivers, which formerly flowed into the sea, may, in very particular situations, be intercepted and dissipated in their course; from lakes, communication may be opened to the sea; peninsulas may, by nature or by industry, be converted into islands; and continents may be intersected, in various directions, by canals. The higher parts of mountains may crumble down by their own weight, or be washed down by rivers: at the mouths of rivers, islands may be formed, or the continents lengthened out by deposition in the sea. Volcanoes, when constant, may tend to reduce mountains to a level; when occasional, they may raise plains into hills, sink beds in them for lakes, or throw up islands in the sea. Ports may be deserted, or new ones hollowed out by the caprices of the ocean. All these alterations may give occasion for correspondent changes, in regard to the individual places that are the objects of certain laws; principally those laws to which semi-public offences, offences against the public force, offences against the public wealth, respectively owe their birth. But the general nature of those offences, and the general nature of those laws, will be still the same; and, at any rate, whatever modifications on this head are made requisite by time, will be such, and such only, as are made requisite by place.

It is the same thing with regard to climate, and those peculiarities in respect of animal and vegetable produce, which are the consequences, partly of this circumstance and partly of the former. Partly by means of cultivation, and partly by other causes, of which the operation is less known, the quantity of sensible heat diffused over the surface of the earth appears to have a tendency, by slow degrees, to verge towards an equilibrium: hot climates become, perhaps, a little cooler; more certainly, cold climates become a little warmer. The productions of one country are, in course of time, transplanted to another: and the course of cultivation may, in consequence, be changed; but if any change is in consequence required in the laws, it arises from the blindness or indolence of the legislator of former times. If, in his enactments, he have employed specific terms, he must alter and add to them: but if he have employed generic terms, it is the nature of these to open up and let in the specific ones, as fast as they are formed.

So far, then, as the texture of the soil and the nature of its productions are concerned, a succession of time may give occasion to a demand for some of the alterations to which a change of place may give occasion: but this change will not extend to those variations, which are consequences of climate, in the moral qualities of men. The changes which time may bring on in respect of heat and cold, will never be considerable enough to give to one zone the temperature of another.

It seems to be a common notion, that those laws, which are the best with reference to the circumstances of a civilized nation, would not have been so with reference to the circumstances of a rude and ignorant nation: on the contrary, that rude nations must have rude and simple, that is, imperfect laws: I mean, not only that in point of fact the laws of a rude nation will have been rude, but that in point of expediency it was proper they should be so. The former of these propositions is undeniable: the latter, I deny. Let us examine the time past, and look forward to the future.

§ 1. *Retrospective View.*

Would the best possible laws, at the present period, have been the best possible laws in times past?

On this occasion, we must once more bring to view the distinction between matters of fact and the matter of right, or rather of expediency; between what has taken place, and what ought to have taken place. That in rude ages the tenor of the laws has always been very different from what would be the standard of perfection for the present age, is not to be disputed. That it could not but have been so without a miracle, is also pretty clear. But were the imperfect laws which obtained then, better for that time than the most perfect which we can imagine now would have been for the same time? The affirmative is what seems to have been insinuated, but, as it should seem, without sufficient cause.

There are two classes of people, from whom this notion seems to have gained countenance: the one consisting of those who, from indolence or timidity, or less pardonable motives,

have found it convenient to set their faces against every proposal that savours of improvement or reformation. To people of this description, it must have seemed the happiest contrivance imaginable, if from the very excellence of a system of laws they could raise an argument, and that a conclusive one, against its fitness. Such an argument, when sifted to the bottom, will indeed be found to be a contradiction in terms: but how few are they by whom such arguments can be sifted to the bottom? If they can get such an argument to apply to the laws of past times, the next step is to transfer it to the present. Get such an argument to pass muster in the first case, in which there is but little reason in it, and perhaps you may get it received in the other case, in which there is no reason in it at all.

The other class of people are those who have a system to defend, which, without some such expedient, would be indefensible. This is the case with the votaries of all those absurd and false religions which have descended into the details of legislation. Viewed by the light of polished reason, the defects of our code are too glaring to be dissembled. Say, then, that from causes peculiar to that age, it could not have been better. That to invest it with the authority of law in present times, would appear to be a measure equally ridiculous and destructive in any country, in which the defects of it are not veiled by the thickest prejudice, is not to be denied. That this pretended emanation of divine wisdom would be found worse than the worst of those systems of law which are in force in polished nations, is scarcely to be disputed with any prospect of success. What is to be done? There is but one thing; which is, to take the blame off the shoulders of the legislator, and lay it upon the people. Say they were stupid, stubborn, prejudiced, intractable: this will put you at your ease. You may then acknowledge, and acknowledge with safety, that in a certain sense the laws were bad; and this will entitle you to maintain, that in another sense they are good: they were bad in theory, but they were good, the best possible, in practice: they were bad in appearance, but they were the best possible in effect.

The plea is plausible enough while it keeps to generals; and as there is no other, it must be made the most of. Distress of argument forced it from minds engrossed by prejudice; and it may pass, as any thing else would pass, upon those who are prejudiced the same way. But come to particulars, the illusion vanishes. Take what nation you will; give them what character you please: where could have been the advantage that injuries should have been left without redress; that men should be teazed and perplexed by a chain of minute and frivolous obligations; that punishments, perhaps of the severest kind, should be heaped on them for acts from which no mischievous consequences can be traced; that when the act, which is forbidden, happens to be of the number of those that are pernicious, no account should be taken of the various grounds of justification, aggravation, extenuation, and exemption, which are pertinent to the case; that punishments should be inflicted without measure and without choice; that no enumeration should be given of the grounds of right, nor any complete set of principles established for the decision of claims to property; that the business of judicial procedure should be abandoned to arbitrary discretion; and that, where power of any other sort is given, no care should be taken to shape it to its end, by the necessary apparatus of obligations, qualifications, and exceptions?

If there be any ground for denying the truth of the position, that the laws which are the best for a civilized, would have also been the best for a rude age in any case, it is in the case of that part of the law which concerns punishments, and that part of it which concerns the laws *in principium*. In a very rude age, it is possible that punishments, in point of quantity, might require to be somewhat greater than it is necessary they should be in a civilized one. In a rude age, the religious sanction has commonly given but little assistance to the political: the force of the former, though much greater in a rude than a civilized age, being diverted into other channels; hence one reason why the quantum of punishment provided by the political sanction may require to be somewhat greater in the former period than in the latter. In a rude age, the moral sanction has less force than in a civilized one: hence another reason for adding something to the magnitude of the punishment provided by the political sanction. In a rude period of society, the people are not yet broken in to the habit of spontaneously lending their assistance to the laws: hence a third reason. The differences, however, that may be occasioned by these circumstances, can at the utmost be but very slight; especially if the maxim laid down in a former chapter be true, that even in a civilized age the whole complement of punishment that is judged necessary, must be taken from the political sanction, and that the auxiliary sanctions alone cannot safely be depended upon for any part of it.

If an intelligent Mahometan be to be found, press him upon the absurdity of the laws of Mahomet; drive him to his last shift: he will say, "True: considered with regard to their application to the purposes of the present life, they are indeed not altogether what they might have been, if made now: but consider the time, consider the state of the people, the state of knowledge at that time. Such laws as a man might make now would not have been understood: they were excellent

for the time; they were excellent for the people: better laws than those, the people would never have received. Such laws as a man might make now, either could not then have been expressed, or would not have been understood."

To this argument there is a short answer: the words that Mahomet made use of we know: to those words the same ideas, or ideas that were the same to all material purposes, were annexed then, that are annexed now; so at least we must suppose, in as far as we pretend to understand them. Give me the words of the Koran; give me the ideas that belong to them; I ask no more: out of them, and them alone, I undertake to produce you a code, which shall contain a hundred times the useful matter there is in that, without any of those absurdities, the existence of which, upon comparison made with the ideas of utility we have at present, you cannot but acknowledge.

But, better laws, though they could have been written at that time, and would have been understood, would not have been received; for the people were an ignorant, prejudiced, and headstrong people. This argument may also be demolished without much difficulty.

Ignorant, prejudiced, and stubborn as they were, did not your prophet tear from them their dearest, their most sacred prejudices? Were they not polytheists, and did he not make them unitarians? Did he not search out with the severest diligence the crimes and vicious propensities they were most addicted to? Throughout the whole of his system and of his proceedings, is any want of firmness, any of audacity, discernible? If not, there is but one want, to which the imperfection of his system can any longer be attributed, the want of wisdom; the want of wisdom on the part of a man, who, you say, was taught by God himself; the want of a share of wisdom equal to what may be found at present in a man of the most ordinary level.

My people will not endure even the most necessary restraints; I have therefore laid them under a vast multitude that are of no use. Such logic may pass upon some minds; but they must first of all have been prepared by a pretty ample dose of prejudices.

The energy of character necessary to enable a man to lead mankind, to influence as well the intellectual faculties as the affections; the character to which we have given the name of enthusiasm, is made up of a determined active courage, and a rambling imagination. No coward, no man even of selfish prudence, was ever a founder of a new system of legislation. *Nemo unquam vir magnus sine aliquo afflatu divino fuit*, says Cicero: the plain truth of this, as far as it is true, is, that the energy of the head, in the degree in which it is necessary to constitute a legislator, I mean always an enterprising innovating legislator, is always accompanied with a more than common degree of energy in the heart.

It is not to considerations of personal prudence that the imperfections of the laws of Mahomet must be attributed: he attempted every thing that his genius had discovered. The defects in his work arose from want of knowledge: if he had known better, he would have done better. This conclusion, if true, completely overturns the foundations of the Mahometan religion: hence he has neglected nothing that could enable him to elude it; and the universal ignorance of its professors is partly the result of the contrivance of the legislator to prevent the detection of his imposture.

It is a saying attributed to Solon, that the laws he had given to the Athenians were not such as were the best in themselves, but the best they were capable of receiving. In this there was doubtless somewhat of truth, especially when applied to that turbulent and jealous people; and the saying would hold good, in the greatest degree, in regard to the constitutional branch of their laws; but that it was strictly true, one may venture without much hesitation to deny.

There could not have been a more convenient maxim for saving the credit of a legislator; and those who have had a legislator to defend, have not failed to make the most of it. But there are few maxims, perhaps, that have been carried so much beyond the mark: and it has been frequently cited in cases where it has not only been erroneous in itself, but not altogether innocent in its consequences.

Whatever Athenian arrogance may pretend, it will not easily gain credit with a discerning mind, that at so early a period of society the best of all possible laws should have presented themselves to view. It will not be believed, that among a people whose character disqualified them from receiving any better laws than those which Solon gave them, there should have existed a man, who in his own mind had carried that most difficult of sciences to so high a pitch of perfection, that it will never be possible for any other man to carry it higher.

This sort of apology, what degree of truth soever there may have been in it, in the instance in which it has been made, has since been much abused; and it has been employed to gain a reputation of wisdom and expediency for many a mischievous and many a foolish law. The law, such as it is, lies before you; yet foolish as you may think it, the lawgiver may, for aught that you know, have been the wisest of mankind. But such as the author is, such are his works. Since, then, the lawgiver is wise, the law itself may perhaps be a wise one too, how foolish soever it may appear to you: it may have had its

use, though you and I don't see it. Let the law, then, stay where it is; to abolish it, is dangerous: a mischief may ensue, which we are not able to foresee. Such is the circle in which many a man who, insensible to the force of truth, has nothing to guide him but the prejudice he has conceived in favour of antiquity, scruples not to run. If any one has a mind to see how far the legislator was entitled to the benefit of this plea, let him consider in what channel the prejudices of the people are likely to have run, and in what points they are likely to have imposed a coercion upon the legislator. It is natural enough they should have opposed any important violent change he might have been inclined to make in the article of religion; and yet we have seen religions overthrown by the legislator, and others set up in their stead. It is natural enough they should oppose the investing men with new powers, or making a new distribution of the old; and yet in this way, too, we have seen great changes made by legislators, with little or no opposition on the part of the people. It is natural enough they should oppose any wishes he might form, or might be suspected to entertain, of subjecting them to new and irksome restraints or obligations; although among the most necessary restraints and obligations, we shall find some of the most irksome. But a supposition, that is not by any means a natural one, is, that by dint of menaces and clamour they should have forced him to fetter their own freedom, by a heap of idle, trifling, and ridiculous obligations and restraints. When a code, amidst all its redundancies, is defective, and regulations of the most obvious use and necessity are looked for in it in vain, it is not a mere *ipse dixit* that will warrant us to give credit for utility to institutions, in which not the least trace of utility is discernible.

§ 2. *Prospective View.*

Will the best possible laws, at the present period, be the best possible laws in all time to come?

Before a period be put to this chapter, it may naturally be expected that some notice should be taken of the immutability, which many have been so fond of attributing to certain laws, or pretended laws; as also of the much-talked-of distinction between *mala in se* and *mala prohibita*, with reference to actions; a distinction which seems analogous to the former.

How mighty in every branch of science, and in the moral branch in particular, how mighty and how universal is the force of words! How many questions, even of those of which one would least expect it, would, if examined with attention, be found to turn upon nothing else! Who would have thought it? Even the question concerning the immutability of certain laws, is of the number! The same act which ought to be forbidden in one age and country, ought it to be forbidden in every other? Yes, and No: yes, if, in pronouncing the word act, we have in view a large and general class of acts: no, if a narrow and particular one. The plain truth of the matter is this: there are certain acts which admit of laws, which, if worded in a certain manner, may stand good, and be equally applicable to all places and times; while there are other acts for which no such laws can be devised. Under the former predicament come those acts, of which the name is included in a single word; such as murder, theft, adultery, perjury, and the like. Let no one commit murder; let no one commit theft; let no one commit adultery; let no one commit perjury; and so on. Upon this plan, we might make a variety of laws, of which the expediency might without impropriety be termed universal and immutable.

But laws, while the expression of them is confined to terms so loose and so extensive, will never be found precise and clear enough for use. The act thus vaguely described must, before it can be thoroughly understood and perfectly distinguished, be broken down into *species:* the law relating to it must, accordingly, be broken down into a multitude of laws: the phrase, pure as it stands now, must be transformed into others, in which provisions of an expository, limitative, or exceptive nature, will be necessary. Now, among these qualifying provisions, will in every case be some, the effect of which is to except out of the general prohibition certain cases, in which the act is either commanded or allowed by some other branch of the code of law. Now, of these qualifying provisions, some, it will be found, ought, in point of expediency, to be different in one country from what they are in another; different in the same country at one time from what they are at another: and this is the secret history of the universality and immutability of these universal and immutable laws.

The notion concerning the essential distinction between *mala in se*, and *mala prohibita*, is a sort of counterpart and consequence of the former. *Mala in se* are the offences that are forbidden by the laws that are immutable: *mala prohibita*, such as are prohibited by laws that are not immutable.

The common notion of this distinction (as far as a distinction which has no clearness in it is capable of an explanation) seems to be this. *Mala in se*, which I suppose is put instead of *mala per se*, are acts which are evil of themselves; that is, although there be no political law by which they stand prohibited: *mala prohibita* are such acts as are indeed evil, but would not have been so, had it not been for the law by which they stand prohibited.

The foundation of this distinction is none

of the clearest: but to throw some little matter of light upon all this darkness, the following observations may be of use:—

If any act can with propriety be termed pernicious, it must be so in virtue of some events which are its consequences: this has been clearly shown already; therefore no act can, strictly speaking, be *mala in se*, in itself pernicious; nor even of, or by itself, any farther than the words *of* or *by* may be understood to exclude the influence of certain laws. Now, then, as to *mala prohibita*. Why is it that any act is prohibited, if prohibited with good cause? Because the events, which are its consequences, are pernicious, if the law is a good one. The distinction between *mala in se* and *mala prohibita*, therefore, appears but verbal. If the consequences are otherwise than pernicious, the law, and whatever punishment it is sanctioned by, are groundless, and thence improper.

Again, the distinction pretends to suppose abstraction to be made of subsisting political laws; but, in truth, no such abstraction is ever made. The cases in which the taking the goods of another is theft, depend upon the laws; and a similar observation may be made with regard to other acts, considered as *mala in se*: even killing becomes murder, only in the absence of any ground of extenuation or justification allowed by the law. On the other hand, the evil of acts termed *mala prohibita*, does not arise from the prohibitory law itself, but is the result of that cluster of laws, by which the negative or positive act, directed to be done or omitted, is applied to beneficial purpose.

The evil, however, of an act which becomes mischievous, in consequence of the establishment of certain laws, is not less real than that of an act *mala in se*. The evil of such an act may, indeed, far exceed the evil even of an act of murder. Let such an act be the non-payment of taxes: let the deficiency rise to a certain amount: an enemy breaks in, and among the consequences of the irruption are many thousand homicides, which, if they have not the name, have the effect of murder.

Were I to choose to what I would (most truly and readily) attribute these magnificent prerogatives of universality and immutability, it should rather be to certain grounds of law, than to the laws themselves: to the principles upon which they should be founded: to the subordinate reasons deducible from those principles, and to the best plan upon which they can be put together: to the considerations by which it is expedient the legislator should suffer himself to be governed, rather than to any laws which it is expedient he should make for the government of those who stand committed to his care.

On this ground, then, a man engaged in a design like that which is the object of this work, might lay claim to the attributes of universality and eternity for the rectitude of his doctrines, with as little arrogance as he could claim for them the most confined and temporary expediency, provided that in the execution of his plan, he has boldness and strength of mind enough to set apart all along whatsoever is peculiar to particular times and places, and to raise his contemplation to that elevated point from which the whole map of human interests and situations lies expanded to his view.

The rules concerning the cases that are respectively meet and unmeet for punishment and for reward; the rules concerning the proportion proper to be observed between offences and punishments, between acts of merit and reward; the rules concerning the properties to be wished for in a lot of punishment and reward; the principles on which the division of offences has its foundation; the principles on which the various methods of attacking offences by indirect or far-fetched means: all these, if they are just and proper now, would at any time have been so, and will be so every where, and to the end of time. They will hold good, so long as pleasure is pleasure, and pain is pain; so long as steel wounds, fire burns, water seeks a level, bread nourishes, inanition destroys; so long as the tooth of the slanderer keeps its venom; so long as difference of sex attracts; so long as neighbour needs the help of neighbour; so long as men derive credit or fortune from their ancestors, or feel an affection for their children.

The author of a work entitled "Public Happiness," has maintained that the condition of man has gone on progressively ameliorating from the commencement of time; and Dr. Priestley has expressed his expectation that man will ultimately attain a degree of happiness and knowledge which far surpasses our present conceptions. These glorious expectations remind us of the golden age of poetry: they have, however, this advantage; the happiness of which they speak is to come, and we are not discouraged by vain regrets for what is past.

We may hope, then, that in future time improvements will be made, among other things, in the practice of legislation. But we must only consider that the laws have reached the maximum of their perfection, and that men have obtained the maximum of their happiness, inasmuch as it depends upon the laws, when great crimes shall be known only by the laws which prohibit them: when the catalogue of prohibited acts shall no longer contain actions the evil of which is imaginary: when the rights and duties of the different classes of men shall be so well defined in the civil code, that there shall be no suits arising

upon points of law: when the system of procedure shall be so simplified, that the disputes which from time to time may arise upon questions of fact, shall be terminated without any other expense or delay than is absolutely necessary: when the courts of justice, though always open, shall be rarely resorted to: when nations, having laid aside their arms and disbanded their armies by mutual agreement, and not from mutual weakness, shall only pay almost imperceptible taxes: when commerce shall be free, so that what may be done by many, shall not be restricted exclusively to a small number; and when oppressive taxes, prohibitions, and bounties, shall not prevent its natural development: when perfect liberty shall be allowed to those branches of trade which require liberty, and positive encouragements shall be granted to those which require it: when, from the perfection of constitutional law, the rights and duties of public officers shall have been so well distributed, and the dispositions of the people to submit and to resist so well tempered, that the prosperity resulting from the preceding causes shall be beyond the danger of revolutions: and, in conclusion, when the law, which should be the rule of human actions, shall be concise, intelligible, without ambiguity, and in the hands of every one.

But to what will the happiness arising from all this amount? It may be described *as the absence of a certain quantity of evil.* It will arise from the absence of a part of the different evils to which human nature is subject. The increase of happiness which will hence result, is doubtless sufficiently great to excite the zeal of all virtuous minds in this career of perfection which is open to us; but there is nothing in it unknown or mysterious, and which cannot be perfectly understood.

Every thing beyond this is chimerical. Perfect happiness belongs to the imaginary regions of philosophy, and must be classed with the universal elixir and the philosopher's stone. In the age of greatest perfection, fire will burn, tempests will rage, man will be subject to infirmity, to accidents, and to death. It may be possible to diminish the influence of, but not to destroy, the sad and mischievous passions. The unequal gifts of nature and of fortune will always create jealousies: there will always be opposition of interests; and, consequently, rivalries and hatred. Pleasures will be purchased by pains; enjoyments by privations. Painful labour, daily subjection, a condition nearly allied to indigence, will always be the lot of numbers. Among the higher as well as the lower classes, there will be desires which cannot be satisfied; inclinations which must be subdued: reciprocal security can only be established by the forcible renunciation by each one, of every thing which might wound the legitimate rights of others. If we suppose, therefore, the most reasonable laws, constraint will be their basis: but the most salutary constraint in its distant effect is always an evil, is always painful in its immediate operation.

The limits of perfectibility are not so easily assigned in some other points: it is not possible to say precisely how far the human mind may go in the regions of poetry, in the different branches of literature, in the fine arts, as painting, music, &c. It is, however, probable that the sources of novelty will be exhausted; and that, if the instruments of pleasure become more exquisite, taste will become proportionably severe.

This faithful picture, the result of facts, is more worthy of regard than the deceptive exaggerations which excite our hopes for a moment, and then precipitate us into discouragement, as if we had deceived ourselves in hoping for happiness. Let us seek only for what is attainable: it presents a career sufficiently vast for genius; sufficiently difficult for the exercise of the greatest virtues. We shall never make this world the abode of perfect happiness: when we shall have accomplished all that can be done, this paradise will yet be, according to the Asiatic idea, only a garden; but this garden will be a most delightful abode, compared with the savage forest in which men have so long wandered.

This discussion has been necessary in order to show, that scarcely at present have just ideas been formed of perfection in matters of government. Until the grand principle of utility had been exhibited; until it had been separated from the two false principles with which it had been unceasingly confounded; until, by the aid of this principle, the end to be pursued, and the means to be employed, had been recognised; until, so to speak, all the legislative apparatus had been provided, and all the fundamental truths had been arranged, it was impossible to form any precise notion of a perfect system of legislation. But if at length these different objects have been accomplished, the idea of its perfection is no longer a chimera: it is, so to speak, presented to him who knows how to appreciate it: he may trace the whole of its horizon; and though no one now living may be permitted to enter into this land of promise, yet he who shall contemplate it in its vastness and its beauty may rejoice, as did Moses, when on the verge of the desert, from the mountain top, he saw the length and the breadth of that good land into which he was not permitted to enter and take possession.

A

TABLE

OF

THE SPRINGS OF ACTION:

SHEWING

THE SEVERAL SPECIES OF PLEASURES AND PAINS OF WHICH MAN'S NATURE IS SUSCEPTIBLE:

TOGETHER WITH

THE SEVERAL SPECIES OF *INTERESTS*, *DESIRES*, AND *MOTIVES* RESPECTIVELY CORRESPONDING TO THEM:

AND

THE SEVERAL SETS OF APPELLATIVES,
NEUTRAL, *EULOGISTIC*, AND *DYSLOGISTIC*,
BY WHICH EACH SPECIES OF *MOTIVE* IS WONT TO BE DESIGNATED:

TO WHICH ARE ADDED,

EXPLANATORY NOTES AND OBSERVATIONS,

INDICATIVE OF

THE APPLICATIONS OF WHICH THE MATTER OF THIS TABLE IS SUSCEPTIBLE, IN THE CHARACTER OF A *BASIS* OR *FOUNDATION*, OF AND FOR THE ART AND SCIENCE OF MORALS, OTHERWISE TERMED ETHICS,

WHETHER

PRIVATE OR *PUBLIC alias* POLITICS—(INCLUDING LEGISLATION)—
THEORETICAL OR *PRACTICAL alias* DEONTOLOGY—
EXEGETICAL alias EXPOSITORY (WHICH COINCIDES MOSTLY WITH *THEORETICAL*,) OR *CENSORIAL*, WHICH COINCIDES MOSTLY WITH DEONTOLOGY:

ALSO OF AND FOR

PSYCHOLOGY, IN SO FAR AS CONCERNS ETHICS, AND HISTORY (INCLUDING BIOGRAPHY) IN SO FAR AS CONSIDERED IN AN *ETHICAL* POINT OF VIEW.

Since the printing of this Tract, the following apposite passage from Helvetius was discovered, and pointed out to the Author :—

" Chaque passion a donc ses tours, ses expressions, et sa manière particulière de s'exprimer : aussi l'homme qui, par une analyse exacte des phrases et des expressions dont se servent les différentes passions, donneroit le signe auquel on peut les reconnoître, mériteroit sans doute infiniment de la reconnoissance publique. C'est alors qu'on pourroit, dans le faisceau de sentiments qui produisent chaque acte de notre volonté, distinguer du moins le sentiment qui domine en nous. Jusques-là les hommes s'ignoreront eux-memes, et tomberont, en fait de sentiments, dans les erreurs les plus grossières."

HELVET. *de l'Esprit.* Tom. II. Disc. iv. Ch. ii. p. 305.

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TABLE

OF

THE SPRINGS OF ACTION.

No. I. PLEASURES AND PAINS,

— of the TASTE *— the* PALATE *— the Alimentary Canal — of* INTOXICATION.

Corresponding Interest, *Interest of the PALATE — Interest of the* BOTTLE.

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC: viz.	— III. DYSLOGISTIC: viz.	
1. Hunger.	*Proper, none.*	1. Gluttony.	cramming, stuffing, devouring, gormandizing, guttling, &c.
2. Need of food.	*Improper.*	2. Gulosity.	10. Drunkenness.
3. Want of food.	1. Love of the pleasures of the social board — of the social bowl, or glass — of good cheer — of good living — of the good goddess — of the jolly god, &c.	3. Voracity.	11. Ebriety.
4. Desire of food.		4. Voraciousness.	12. Intoxication.
5. Fear of hunger.		5. Greediness.	13. Sottishness.
6. Thirst.		6. Ravenousness.	Love, &c. (*as per Col.* 3) of &c. drink, liquor — drinking, tippling, toping, boosing, guzzling, swilling, soaking, sotting, carousing — junketting, revelling, &c.
7. Drought.		7. Liquorishness.	
8. Need, want, desire — of the means of quenching, relieving, abating, &c. thirst.		8. Daintiness.	
9. Inanition.		9. Love, appetite, craving, hankering, propensity, eagerness, passion, rage — of, for, to, and after —	

No. II. PLEASURES AND PAINS,

— of the Sexual Appetite, or of the Sixth Sense.

Corresponding Interest, *SEXUAL INTEREST.*

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC: viz.	— III. DYSLOGISTIC: viz.	
Single-worded, none.	None.	1. Venery.	6. Libidinousness.
Many-worded, Sexual desire.		2. Lust.	7. Lecherousness.
		3. Lechery.	8. Salacity.
		4. Lewdness.	9. Salaciousness.
		5. Lustfulness.	10. Venereal desire.

No. III. PLEASURES AND PAINS,

— of SENSE, *or of the* SENSES: *viz. generically or collectively considered.*

Corresponding Interest,

Interest of SENSE — of the Senses: — SENSUAL INTEREST.

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC: viz.	— III. DYSLOGISTIC: viz.	
Single-worded, none.	None.	1. Sensuality.	8. Love, appetite, craving, &c. (*as per No. I. Col.* 3) of, for, to, and after--sensual pleasure, enjoyment, gratification, indulgence, &c.
Many-worded, Physical want, need, exigency, necessity — desire, appetite.		2. Luxury.	
		3. Carnality.	
		4. Debauchery.	
		5. Intemperance.	
		6. Luxuriousness.	
		7. Voluptuousness.	See note *(b)*, *Synonyms to pleasure.*

No. IV. PLEASURES AND PAINS,

Derived from the matter of WEALTH.—PLEASURES *of Possession—Fruition—Acquisition—Affluence—Opulence.* PAINS *of Privation—Loss—Poverty—Indigence.*

Corresponding Interest,

PECUNIARY INTEREST. Interest of the Purse.

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC: viz.	— III. DYSLOGISTIC: viz.	
Single-worded, none	1. Economy.	1. Parsimony.	1. Covetousness.
Many-worded,	2. Frugality.	2. Parsimoniousness.	2. Cupidity.
1. Desire, want, need, hope, prospect, expectation — of the means of subsistence, of competence, plenty, abundance, riches, opulence;—of profit, acquisition, &c.	3. Thrift.	3. Penuriousness.	3. Avarice.
	4. Thriftiness.	4. Closeness.	4. Rapacity.
		5. Stinginess.	5. Rapaciousness.
2. Fear, apprehension — of loss, pecuniary damage, want, penury, poverty, impoverishment, indigence.	5. Desire, hope, prospect, expectation — of thriving.	6. Niggardliness.	6. Corruption.
		7. Miserliness	7. Corruptness.
3. Desire, &c. — of maintaining, preserving, improving, mending, bettering, meliorating, advancing — a man's condition, situation, station, position — in life, in society, in the world, &c.	6. Prudential regard, care, attention, for and to a man's pecuniary concerns, property, income, estate, livelihood, subsistence.	8. Nearness.	8. Venality.
		9. Dirtiness.	9. Love, appetite, &c. (*as per No. I. Col.* 3) lust, greediness — of, for, to and after — money, gain, lucre, pelf—hoarding, flint-skinning, scraping, &c.

No. V. PLEASURES AND PAINS,

— of POWER, *Influence, Authority, Dominion, Governance, Government, Command, Rule, Sway, &c.; —of Governing, Commanding, Ruling, &c.*

Corresponding Interest, *Interest of the SCEPTRE.*

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC: viz.	— III. DYSLOGISTIC: viz.	
1. Ambition. 2. Aspiringness.	*Single-worded, none.*	1. Ambition. 2. Love, appetite, craving, hankering, eagerness, greediness, thirst, lust, rage, passion — for *power*, &c. (as per Col 1.)	4. *Self-regarding or dissocial* moral qualities, liable to be *manifested* in the *exercise* of power, and *productive* of the *abuse* of it; — and wont to be spoken of in the character of MOTIVES. 1. Tyranny. 2. Tyrannicalness. 3. Despotism. 4. Despoticalness. 5. Arbitrariness. 6. Imperiousness. 7. Dictatorialness. 8. Domineeringness. 9. Magisterialness. *And see No. VIII. Col.* 4.
3. Desire, &c. as per No. IV. Col. 1, of *power*, &c. as above: of promotion, preferment, advancement; of exaltation, aggrandisement, ascendancy, preponderancy, superiority; of rising in the world, &c.	*Many-worded,* 1. Honest, becoming, praiseworthy, laudable, honourable, generous, noble, virtuous — ambition.	3. Spirit of faction, turbulence, intrigue.	

No. VI. PLEASURES AND PAINS,

— of CURIOSITY.

Corresponding Interest, *Interest of the SPYING-GLASS.*

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC: viz.	— III. DYSLOGISTIC: viz.	
1. Curiosity. 2. Inquisitiveness.	*Single-worded, none.*	1. Inquisitiveness. 2. Pryingness. 3. Impertinence. 4. Meddlesomeness.	5. Idle, vain, busy, prying, impertinent — curiosity, inquisitiveness.
3. Love of novelty. 4. Love of experiment. 5. Desire of information.	*Many-worded,* 1. Love, desire, appetite, thirst, rage, passion—for knowledge, learning, instruction, literature, science; useful information; the arts, &c. 2. Laudable curiosity.		

No. VII. PLEASURES and PAINS,

— *of* Amity: *viz.* Pleasures *derivable from the* Good-will, *thence from the* Free Services, *of this or that individual.* — Pains *derivable from the* Loss *or* Non acquisition *of ditto.*

Corresponding Interest, *Interest of the CLOSET.*

Corresponding *MOTIVES* — with Names,

— Neutral: viz.

Single-worded, none.

Many-worded,

1. Desire, wish, want, need, hope, prospect, expectation — of obtaining, gaining, acquiring, procuring — partaking of, sharing in — enjoying, retaining, securing — the good opinion, favourable opinion, good-will; good offices, services; help, aid, assistance, support, co-operation; vote; interest; favour, patronage, protection, countenance, recommendation — of this or that *individual.*
2. Fear, apprehension, dread — of losing, forfeiting, foregoing — the favour, good opinion, &c. as above.
3. Desire, &c. of ingratiating a man's self with him, of recommending a man's self to him, to his favour, &c. as above; — of obtaining, &c. a place in his favour.

— II. Eulogistic: viz.

Single-worded, none.

Many-worded,

Honest, &c. *(as per No. V. Col. 2)*, desire, &c. *(as per No. VII. Col. 1.)*

— III. Dyslogistic: viz.

1. Servility.
2. Slavishness.
3. Obsequiousness.
4. Cringingness.
5. Abjectness.
6. Meanness.
7. Sycophantism
8. Toad-eating.
9. Propensity, readiness — to fawn, cringe, truckle to, humour, flatter — this or that individual.
10. Desire, hope, &c. of insinuating, worming a man's self, creeping into the good graces of the individual in question; of currying favour with him.

No. VIII. PLEASURES AND PAINS,

— of the MORAL *or* POPULAR *Sanction : viz.* PLEASURES *of* REPUTATION, *or Good-repute:* PAINS *of* BAD REPUTATION, *or Ill-repute.*

Corresponding Interest, *Interest of the TRUMPET.*

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL : viz.	I. NEUTRAL *continued.*	— II. EULOGISTIC : viz.	— III. DYSLOGISTIC : viz.
Single-worded, none.	disgrace, ignominy, infamy, odium, unpopularity; of ill, evil, bad — repute, report, or fame; of an ill, &c. name; of bad reputation, bad character: of being disgraced, dishonoured, &c.	1. Honour.	1. Vanity.
Many-worded,	4. Sense of propriety, decorum, honour, dignity; moral rectitude, moral duty.	2. Conscience.	2. Vainness.
1. Desire, &c. *(as per No. VII.)* — of obtaining, &c. the good-will, &c., thence the eventual services, &c. of *the public at large*, or a more or less considerable, though not liquidated, portion of it.		3. Principle.	3. Ostentation.
		4. Probity.	4. Fastidiousness.
		5. Integrity.	5. Vainglory.
2. Fear, &c. *(as per No. VII. Col. 2.)* of losing, &c. the good opinion, &c. of ditto.		6. Uprightness.	6. False glory.
		7. Rectitude.	7. False honour.
3. Fear, or sense — of shame, disrepute, opprobrium, reproach, dishonour,		8. Honesty.	8. Pride.
		9. Heroicalness.	9. False pride.
		10. Honest, becoming, laudable, virtuous, pride : a proper degree of pride.	10. Self-sufficiency.
		☞ Conscience *and* Principle *belong also to Nos. IX. and X. : so likewise* Probity, &c. : *and these last belong to No. XIV. in so far as depends upon the* LEGAL SANCTION.	11. Loftiness.
			12. Haughtiness.
			13. Assumingness.
			14. Arrogance.
			15. Overbearingness.
			16. Insolence.
			And see No. V. Col. 4.

No. IX. PLEASURES AND PAINS,

— of the RELIGIOUS SANCTION.

Corresponding Interest, *Interest of the ALTAR.*

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC : viz.	— III. DYSLOGISTIC : viz.	
1. Religion.	1. Piety.		
2. Religiousness.	2. Devotion.	1. Superstition.	— piety, &c. — *as above, Col. 2.*
	3. Devoutness.	2. Bigotry.	8. Religious prejudice.
3. Sense of religious duty.	4. Godliness.		9. Religious frenzy.
4. Religious zeal, fervour, ardour.	5. Holiness.	3. Enthusiasm.	10. Religious intolerance.
	6. Sanctity.	4. Fanaticism.	
	7. Righteousness.		
5. Fear of God.		5. Sanctimoniousness.	
6. Hope from God.	8. Pious, godly, holy, sacred — &c. zeal, fervour, ardour, &c.	6. Hypocrisy.	
7. Love of God.		7. Affectation of, pretension to — religion, &c.	

No. X. PLEASURES AND PAINS, — *of* SYMPATHY.

Corresponding Interest,

Interest of the HEART: viz. more or less expanded, expansive, comprehensive— in proportion to the Number *of the* Persons *whose Welfare is the object of the* Desire.

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.

I. — *Towards this or that determinate INDIVIDUAL* —

1. Sympathy.
2. Fellow-feeling.
3. Good-will.
4. Friendship.

5. Personal attachment, affection, regard, kindness, tenderness, fondness.

II. — *Towards this or that DOMESTIC, or other comparatively PRIVATE Circle*—

1. Family, domestic, parental, social attachment, &c.—*as above.*

III.—*Towards the POLITICAL Community at large* —

1. National attachment.
2. National zeal.

IV. — *Towards MANKIND at large* —

1. Sympathy, fellow-feeling, good-will, regard, kindness — for or towards — mankind, the human species, the race of men, &c. — in general.

— II. EULOGISTIC: viz.

(Mostly names of permanent moral qualities —)

I. — *Towards this or that INDIVIDUAL* —

1. Kindness.
2. Good-nature.
3. Amicableness.
4. Complacency.
5. Benignity.
6. Tenderness.
7. Loving-kindness.

8. Affability.
9. Courteousness.
10. Urbanity.

11. Pity.
12. Compassion.
13. Commiseration.
14. Charity.

15. Mercy.
16. Clemency.
17. Long-suffering.
18. Forbearance.
19. Humanity.

20. Kindheartedness.
21. Tenderheartedness.
22. Goodness of heart.

23. Gratitude.

II.—*Towards this or that comparatively PRIVATE Circle* —no otherwise than as above.

II. EULOGISTIC *continued:*

III. — *Towards the POLITICAL Community, or Nation, at large* —

1. Patriotism.
2. Public spirit.
3. Public zeal.
4. Love of country.

IV.—*Towards MANKIND at large* —

1. Philanthropy.
2. General, universal, all-embracing, all-comprehensive—benevolence, beneficence, kindness, &c. *(See Cols.* 1. *&* 2.)

— III. DYSLOGISTIC: viz.

I. — *Towards this or that INDIVIDUAL* —

1. Partiality.
2. Favouritism.
3. Partial attachment, &c. — *(See Cols.* 1. *and* 2.)

II. — *Towards this or that comparatively PRIVATE Circle* —

1. Family partiality.

2. Party attachment, favour, affection, prejudice, prepossession, zeal, spirit, rage, madness.
3. Spirit of faction.
4. Corporation spirit.

III. — *Towards the POLITICAL Community at large*

1. Nationality.

2. National partiality, prejudice, prepossession.

IV.—*Towards MANKIND at large* —

None.

No. XI. PLEASURES AND PAINS,

— *of* ANTIPATHY — *of Ill-will* — *of the* IRASCIBLE APPETITE : *including the* PLEASURES *of* Revenge, *and the* PAINS *of* Unsatisfied Vindictiveness.

Corresponding Interest, *Interest of the GALL-BLADDER.*

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL : viz.	— II. EULOGISTIC : viz.	— III. DYSLOGISTIC : viz.	
		I. — *Specially derived and directed affections* —	II. *Abstract Moral Qualities — continued.*
1. Antipathy.	*Single-worded, none.*	1. Ill-will.	33. Obduracy.
2. Dislike.		2. Ill-humour.	34. Obdurateness.
3. Aversion.	*Many-worded,*	3. Animosity.	35. Implacability.
4. Displeasure.	1. Just, proper, legitimate, justifiable, warranted, well-grounded, due, becoming, laudable, praiseworthy, commendable, noble, dignified — displeasure, indignation, resentment.	4. Spite.	36. Callousness.
5. Anger.		5. Malice.	37. Unjust, improper, &c. — asperity, harshness, rigour, severity, antipathy, &c. *(See Cols. 2. and 3.)*
6. Wrath.		6. Hatred.	
7. Exasperation.		7. Hate.	
8. Resentment.		8. Abhorrence.	
9. Indignation.		9. Abomination.	
10. Incensement.		10. Detestation.	
		11. Execration.	
		12. Rage.	
		13. Fury.	
		14. Rancour.	
		15. Revenge.	
		16. Vengeance.	
		17. Envy.	
		18. Jealousy.	
		II. — *Abstract Moral Qualities* —	
		19. Spleen.	
		20. Ill-nature.	
		21. Waspishness.	
		22. Maliciousness.	
		23. Malignity.	
		24. Malignancy.	
		25. Venomousness.	
		26. Cruelty.	
		27. Barbarity.	
		28. Savageness.	
		29. Brutality.	
		30. Ferocity.	
		31. Vindictiveness.	
		32. Vengefulness.	

No. XII. PAINS,

— of LABOUR *— Toil — Fatigue.*

Corresponding Interest, *Interest of the PILLOW.*

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC:	— III. DYSLOGISTIC: viz.	
Single-worded, none.	*None.*	1. Indolence.	11. Torpidity.
Many-worded,		2. Laziness.	12. Seguity.
1. Love of ease.		3. Sloth,	
2. Aversion to labour.		4. Slothfulness.	13. Tardiness.
3. Fear, apprehension, dread — of toil, fatigue, over-exertion, over-working, over-straining.		5. Sluggardliness.	14. Dilatoriness.
		6. Sluggishness.	15. Procrastination.
		7. Self-indulgence.	
		8. Idleness.	16. Slowness.
		9. Listlessness.	17. Lenitude.
		10. Torpidness.	18. Drawlingness.

No. XIII. PAINS,

— of DEATH, *and* BODILY *Pains in general.*

Corresponding Interest,
Interest of EXISTENCE — of Bodily, Corporal, Personal, SELF-PRESERVATION — Safety — Security.

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC: viz.	— III. DYSLOGISTIC: viz.	
		I. *Transient EMOTIONS.*	II. *Permanent QUALITIES.*
1. Self-preservation.	*Properly belonging to this head, none.*	1. Dread.	1. Timidity.
2. Self-defence.		2. Terror.	2. Timorousness.
3. Self-protection.	*Borrowed from the Habitudes of the INTELLECTUAL Faculty —*	3. Appalment.	3. Pusillanimity.
4. Desire of, regard to, or for—personal safety, security.	1. Prudence.	4. Consternation.	4. Faint-heartedness.
	2. Circumspection.	5. Dismay.	5. Chicken-heartedness.
5. Fear, apprehension—of pain, suffering, &c.	3. Forecast.	6. Tremor.	6. Cowardice.
6. Fear of death.	4. Foresight.	7. Trepidation.	7. Poltroonery.
7. Love of life.	5. Cautiousness.		
	6. Vigilance.		
	7. Prudential care.		

No. XIV. PLEASURES AND PAINS,

— *of the* SELF-REGARDING *Class, generically or collectively considered: i. e.* of all the above sorts, except Nos. X. and XI.

Corresponding Interest, *SELF-REGARDING Interest.*

Corresponding *MOTIVES* — with NAMES,

— I. NEUTRAL: viz.	— II. EULOGISTIC: viz.	— III. DYSLOGISTIC: viz.	
Single-worded, none: except in so far as those in No. XII. may here be applicable.	*None: except in so far as those in No. XIII. may here be applicable.*	1. Self-interest.	3. Interestedness.
1. Personal interest.		2. Selfishness.	4. Self-interestedness.
2. Self-regarding interest.			

I. EXPLANATIONS.

(a) [*Springs of action.*] 1. Under this denomination, those objects and considerations alone are included in this Table, which, in their operation on the *will*, act as it were in the way of immediate contact. Concerning those which act on the will no otherwise than through the understanding, see Note *(m)* on the word *Motives*.

2. The words here employed as leading terms, are names of so many *psychological entities*, mostly *fictitious*, framed by necessity for the purpose of *discourse*. Add, and even of *thought*: for, without corresponding words to clothe them in, ideas could no more be *fixed*, or so much as *fashioned*, than *communicated*.

3. By habit, wherever a man sees a *name*, he is led to figure to himself a corresponding object, of the reality of which the *name* is accepted by him, as it were of course, in the character of *a certificate*. From this delusion, endless is the confusion, the error, the dissension, the hostility, that has been derived.

4. Of all these groups or classes of intimately connected psychological entities, to *motives* alone is the appellation *Springs of action* immediately applicable: to the others, no otherwise than in virtue of the relation they respectively bear to *Motives*.

5. Psychological *dynamics* (by this name may be called the science, which has for its *subject* these same *springs of action*, considered as such) has for its basis psychological *pathology*. *Pleasure* and *exemption from pain* fall to be considered *every where* in the character of *ends*: pleasure and pain *here* in the character of *means*.

(b) [*Pleasures.*] Synonyms to the word *pleasure*: including those by which are designated the correspondent *states of mind*, and their respective causes. 1. Gratification. 2. Enjoyment. 3. Fruition. 4. Indulgence. 5. Joy. 6. Delight. 6*. Delectation. 7. Hilarity. 8. Merriment. 9. Mirth. 10. Gaiety. 11. Airiness. 12. Comfort. 13. Solace. 14. Content. 15. Satisfaction. 16. Rapture. 17. Transport. 18. Ecstasy. 19. Bliss. — 20. Joyfulness. 21. Gladness. 22. Gladfulness. 23. Gladsomeness. 24. Cheerfulness. 25. Comfortableness. 26. Contentedness. 27. Happiness. 28. Blissfulness. 29. Felicity. 30. Well-being. 31. Prosperity. 32. Success. 33. Exultation. 34. Triumph. 35. Amusement. 36. Entertainment. 37. Diversion. 38. Festivity. 39. Pastime. 40. Sport. 41. Play. 42. Frolic. 43. Recreation. 44. Refreshment. 45. Ease. 46. Repose. 47. Rest. 48. Tranquillity. 49. Quiet. 50. Peace. 51. Relief. 52. Relaxation. 53. Alleviation. 54. Mitigation.

(c) [*Pains.*] Synonyms to the word *pain*: including those by which are designated the correspondent states of mind and their respective causes. 1. Vexation. 2. Suffering. 3. Mortification. 4. Humiliation. 5. Sorrow. 6. Grief. 7. Mourning. 8. Concern. 9. Distress. 10. Discomfort. 11. Discontent. 12. Dissatisfaction. 13. Regret. 14. Anguish. 15. Agony. 16. Torture. 17. Torment. 18. Pang. 19. Throe. 20. Excruciation.

21. Distraction. 22. Trouble. 23. Embarrassment. 24. Anxiety. 25. Solicitude. 26. Perplexity. 27. Disquiet. 28. Disquietude. 29. Inquietude. 30. Unquietness. 31. Discomposure. 32. Disturbance. 33. Commotion. 34. Agitation. 35. Perturbation. 36. Disorder. 37. Harassment. 38. Restlessness. 39. Uneasiness. 40. Discontentedness. 41. Anxiousness. 42. Sorrowfulness. 43. Sadness. 44. Weariness. 45. Mournfulness. 46. Bitterness. 47. Unhappiness. 48. Wretchedness. 49. Misery. 50. Infelicity. 51. Melancholy. 52. Gloom. 53. Depression. 54. Dejection. 55. Despondence. 56. Despondency. 57. Despair. 58. Desperation. 59. Hopelessness. 60. Affliction. 61. Calamity. 62. Plague. 63. Grievance. 64. Misfortune. 65. Mishap. 66. Misadventure. 67. Mischance.

2. Note, that in many instances the *transient* sensation, the *permanent* state of mind, and the *cause* of one or both, are designated by the same word.

3. In the plural *number*, in some instances, the word is scarcely in use.

4. In some instances, different modifications of the principal idea, as above, are designated by the two *numbers*. See for example under *Pleasure*, Nos. 11, 12, 13, 14, 15.

5. Fully to delineate and illustrate these and other observable modes of difference, would require a volume.

6. *Use of these synonyms.* It is only by means of its *relation* to objects designated by other *names*, that the nature of any object can be made known: proportioned to the number of the *names* brought to view, is the number of the *relations* here exhibited. *Synonymation* is *denomination*. By denomination, to an extent proportioned to that of the *denominatives* employed, the work of *classification* is performed. In *physics*, right *denomination* and right *conception*, — and, so far as depends upon right conception, right *practice*, — are acknowledged to be inseparable. By identity of *denomination*, identity of *nature*, i. e. of *properties;* by diversity, diversity is declared.

7. Constructed in different *languages*, a Table of this sort would afford an interesting specimen of their comparative copiousness and expressiveness.

8. Of the *value* of a *pleasure*, the *elements* or *ingredients* are, 1. Its *intensity:* 2. Its *duration* (of these two its *magnitude* is composed:) 3. Its *certainty* (say rather its *probability:*) 4. Its *propinquity* or *nearness* (measurable no otherwise than by the opposite quality, its *remoteness;*) in both which cases, by the supposition, it is not *present:* 5. Its *purity*, which is inversely as the value of any *pain* or pains, *loss* or losses (*viz.* of *pleasure*), in such sort associated with it, as that, in case of his experiencing the pleasure, a man will experience them, otherwise not: 6. Its *fecundity*, which is directly as the value of any pleasure or pleasures, *exemption* or exemptions (*viz.* from pain), which, in case of his experiencing the pleasure, he will experience, otherwise not: 7. Its *extent*, which is as the *number* of the persons, by whom a pleasure of the *sort* in question, produced by the *individual* event or state of things in question which is the cause of the pleasure, is experienced.

9. Apply this to *reward*, to *punishment*, to *compensation;* to the matter of *good* and the matter of *evil* employed to those respective purposes. In so far as this application is neglected, the business of *law* and *government* is carried on blindfold.

10. *Positive good* (understand *pathological* good) is either pleasure itself, or a cause of pleasure: *negative good*, either *exemption from pain*, or a cause of such exemption.

11. In like manner, positive evil is either pain itself, or a cause of pain: negative evil, either loss of pleasure, or a cause of such loss.

12. In the character of an interest — a desire — a motive — equivalent to, and thence equipollent with, a given pleasure, may be *exemption from a given pain:* — say for simplicity's sake an *exemption:* equivalent to a given pain, *loss of a given pleasure:* — say for simplicity's sake, *a loss.*

13. *Moral good* is, as above, *pathological* good, in so far as *human will* is considered as instrumental in the production of it: in so far as any thing else is made of it, either the *word* is without meaning, or the thing is without *value*. And so in regard to *evil*.

14. For *pathological* might here have been put the more ordinary adjunct *physical*, were it not that, in that case, those pleasures and pains, the seat of which is not in the *body*, but only in the *mind*, might be regarded as excluded.

15. Take away *pleasures* and *pains*, not only *happiness*, but *justice*, and *duty*, and *obligation*, and *virtue* — all which have been so elaborately held up to view as independent of them — are so many empty sounds.

16. As *a spring of action*, *a pleasure* cannot operate, but in so far as, in the particular direction in question, action is regarded as a means of *obtaining* it; *a pain*, in so far as action is regarded as a means of *avoiding* it.

17. In so far as it happens not to operate as a spring of action, a *pleasure* may be termed *inert*. Pleasures which in their very nature are inert, are: 1. All pleasures of mere recollection. 2. All pleasures of mere imagination. 3. Even pleasures of expectation, when the expected pleasure is regarded as certain, and not capable of being by action either brought nearer or increased. And so it is with *pains*.

18. In a remote way, indeed, it may happen to any such pleasure, howsoever in itself *inert*, to give birth to action: but then it is only by means of some different pleasure, which it happens to bring to view.

19. In itself, the pleasure derived, for example, from a recollected landscape, is an *inert* one. An effect of it may indeed be the sending a man again to the place to take another view. But, in that case, the operating pleasure—the actuating motive—is a different one: *viz.* the pleasurable idea of the pleasurable sensation *expected* from that *other* view.

(d) [*Original.*] 1. *viz.* as opposed to *derivative*. By the adjunct *original*, may be distinguished such *pleasures* as are the immediate and simultaneous accompaniments of *perception:* viz. *physical*, i. e. *corporeal*, or merely *psychological*, i. e. *mental:*—and so of *pains*.

2. By the adjunct *derivative*, such as are not accompaniments of perception, *viz.* of *present* perception, but are derived from *past* perception:—and so of *pains*.

3. Derived from *past perception*, they are the fruit of *memory (i. e.* of recollection), or of *imagination:* of *memory*, in so far as they are copies of an *entire* picture: of *imagination*, in so far as they are copies taken in the way of abstraction, from detached parts of any such picture;—those parts being taken either, each by itself, or mixed up together, in any order, along with parts taken in like manner from other pictures.

4. Derived from *imagination*, if the conception formed of them be accompanied with a *judgment* more or less *decided*—a *persuasion* more or less *intense*—of the future realization of the pictures so composed, the *imagination* is styled *expectation:* and the pleasure, if any there be, which is the immediate accompaniment of such persuasion, is styled *a pleasure of expectation*, or a pleasure of *hope:* if not so accompanied, a pleasure of *imagination*, and nothing more. And so of pains: except that pains of *expectation* have for their synonyms, not pains of *hope*, but pains of *apprehension*.

5. Thus, it is no otherwise than through the medium of the *imagination*, that any pleasure, or any pain, is capable of operating in the character of *a motive*. It is only through the medium of these *derivative* representations that the past *original* can, in any shape, or in any part, be brought to view.

6. Note, that in the way of *imagination*, from original *pleasures* may be derived not *pleasures* only but likewise *pains*. *Pain*, for example, is a natural accompaniment of the recollected idea of the past pleasure, when the expectation is that it *will not be*—as *pleasure* is, when the expectation is that it *will be*—again realized. And so in the case of *pains*.

(e) [*simple.*] 1. The pleasures and pains here brought to view are, every one of them, *simple* and *elementary*. Out of these, others in any number may be compounded; and for the compound so made, appropriate denominations may be, and in an indefinite number have been framed; giving, each of them, to the *compound* object, especially in so far as the denomination employed is *single-worded*, the aspect of a *simple* one. For example, in Note *(r)*, Pleasures of the bottle: 2. Love (the sexual) considered as a motive. 3. Love of justice. 4. Love of liberty.

2. *Objection.* The pleasures and pains styled, as above, simple, are not so in every instance: for, under the import of the word *physical pleasure* (No. 3.), physical pleasures *of all sorts*, with the several *motives*, are included.

Answer. The pleasure which, on any individual occasion, is here considered as being in question is not the less *simple:* for, on the occasion here supposed, no more than *one* such pleasure is as being in prospect, though that one may be of any one of the species comprised under the *class* designated by the word in question, viz. *physical*. Whether of this same class, or of any other class, or of any two classes, suppose *two* pleasures operating on the same occasion in the character of *motives*, then, and then only is it, that to the pleasure and to the correspondent motive, the epithet *compound*, in the sense in which it is here employed, is applicable.

(f) [*Interest.*] 1. A man is said *to have an interest in any subject*, in so far as that *subject* is considered as more or less likely to be to him a source of pleasure or exemption:—subject, viz. *thing* or *person; thing*, in virtue of this or that *use* which it may happen to him to derive from that thing. *person*, in virtue of this or that *service*, which it may happen to him to receive at the hands of that person.

2. A man is said *to have an interest* in the *performance* of this or that *act*, by himself or any other—or in *the taking place* of this or that *event* or *state of things*,—in so far as, upon and in consequence of its having place, this or that *good* (i. e. *pleasure* or *exemption*) is considered as being more or less likely to be possessed by him.

3. It is said *to be a man's interest that* the act, the event, or the state of things in question should have place, in so far as it is supposed that—upon, and in consequence of, its having place—*good*, to a greater *value*, will be possessed by him than in the contrary case. In the former case, *interest* corresponds to a *single item* in the account of *good and evil;* in the latter case, it corresponds to a *balance* on the side of *good*.

4. For the word *interest* no *synonyms* have been found.

(g) [*Desires.*] Synonyms to the word *de-*

sire. 1. Wish (to, or for.) 2. Appetite (for.) 3. Craving (for.) 4. Longing (for, or after.) 5. Coveting (of, or for.) 6. Liking (to, or for.) 7. Inclination (to, or for.) 8. Regard (for.) 9. Affection (for.) 10. Attachment (to.) 11. Love (of, or for.) 12. Hankering (after.) 13. Propensity (to, or towards.) 14. Zeal (for, or in behalf of.) 15. Eagerness (for.) 16. Anxiety (for.)

(h) [*Aversions.*] Synonyms to the word *aversion.* 1. Dislike (of, to, or for.) 2. Distaste (of, or for.) 3. Disgust (at.) 4. Antipathy (against, or towards.) 5. Loathing (of.) 6. Abhorrence (of.) 7. Detestation (of.) 8. Execration. 9. Hatred (of, or towards.)

(i) [*Wants.*] Synonyms to the word *want* are: 1. Need (of.) 2. Demand (for.) 3. Exigency. 4. Necessity.

(k) [*Hopes.*] Synonyms to the word *hope.* 1. Expectation (of, or from.) 2. Prospect (of, or from).

(l) [*Fears.*] 1. Synonyms to the word *fear.* 1. Apprehension (of, for, or about.) 2. Dread (of.) 3. Terror. 4. Horror (of.) 5. Solicitude (for, or about, or concerning.) 6. Anxiety (for, or about.) 7. Suspicion (of, or about.)

2. As *desire* is to *pleasure* (and its expected causes), so is *aversion* to *pain* and its expected causes. So, as to *hope* and *fear.*

3. *Want* bears a common reference to pleasure and to pain: satisfied, it produces pleasure; unsatisfied, pain; though capable of being overbalanced by the pleasure of *hope*, i. e. of *expectation*

4. *Need, demand exigency, necessity,* may exist without any corresponding *desire:* so likewise *want,* in so far as it is synonymous to these four appellatives without being so to *desire.* Exposed to danger, a man has *need* of, and so far is in *want* of, all necessary means of safety: but, so long as he is ignorant of the danger, he has no *desire* of or for any of them.

5. As *hope* is to *pleasure* and *exemption,* so is *fear* to *pain* and *loss.*

6. *Expectation* and *prospect* are, without self-contradiction, applicable to *pain,* to *loss,* and to their supposed causes: *hope,* not.

(m) [*Motives.*] 1. Synonyms to the word *motive.* 1. Inducement. 2. Incitement 3. Incentive. 4. Spur. 5. Invitation. 6. Solicitation. 7. Allurement. 8. Enticement. 9. Temptation.

2. Motives to the *will*—motives to the *understanding:*—note well the difference. Motive to the *will,* a *desire*—the corresponding desire—operating in the character of a motive: motive to the *understanding,* any consideration,—the apparent tendency of which is to give increase to the efficiency of the desire, in the character of a motive to the *will.*

Of the modifications of *good* and *evil,* capable of operating in the character of motives to the *will,* this Table presents a view: of the corresponding considerations capable of operating, in subservience to these several motives to the will, in the character of motives to the *understanding,* no book could comprise the catalogue.

3. To the head of *motives to the understanding* belong *means.*

4. The desire existing, whatsoever, in the character of a *means,* promises to be contributory to the attainment of the *end (i. e.* to the possession of the *pleasure* or the *exemption* which is the object of the *desire),* operates in the character of an *incentive, i. e.* a *motive: viz.* by giving increase to the apparent *value* of the good in respect of *certainty.*

5. As by *judgment, desire* is influenced, so by *desire, judgment:* witness *interest-begotten prejudice:*—the tendency of the influence being, in the first case regular and salutary, *rightly* instructive and *directive;* in the other case irregular, and naturally *sinister,* deceptious, and *seductive.*

6. Motives to the *understanding* operate as such in every case on the *will:* else they would not be *motives.* The converse does not hold good. Antecedently to action (the actions termed *involuntary* excepted), the *will* is, in every case, perceptibly in exercise: not so the *understanding.*

7. In so far as the effect or tendency of the desire is to *restrain* action, not to *produce* it, the term *motive* cannot be employed without a contradiction in terms. Unfortunately, the word *restrictive,* though in the form of an *adjective* it *is,* in the form of a *substantive* is *not,* as yet in the language.

8. Of the sorts of psychological *powers* brought to view in this Table under the appellation of *motives, three* at least, *viz.* No. 8 (regard for reputation, &c.) No. 9 (piety), and No. 10 (sympathy), will be found to be more frequently and extensively, as well as more usefully, employed to the purpose of *restraint,* than to that of *incitement*—as *restrictives* than as *motives.* In comparison of the degree of efficiency, with which man's power of producing *unhappiness,* small indeed is that with which his power of producing *happiness* is capable of being employed. By the power of the *political sanction,* almost all the *pleasures* and *pains* of which man's nature is susceptible, thence almost all the *motives* to the action of which he is sensible, are capable of being applied to the purpose of *restraint:* but, except in so far as they are so employed by that power, *incitement* alone is the purpose, to which, in the character of *springs of action* (as the term *springs of action* imports) the motives under the governance of which man is placed, are mostly employed. All perform alike the office of a *spur:*

upon these few rests principally the charge of performing the office of a *bridle*.

9. *Pleasure*, *pain*, &c. — connection between the respective imports of these several appellatives.

When to a man's enjoying a certain *good*, *i. e.* a certain *pleasure* or *exemption* from a certain *pain* — it has appeared to him to be necessary that a certain *event* or *state of things* should have had place; and, for the purpose of causing it to have place, he has performed a certain act; then so it is, that among the psychological phænomena, which, on the occasion in question, have had place and operation in his mind, are the following, *viz.* 1. He has felt himself to have *an interest* in the possession of that same good. 2. He has felt *a desire* to possess it. 3. He has felt *an aversion* to the idea of his not possessing it. 4. He has felt *the want* of it. 5. He has entertained *a hope* of possessing it. 6. He has had before his eyes the *fear* of not possessing it. 7. And the *desire* he has felt of possessing it has operated on his will in the character of a *motive*, by the sole operation, or by the help of which, the act exercised by him, as above, has been produced.

10. Such has been the state of the case, of whatsoever nature the *pleasure* or the *pain* in question has been: whether of the *self-regarding* or of the *extra-regarding* class: if of the *extra-regarding* class, whether of the *social*, or of the *dissocial* order or *genus*.

11. Thus it is, that these intimately *connected*, but not otherwise *commensurable*, appellatives serve for the *exposition* of each other: no one of these having any superior genus, nor consequently being susceptible of the only species of *exposition* as yet in common use, *viz.* that which is called *a definition*, and is performed by the assignment of some word expressive of a *superior genus*, of which the word in question denotes a *species*.

12. To the *will* it is that the idea of a pleasure or an exemption applies itself in the *first* instance; in *that* stage its effect, if not conclusive, is *velleity*: by velleity, reference is made to the *understanding*, viz. 1. For striking a *balance* between the *value* of this *good*, and that of the *pain* or *loss*, if any, which present themselves as eventually about to stand associated with it: 2. Then, if the balance appear to be in its favour for the choice of *means*: thereupon, if *action* be the result, *velleity* is perfected into *volition*, of which the correspondent *action* is the immediate consequence. For the process that has place, this description may serve alike in *all* cases: *time* occupied by it may be of any length; from a minute fraction of *a second*, as in ordinary cases, to any number of years.

(n) [*eulogistic*] *(o)* [*dyslogistic*] *(p)* [*neutral.*] 1. *Eulogistic* or *dyslogistic*, any such appellative may in either case be termed *censorial*.

2. Thus it is that, in addition to the import which, in the character of a *simple term*, properly belongs to it, will be found involved in every such censorial appellation the import of at least one entire *proposition*: viz. a proposition expressive of a *judgment* of *approbation* or *disapprobation*, as above.

3. Various, and as yet seldom altogether determinate, are the *grounds* on which this judgment seems to have been framed: — 1. A supposed excess of *intensity* on the part of the desire: (See Nos. 1, 2, 4, 5, 11, 12, 13, 14.) 2. A supposed impropriety in the choice of the *subject*, on which the *act* from which the pleasure is expected to be derived is exercised: (See No. 2.) 3. A supposed impropriety in *the nature of the act*, *i. e.* in so far as the imputed impropriety has any intelligible grounds, a supposed *mischievousness* — a balance on the side of evil (*pathological* evil) on the part of its *consequences*. See the above, and the several other instances.

4. On this occasion, to take the case of a *dyslogistic* appellative, the error, in so far as there is any, consists in this: *viz.* that, on account of some *accidental* effect, which, on this or that occasion, has been observed to be produced by the *desire*, the whole corresponding group of *psychological* entities — *pleasure*, *interest*, *desire*, *motive* — are, on all occasions, by the undistinguishing and uneludible force of this condemnatory appellative, involved in one common and undistinguishing censure: and, *vice versâ*, when the censorial appellative is of the *eulogistic* cast, whatsoever *mischievous* effects are liable, and apt, to be produced by the desire, are covered and kept out of sight: whereas, to a truly enlightened, as well as sincerely benevolent mind, it will appear, that, on each individual occasion, it is by the probable *balance* in the account of *utility*, whether of *pleasure* or of *pain*, that the judgment, whether it be of *approbation* or of *disapprobation*, ought to be determined.

(q) [*impassioned.*] 1. Between such as are simply *censorial* and such as are moreover *impassioned*, the line will almost every where be necessarily and irremediably indeterminate: on the question to which of the two classes the appellative belongs, the decision therefore cannot but be in a proportionable degree arbitrary.

2. *Passion* being among the causes of wrong judgment and consequent *misconduct*, any intimation of the existence of any such feeling, in the breast of him by whom the appellative is applied, may on that score have its *practical* use.

3. Having, without the *form*, the *force* of an assumption, — and having for its object, and but too commonly for its effect, a like assumption on the part of the hearer or reader, — the sort of allegation in question, how

ill-grounded soever, is, when thus masked, apt to be more persuasive than when expressed simply and in its own proper form: especially where, to the character of a *censorial* adding the quality and tendency of an *impassioned* allegation, it tends to propagate, as it were by contagion, the passion by which it was suggested. On this occasion, it seeks and finds support in that *general* opinion, of the existence of which the eulogistic or dyslogistic sense, which thus, as it were by adhesion, has connected itself with the import of the appellative, operates as proof.

4. Applied to the several *springs of action*, and in particular to *pleasures* and to *motives*, these censorial and impassioned appellatives form no inconsiderable part of the *ammunition* employed in the *war of words*.

5. Under the direction of *sinister interest* and *interest-begotten prejudice*, they have been employed in the character of *fallacies*, or instruments of deception, by polemics of all classes:—by politicians, lawyers, writers on controversial divinity, satirists, and literary censors.

6. *Causes of the comparative numbers of censorial and neutral names of motives. Eulogistic* appellatives; in some instances abundant, in others rare or wanting: so likewise, *dyslogistic;* in some instances *both* abundant: *neutral* appellatives; in most instances either rare or wanting:—such are among the observations which the contents of this Table may be apt to suggest. Of so remarkable a diversity, where (it may be asked) are we to look for the cause? — *Answer.* In the *interest*, which, on the several occasions, in their character of makers and employers of language, men have understood themselves to have, in propagating the persuasion which, by the appellatives respectively in question, has been endeavoured to be impressed.—Of this proposition, the proof will, it is supposed, be seen in the following paper, entitled OBSERVATIONS.

N. B. Where on this occasion appellatives are said to be *wanting*, understand *single-worded* ones: by *combinations* of words, no assignable object for which appellatives may not be found.

(r) [*Compound Pleasures exemplified.*]

Example I. *Pleasures of the bottle.*—No. 1.—COMPONENT ELEMENTS, commonly conjoined in this aggregate, are: 1. *Pleasure of the palate;* viz. from the taste of the liquor. —2. *Pleasure of exhilaration;* viz. of what may be termed *physical* or *pharmaceutic* exhilaration:—*seat* of it, the nervous system in general (No 1.) — 3. *Pleasure of sympathy or good-will* (No. 10.) viz. as towards co-partakers, the compotators.

Example II. *Love*, (the passion). — COMPONENT ELEMENTS — 1. *Sexual desire* (No. 2.) 2. Do. enhanced by particular beauty. 3. *Desire of good-will* (No. 7.) viz. the good-will of the person beloved; including the indefinite train of *services*, of which it may be the imagined and expected source: 4. *Good-will* itself; viz. towards that same person (No. 10.) or say *sympathy:* viz. in contemplation of the qualities, intellectual or moral, ascribed to that same person, &c. &c.

Example III. *Love of justice.* — COMPONENT ELEMENTS—1. In so far as it is to the individual *in question*, that, in the instance in question, the benefit of justice accrues, *Desire of self-preservation* (No. 13.) 2. *Sympathy* (No. 10.) for this or that *other individual*, considered as being, on the occasion in question, or on other similar ones, liable to become a sufferer by the opposite *injustice.* 3. *Sympathy* (No. 10.) for *the community* at large, in respect of the interest which it has in the maintenance of *justice:* i. e. as being liable, in an indefinite extent, to become a sufferer by *injustice.* 4. *Antipathy* (No. 9.) towards any other person or persons, considered as profiting, or being in a way to *profit*, by the opposite *injustice.* 5. *Antipathy* (No. 9.) towards any other person, who, in the character of *a judge*, is considered as concerned, or about to be concerned, in giving *existence* or *effect* to the injustice.

Example IV. *Love of liberty:* viz. *constitutional liberty*, or rather (to speak more distinctly) *security.*—COMPONENT ELEMENTS—1. *Desire of self-preservation* (No. 13.) viz. against *misrule* and its effects. 2. *Sympathy* (No. 10.) viz. that which has for its object *the community* at large, considered as liable to be made to suffer from the misrule. 3. *Sympathy* (No. 10.) towards this or that *individual*, considered as being, or having been, or about to be, or liable to be, on the occasion in question, or other similar one, a particular *sufferer* from the misrule; —4. *Antipathy* (No. 9.) towards individuals, viz. in the character of lovers and supporters, creators or preservers, of misrule; and partakers, actual or expected, in the *fruits* of it. 5. *Love of power* (No. 5.) *ex. gr.* in respect of the influence exercised, — immediately or through the medium of the *understanding*, — on the *wills* of persons on the *same* side; or, in the way of *intimidation*, on the *wills* or *sensibilities* of persons on the *opposite* side.

In the same manner may be analyzed—and resolved into the *simple* and *elementary* pleasures, of which they are composed, — other *complex* pleasures, agreeing with, and differing from, one another, in endless variety, according to the nature of the *sources* from whence they are respectively derived: *ex. gr.* 1. Pleasures of the *ball-room:*—2. Pleasures of the *theatre:* —3. Pleasures of the *fine arts*, — whether severally produced, or conjunctively, in *modes*, *proportion*, and *groups* indefinitely diversifiable.

Note that,—according to the nature of the *instrument*, by means of which, or of the *channel*, through which, any such complex pleasure is considered as being capable of being experienced,—the *desire* may be resolvable into the *desire*, corresponding to this or that one in the catalogue of the more *simple* pleasures. For instance into (No. 4.) desire of *the matter of wealth* ;—(No. 7.) desire of *amity* ;—(No. 8.) desire of *reputation*.

II. OBSERVATIONS.

§ 1. *Pleasures and Pains the Basis of all the other Entities: these the only real ones ; those, fictitious.*

Among all the several species of psychological entities, the names of which are to be found either in the *Table of the Springs of Action*, or in the *Explanations* above subjoined to it, the two of which are as it were the *roots*, — the main pillars or *foundations* of all the rest, — the *matter* of which all the rest are composed — or the *receptacles* of that matter, — which soever may be the *physical image*, employed to give *aid*, if not *existence* to conception, —— will be, it is believed, if they have not been already, seen to be, Pleasures and Pains. Of *these*, the existence is matter of universal and constant experience. Without any of the rest, *these* are susceptible of, — and as often as they come *unlooked* for, do actually come into, — *existence:* without these, no one of all those others ever had, or ever could have had, existence.

True it is, that, when the question is — what, in the case in question, are the *springs of action*, by which, on the occasion in question, the mind in question has been operated upon, or to the operation of which it has been exposed, — the species of *psychological entity*, to be looked out for in the first place, is *the motive*. But, of the sort of *motive*, which has thus been in operation, no clear idea can be entertained, otherwise than by reference to the sort of *pleasure* or *pain*, which such *motive* has for its *basis:* viz. the pleasure or pain, the idea, and eventual expectation, of which, is considered as having been operating in the character of *a motive*.

This being understood, the corresponding *interest* is at the same time understood: and, if it be to the *pleasurable* class that the operating cause in question belongs, then so it is that, in its way to become *a motive*, the interest has become productive of *a desire:* if to the *painful* class, of a correspondent *aversion:* and thus it is, that, on the occasion in question, the operation of a motive of the kind in question, whatever it be (meaning a motive *to the will)*, having had existence, it cannot but be, that a corresponding *desire* or *aversion*, — and the *idea*, and *eventual expectation* at least, of a corresponding *pleasure* or *pain*, — and the idea and belief of the existence of a corresponding *interest*, — must also have had existence.

On this basis must also be erected, and to this standard must be referred, — whatsoever clear explanations are capable of being suggested, by the other more anomalous appellatives above spoken of ; such as *emotion*, *affection*, *passion*, *disposition*, *inclination*, *propensity*, *quality* (viz. *moral quality)*, *vice*, *virtue*, *moral good*, *moral evil*.

Destitute of reference to the ideas of *pain* and *pleasure*, whatever ideas are annexed to the words *virtue* and *vice*, amount to nothing more than that of groundless *approbation* or *disapprobation*. All language in which these appellatives are employed, is no better than empty declamation. A *virtuous disposition* is the disposition to give birth to *good* — understand always *pathological* good, — or to prevent, or abstain from giving birth to *evil*,— understand always *pathological* evil, — in so far as the production of the effect requires *exertion* in the way of *self-denial: i. e.* sacrifice of supposed lesser good to supposed greater good. In so far as the greater good, to which the less is sacrificed, is considered as being the good of *others*, the virtue belongs to the head of *probity* or *beneficence:* in so far as it is considered as being the good of *self*, to that of *self-regarding prudence*. (No. 13.) *Means selecting* is the name by which the other branch of prudence may be designated: viz. that which, being *subservient* in its nature, and being so with reference to some *interest*, is equally capable of being understood to be so, whether that interest be of the *self-regarding* class (No. 14.) or of the *extra-regarding*, viz. of the *social* (No. 10.) or of the *dissocial* class (No. 9.)

§ 2. *No Act, properly speaking, disinterested.*

If so it be, that, of the view here given of the causes of human action, the general tenor is conformable to the truth of things, then so it is, that, by means of it, divers psychological phænomena — divers phænomena of the human mind — which till now have been either not at all or but indistinctly perceived — phænomena of the most unquestionable importance with reference to practice — will, now for the first time, have become distinctly visible.

1. In regard to *interest*, in the most ex-

tended, — which is the original and only strictly proper sense, — of the word *disinterested*, no human act ever has been, or ever can be, *disinterested*. For there exists not ever any voluntary action, which is not the result of the operation of some *motive* or *motives:* nor any motive, which has not for its accompaniment a corresponding *interest*, real or imagined.

2. In the only sense in which *disinterestedness* can with truth be predicated of human action, it is employed in a sense more confined than the only one which the etymology of the word suggests, and can with propriety admit of: — what, in this sense, it must be understood to denote, being — not the absence of *all* interest, — a state of things which, consistently with voluntary action, is not possible, — but only the absence of all interest of the *self-regarding* class. Not but that it is very frequently predicated of human action, in cases, in which divers interests, to no one of which the appellation of *self-regarding* can with propriety be denied, have been exercising their influence: and in particular (No. 9.) *fear of God* or *hope from God*, and (No. 8.) fear of *ill-repute* or hope of *good repute*.

3. If what is above be correct, the most *disinterested* of men is not less under the dominion of *interest* than the most *interested*. The only cause of his being styled *disinterested* is — its not having been observed that the sort of *motive* (suppose it *sympathy* for an individual, or a class of individuals) has as truly a corresponding *interest* belonging to it, as any other species of motive has. Of this contradiction, between the truth of the case, and the language employed in speaking of it, the cause is — that, in the one case, men have not been in the habit of making, — as in point of consistency they ought to have made, — of the word *interest*, that use which, in the other case, they have been in the habit of making of it.

4. At the same time, by its having been as properly, and completely, and indisputably, the product of *interest*, as any other action ever is or can be, whatsoever *merit* may happen to belong to any action, to which, in the loose and ordinary way of speaking, the epithet *disinterested* would be applied, is not in any the slightest degree lessened.

Not that, in the case where *sympathy* is the motive, there is less *need* of — nor even less actual *demand* for — such a word as *interest*, than in the case where the motive and interest are of the *self-regarding* class. Not but that, even in the case of *sympathy*, *conjugates* of the word *interest* are employed, and even the word itself. Witness these expressions among so many — *There stands a man, in whose behalf I feel myself strongly interested: a man, in whose fate — in whose sorrows — I take a lively interest, &c. &c.*

§ 3. *Appellatives Eulogistic, Dyslogistic, and Neutral — Cause of their comparative penury and abundance, as applied to Springs of Action.*

Of the declared opinions of such of the several members of the community, by whom respectively, in relation to the subject in question, an opinion or judgment of *approbation* or *disapprobation* is expressed, is that quantity of *the force of public opinion*, otherwise termed *the force of the popular or moral sanction*, which is thus brought to bear upon that subject, composed and constituted. In and by any act, by which intimation is given of such his judgment, in quality of member of the tribunal, by which that judgment is considered as pronounced, a man may be considered as delivering his *vote*. On the present occasion, the subject-matter of this judgment will be seen to be the several *springs of action*, by which, on the several occasions in question, human *conduct* — human *action* — is liable to be influenced and determined: — these several *springs of action*, considered as being in operation, and as giving birth to whatsoever *acts*, or modes of *conduct*, may respectively be the result.

On and by the delivery of this vote, in so far as it is with himself that it originates, he makes as it were a *motion*, which, by the concurrence of as many as join with him in the sentiment so expressed, is formed into a *judgment;* a judgment, pronounced by that portion, be it what it may, of the tribunal of public opinion, which the persons so concurring compose.

I. In this, as in every other instance, in which any thing is either done or said, whatsoever is done or said is the result of *interest:* of *interest* in this or that one of its shapes, as above explained — *(benevolence — sympathy* not excluded) — operating upon him by whom it is done or said, in the character of a *motive*. In this interest will be seen the cause of the several diversities above spoken of, and which will now be in a more particular manner brought to view.

I. Case 1. *Eulogistic appellatives, none:* — for the numbers, see the Table.

Instances. (No. 1.) Desire of food and drink. (No. 2.) Sexual desire. (No. 3.) Physical desires in general. (No. 5.) Desire of power. (No. 6.) Curiosity. (No. 12.) Love of ease. (No. 13.) Desire of self-preservation. (No. 14.) Personal interest in general.

Cause or *Reason* of this deficiency. — Men in general do not derive any advantage, one man from what is done by another, for the satisfaction of those several desires.

Objection, in the case of No. 2. In this case, it is on what is done by some other person for the gratification of this desire, that, on the part of each person, the correspondent

gratification depends. — *Answer.* True; but, on the occasion of those more or less elaborated discourses, of which language, as it stands expressed in and by means of its permanent signs, is composed, it does not answer a man's purpose, to bring it to view in any state, other than that in which, being, as abovem entioned (p. 10), combined with other desires, it enters into the composition of that *complex* desire, which admits of the *neutral*, or rather *eulogistic* appellative — *love*.

II. Case 2. *Eulogistic abundant.* — *Instances.* (No. 4.) Love of the matter of wealth: — (No. 8.) Regard for reputation: — (No. 9.) Fear of God: — (No. 10.) Good-will towards men. *Cause* or *Reason.* Of all these several desires, there is not one which it is not common for one man to behold an advantage to himself, in the creating and increasing, in the breasts of other men. But, as to *Love of the matter of wealth*, see below, Case 7.

III. Case 3. *Dyslogistic wanting.* — *Instances*, none. — *Cause* or *Reason.* There exists not any species of desire such, that by the pursuit of it, *i. e.* of the object of it, it does not frequently happen, that one man's *interest* is opposed, and his *desires* frustrated, by the interests and corresponding desires and pursuits of other men.

IV. Case 4. *Dyslogistic abundant.* — *Instances:* generally speaking, all fourteen, with little distinction worth noticing. *Cause* or *Reason*, the same as just mentioned.

For *sexual desire*, when taken by itself, *dyslogistic* appellatives may be observed to be in a more particular degree abundant. *Cause* or *Reason.* This may be seen in — 1. The intensity of the *desire;* — 2. Its aptitude to enter into *combination* with others, as above; — 3. The importance of the *consequences*, with which the gratification of it is liable to be attended; — 4. The variety of ways, in which the *interests* of different persons are liable to be put in opposition to each other, by the force of it. 1. Of two *rivals*, each is thus, by the *interest* correspondent to this *desire*, prompted to vent his antipathy against his opponent, by whatsoever names of reproach he can find applicable. 2. *Husbands* find themselves annoyed by it in the persons of *Gallants:* and so, in a corresponding manner, *Wives.* 3. *Parents* and other *Guardians*, in the persons of their *Wards.* 4. *Legislators*, *Moralists*, and *Divines*, finding it operating, to so great an extent, and with so efficient a force, in opposition to their views and endeavours, make unceasing war upon it. The corresponding *compound* or *mixed* desire (*love*), being protected by its necessity to the preservation of the species, and thence by public opinion, the form of invective is by this means directed exclusively against the *simple* desire; which however is not only the basis, but the indispensably necessary basis, of the whole compound.

V. Case 5. *Neutral abundant.* — *Instances*, none. — *Cause* or *Reason.* Seldom, comparatively speaking, has a man occasion to speak of a *motive* as operating, or of a *desire*, &c. as having place, in any human breast — whether his own or any other — without feeling an interest in presenting it either to the approbation or to the disapprobation of those for whose ear or eye his discourse is intended.

VI. Case 6. *Neutral wanting.* — *Instances*, many: understand *single-worded* appellatives, which are the only ones here in question: viz. (No. 2.) *Sexual desire:* — (No. 3.) *Physical desire* in general: — (No. 4.) *Love of money*, or rather of the *matter of wealth:* — (No. 5.) *Love of power;* — unless *Ambition*, as well as *Aspiringness*, be regarded as purely neutral: — (No. 6.) *Desire of Amity:* — (No. 7.) *Regard for reputation:* — (No. 12.) *Love of Ease:* — (No. 14.) The desire corresponding to *Personal interest* at large.

VII. Case 7. *Eulogistic and Dyslogistic, both abundant.* — *Instance.* (No. 4.) *Love of the matter of wealth.* — *Cause* or *Reason.* Under the two respective heads, indication has, in some measure, been already given of it. What remains to be given is — an indication of the different *circumstances* in which judgments thus opposite, — the judgment having moreover in each case *emotion* for its not unfrequent accompaniment, — take their rise.

1. As to *disbursement* and *non-disbursement*, in so far as *acquisition* has already taken place. Some persons there will commonly be, connected with the person in question, by this or that circumstance, the effect of which has been to render it their *interest*, that in this or that particular *way*, on this or that particular *occasion*, he should *disburse:* in speaking of *disbursement*, by these it is that appellatives of the *eulogistic* cast will naturally have been employed: — so, on the other hand, in speaking of *non-disbursement*, appellatives of the *dyslogistic* cast. Others there will have been, by whose connection with that same person it will have been rendered their interest, that, in the *way* in question, or the *occasion* in question, he should *not disburse:* in speaking of *non-disbursement*, by these it is that appellatives of the *eulogistic* cast will naturally have been employed: in speaking of *disbursement*, appellatives of the *dyslogistic* cast.

2. As to *acquisition* and *non-acquisition.* Rivality and competition of interests apart, — generally speaking, of those who, by any tie, whether of *self-regarding* interest or *sympathy*, are more or less intimately connected, or disposed to be connected, with the party in question, it is the interest, that the quantity of the matter of wealth *possessed* by him — (*of wealth*, of which an inseparable accompaniment is *power*) — and thence that the quantity

of it *acquired* by him should at all times be as great as possible. But, so far as concerns *acquisition*, finding *that* operation, necessary as it is to human existence, loaded notwithstanding, to wit, by the influence of the above-mentioned causes, with the sort of reproach involved in the import of the several articles, in the long list of *dyslogistic* appellatives exhibited in the Table, — and at the same time not provided with *eulogistic*, nor so much as with *neutral* appellatives, — thence, in their endeavours to obtain for it the approbation of their hearers or readers, — and for that purpose to elude the force of the dyslogistic appellatives, which in a manner lie in wait for it, unable to find for the desire in question any appellative, which, by its *eulogistic* quality, would be rendered applicable to their purpose, — men put aside *that* species of desire, and look out for some other, which, being furnished with *eulogistic* appellatives, shall, at the same time, be nearly enough resembling to it, or connected with it, to be made to pass instead of it. Under these circumstances, *labour* being necessary to the acquisition of *wealth*, and at the same time equally necessary to the preservation of *existence*, thus it is that, disguised under the name of *desire of labour*, the *desire of wealth* has been, in some measure, preserved from the reproach which, with so much profusion, has been wont to be cast upon it, when viewed in a direct point of view, and under its own name.

Meantime, as to *labour*, although the desire of it — of labour *simply* — desire of labour *for the sake of labour*, — of labour considered in the character of an *end*, without any view to any thing else, is a sort of desire that seems scarcely to have place in the human breast; yet, if considered in the character of a *means*, scarce a desire can be found, to the gratification of which *labour*, and therein *the desire of labour*, is not continually rendered subservient: hence again it is, that, when abstraction is made of the consideration of the *end*, there scarcely exists a desire, the name of which has been so apt to be employed for *eulogistic purposes*, and thence to contract an *eulogistic signification*, as the appellative that has been employed in bringing to view this *desire of labour*. *Industry* is this appellative: and thus it is, that, under *another* name, the *desire of wealth* has been furnished with a sort of *letter of recommendation*, which, under its *own* name, could not have been given to it.

Aversion — not *desire* — is the emotion — the only emotion — which *labour*, taken by itself, is qualified to produce: of any such emotion as *love* or *desire*, *ease*, which is the *negative* or *absence* of labour — *ease*, not *labour* — is the object. In so far as *labour* is taken in its proper sense, *love of labour* is a contradiction in terms.

Frugality, *economy*, — these, it is true, are *eulogistic* terms; but by these, *preservation* of the quantity of wealth acquired, — *preservation* only, not *acquisition*, — is the thing indicated. Add to the above the terms *thrift* and *thriftiness*: for if, in the import of these two latter terms, *acquisition* be in any way included, it is only in a confined way, and, as in the before-mentioned cases, as it were by *stealth*. *Insinuated* it is; *declared* it can scarce be said to be. To *thrive* is the property — the *physical* property — of a plant or an inferior species of animal. Applied to a human being — employed in a psychological sense — it is indicative of *prosperity in general* — *of happiness in general*; — and not in the shape of any particular pleasure, reaped in and from the gratification of the correspondent particular desire.

VIII. Case 8. *Eulogistic appellatives how supplied.* — In some instances, in default of a *single-worded* one, *many-worded* appellatives of the eulogistic cast may be formed, by adding, to a neutral, or but faintly dyslogistic appellative, an eulogistic adjunct. — *Examples*:

1. (No. 3.) *Dyslogistic* appellative, *sensuality*: *eulogistic* adjunct, *refined*. 2. *Neutral*, though but faintly *dyslogistic* appellative, *luxury*: *eulogistic* adjunct, *elegant*: and note in this view the phrase *luxury of beneficence*. 3. (No. 5.) *Neutral*, or but *faintly dyslogistic* appellative, *ambition*: *eulogistic* adjunct, *honest*, *generous*, *noble*, *laudable*, *virtuous*, &c. 4. (No. 7.) *Dyslogistic* appellative, *pride*: *eulogistic* adjunct, *honest*, *generous*, &c. as above.

N. B. Some instances there are, in which the quantity of odium heaped upon the desire by this or that dyslogistic appellative, is so great, as not to be overbalanced or so much as counterbalanced by any eulogistic adjunct that can be set in the scale against it. By any such additament, the expression would be made to wear the appearance of a self-contradictory one. — *Examples*: (No. 1.) *Dyslogistic* appellatives, *gluttony*, *drunkenness*. (No. 2.) *Dyslogistic* appellatives, *lewdness*, &c. (No. 7.) *Dyslogistic* appellative, *servility* (No. 11.) *Neutral* appellative, *antipathy*: *dyslogistic* appellative, *malignity*. In company with none of these would any such epithets as *honest*, *generous*, *noble*, *virtuous*, *laudable*, &c. be found endurable.

§ 4. Good *and* Bad—*Attributives, applied to Species of Motives: Impropriety of the application — its Causes and Effects.*

As there is not any sort of *pleasure*, the enjoyment of which, if taken by itself, is not a *good* — (taken by itself, that is, on the supposition that it is not *preventive* of a more than equivalent *pleasure*, or *productive* of more than equivalant *pain*) — nor any sort

of *pain*, from which taken in like manner by itself, the *exemption* is not a good; — in a word, as there is not any sort of *pleasure* that is not itself a good, nor any sort of *pain* the exemption from which is not a good, — and as nothing but the expectation of the eventual enjoyment of pleasure in some shape, or of exemption from pain in some shape, can operate in the character of a *motive*, — a necessary consequence is, that if by *motive* be meant *sort* of motive, there is not any such thing as a *bad* motive: no, nor any such thing as a motive which, to the exclusion of any other, can with propriety be termed a *good* motive. Incontestable as the correctness of these positions will be found to be, perpetual are the occasions on which, in discourses on *moral*, *political*, and even *legal* subjects, *motives* are distinguished from, and contrasted with, one another, under the respective names of *good* motives, and *bad* motives.

From this speculative error, practical errors of the very first importance may be seen to have taken their rise. In the instance of any person, to assign, as the cause by which any act of his has been produced, any motive to which the adjunct *bad* is wont to be prefixed, is among the number of acts, for which, under the description of *criminal offences*, men are held punishable. — Punishable? — Yes: and actually and habitually punished: — when perhaps, in the very nature of the case, one of the sort of motives thus denominated, is the only one by which the act in question, the existence of which is unquestionable, could have been produced.

In the composition of this error, what there is of truth seems to be this: *viz.* that, as there are some motives, the force of which, they being either of the *self-regarding*, or of the *dissocial* class, is more liable than the force of those of the remaining class, viz. the *social* class, to operate in the breast of each particular individual, to the prejudice of the general good — of the interest of mankind at large; so, on the other hand, there are others, — and more particularly among those which belong to the *social* class, — which, in a particular degree, are capable of being employed, and with success, in checking the operative force of the above *comparatively* dangerous motives, and restraining it from applying itself with effect to the production of acts of the tendency just mentioned.

But, if in any such observations a sufficient warrant were supposed to be found, for attaching to a motive of the former description the appellative of a *bad* motive, or to a motive of the other description any such appellative as that of a *good* motive, — and for acting accordingly; *viz.* by *punishing* a man as often as his conduct was deemed to have for its cause one of these *bad* motives, or *rewarding* him as often as it was found to have for its cause any one of those *good* motives, — of any such error, supposing it universally embraced and permanently acted upon, the destruction of the whole human race would be the certain consequence. — "*Regulators* are good things; *mainsprings* are bad things: therefore, to make a good watch, put into it *regulators*, two, or as many more as you please, but not one *mainspring*." Exactly as conducive as such notions would be to *good watchmaking*, would be to *good government* the notion that men's conduct ought not to be influenced by any motives but those of the sort commonly called *good motives*; — that it ought not ever to be influenced by any motives of the sort commonly called *bad motives*.

A measure of government is brought to view: — by certain persons it is *opposed* — the *motives* by which they are engaged in the opposition to it are, it is said, *bad* motives: — *conclusion*, it ought to be *adopted*.

A measure of government is brought to view: — by certain persons it is *supported*: — the *motives* by which they are engaged in the support of it are, it is said, *bad* motives: — *conclusion*, it ought to be *rejected*. — By the influence of arguments such as these, how frequently has a bad measure been adopted, a good measure thrown out!

For an alleged wrong, a person is under prosecution: the *motives* by which the *prosecutor* is engaged in the prosecution are, it is said, *bad* motives: *lucre*, for example, or *selfish ambition*, or *vengeance*: therefore the defendant ought to be acquitted, or the prosecution quashed. — By the influence of arguments such as these, how frequently has a wrongdoer been exempted from the infliction due to his transgression! — exempted, more or less, either from *punishment*, or from the burthen of *satisfaction*, in a pecuniary, or in whatever other shape it has been due! And note, that for the sort of imputation of which this argument is composed, seldom can there be any difficulty in finding a plausible ground, or even a true one.

Note, however, that, from the nature of the *motive*, the *mischief*, produced by an action of a *mischievous* species, is really liable to receive very considerable increase. But it is not from the sort of motive which is most apt to be spoken of as a *bad* motive, that in this case the mischief will always receive the greatest increase. The *desire* of acquiring the *matter of wealth*, — let this, as it so commonly is, be set down in the catalogue of *bad motives*; yet, by those who bear hardest upon it, it will hardly be deemed so bad a motive as *revenge*. But there are offences, of which, when produced by the desire of the matter of wealth, the mischief is by far greater than that of an offence of the same

denomination produced by revenge. Take for example *murder* committed in prosecution of a plan of *highway robbery*, and murder produced by *a private quarrel*. In the *first* case, in the *alarm* and *danger*, — in which consists by far the greater part of the *mischief*, — *all* are sharers, whose occasions happen to call them that way: in the *second* case, none but those, to whom it might happen to offer to the murderer a *provocation*, equally irritating with that which gave occasion to his crime.*

Of all *motives*, actual or imaginable, the very *best*, if goodness were to be measured by necessity to human existence, would be the motives that correspond respectively to the desires of *food* and *drink* (No. 1.) and to *sexual desire* (No. 2.) Yet, to any such desire as that of *eating* or *drinking*, by those by whom so much is said of *good motives*, and so much stress is laid upon the degree of *goodness* of a man's *motives*, admittance would scarcely have been given into their list of *good motives:* and as to *sexual desire*, taken by itself, so bad a thing is it commonly deemed in the character of a motive, or even in the character of a desire, that all the force which it is in the power of human exertion to muster has, to a great extent, been employed in the endeavour to extinguish it altogether.

Under the general name of *self-regarding interest* (No. 14.) are comprisable the several *particular* interests, corresponding to all the several *motives*, that do not belong either to the *social* class (No. 10.) or the *dissocial* class (No. 11.) Weed out of the heart of man this species of *interest*, with the corresponding *desires* and *motives*, the thread of life is cut, and the whole race perishes. — *Self-regarding interest* — has it any where a place in the catalogue of *good motives?* Oh no: scarce any where as yet is it known by any such unimpassioned, any such neutral name. *Self-interest, selfishness, interestedness*, these are the only names it is known by: and, to any of these to attach *good* — any such epithet as *good* — would be a contradiction in terms.

Fear of God (No. 9.) — *Sympathy* (No. 10.) — *Love of reputation* (No. 8.) — to these, if to any, would be assigned a place — and, if not the only place, the highest place — in the catalogue of *good* motives. Yet, in a savage state (to look no higher), men have existed, from the very first, in countless multitudes, with scarce any perceptible traces in their conduct, of the influence or existence of any such motives: at any rate, in the character of motives, capable of operating with efficiency, as a *check* to excess, in the action of the *self-regarding* and *dissocial* motives.

Moreover, of all those *good* motives, the goodness or badness of the *effect* depends altogether upon the *direction* in which, on each occasion, they act, — upon the nature of the effects, — the consequences, *pleasurable* or *painful*, of which they become *efficient causes* or *preventives*. 1. *Fear of God.* The mischiefs of which this motive has been productive are altogether as incontestable as, and still more *distinctly* visible than, the good effects: witness the word *persecution*, with the miseries which it serves to bring to view. 2. *Sympathy.* Of the operation of sympathy, in so far as the object of it is but a single individual, the effects, supposing it to operate alone and unchecked, may be neither better nor worse than those of *selfishness:* of these effects, the *degree* of its efficiency being given, the *goodness* depends upon the *extent* to which they reach: and that extent — such is its amplitude — has at one end *unity*, at the other, the number of the whole of the human race, — or rather of the whole sensitive race, all species included, — present and future. 3. *Love of reputation. Infanticide*, when committed by the mother of an illegitimate offspring, has no other motive for its cause. *Murder* committed upon the body of any other individual in whose agency, in the way of testimony or any other, a man beholds a cause of life in respect of reputation, is equally capable of being produced by the same cause. *Conquest* — a short word for the aggregate of all the crimes and all the mischiefs that man is capable of committing or suffering by, — in particular, for *murder*, *robbery*, and *violence* in every other imaginable shape, committed all of them upon the very largest scale,—is, even without any such aid as that of *love of power*, *love of the matter of wealth*, or *antipathy*, capable of being produced by this same motive. See more on this head in Introduction to Principles of Morals and Legislation, ch. *Motives.*

§ 5. *Proper Subjects of the Attributives* Good *and* Bad, *are Consequences, Intentions, Acts, Habits, Dispositions, Inclinations, and Propensities; so of the Attributives* Virtuous *and* Vitious, *except Consequences: how as to Interests and Desires.*

Consequences and *intentions*, — *intentions*, considered in respect of the *consequences*, to the production of which they are directed, or at any rate in respect of the consequences which, at the time of the intention, a man actually *had*, or at least *ought* (it is supposed) to have had *in view*, — these, together with the *acts*, which the *intentions* in question are considered as having been directed to the production of, or as having a *tendency* to produce, — will (it is believed) be seen to be the only subjects, to which, in the character of *attributives*, such adjuncts as *good* and *bad* can either with speculative propriety, or

* See Introd. to Morals and Legislation, ch. *Motives.* Dum. Traité de Législation.

without danger of practical error, in so far as *acts* and *springs of action* are concerned, be attached.

To *motives* they cannot, without impropriety, be attached:—viz. for the reasons already exhibited at large.

For the like reasons, neither can *bad* be attached to *pleasures*, or to *exemptions* (viz. from pain); nor *good*, to *pains*, or to *losses* (viz. of *pleasure*.)

For the like reasons, neither can *vitious* be attached to *pleasures*, any more than *virtuous* to *pains*.

For the like reasons, neither can *bad* be attached to any species of *interests*,—nor therefore *good*, to any species of interest, to the exclusion of any other.

Of late years, though any such expression as *good interest* has hardly ever been seen or heard, yet the expression *best interests*—chiefly in the *rhetorical* or other *impassioned* style, is become a common one.

According to analogy, for the same reasons, neither should *vitious*, any more than *bad* or *good*, be attached to *desires*, *aversions*, or *propensities*. But, when the word *desire* is employed, it is commonly with reference to some *act*—which, for the gratification of the *desire*, the person in question is considered as having it in contemplation to exercise: and,—forasmuch as, in respect of *consequences* and *intentions*, the adjuncts *good* and *bad* are, in strictness of speech, and without any danger of leading to error, properly as well as continually, attached to *acts*,—thence it is that, in as far as any *act*—any *sort* of act, or any individual *act*—to which those epithets may with propriety be attached, is in view, these same epithets may, without impropriety, as in practice they are continually, be applied to *desires*.

So likewise the epithets *vitious* and *virtuous;* as, accordingly, the epithet *vitious* frequently is; as, also, sometimes the epithet *virtuous*, though not with equal frequency.

To *dispositions*, *inclinations*, and *propensities*,—*vitious* and *virtuous*, as well as *bad* and *good*, are, and with similar propriety, frequently applied in practice.

To *aversions* the occasion for applying them has not, in the instance of any one of those four attributives, been wont to present itself with any considerable degree of frequency.

In respect of the relation that has place between the import of the word *act* and the import of the word *habit*,—we hear of *good* and *bad*, *virtuous* and *vitious habits*,—as properly, and at least as frequently, as of *good* and *bad*, *virtuous* and *vitious acts*.

Applied to *interests*, in the character of a *dyslogistic* epithet, instead of *bad* or *vitious*, we have *sinister:—eulogistic*, except, as above, *best*—the superlative of *good*—we have none: in *Ethics*, *sinister* has not, as in *Anatomy*, and thence in *Heraldry*, *dexter* for its accompaniment.

On this occasion, by *sinister*, if any thing determinate is meant, is meant operating, or tending to operate, in a sinister *direction: i. e.* in such a direction as to give birth to a *bad*, *alias* a *vitious* act.

The sorts of bad or vitious acts, of which *sinister interest* is, in practice, commonly spoken of as the efficient cause, seem to be more frequently, if not exclusively, such as come under the denomination of acts of *improbity*, than such as come under the denomination of acts of *imprudence:* such as are considered as injurious to the interests of other persons, than such as are considered as injurious to the interest of the agent himself:—but it is in the accidental course of practice, and not in the nature of the case, that the restriction will (it is believed) be seen to have originated.

§ 6. *Causes of Misjudgment and Misconduct—Intellectual Weakness, inborn and adoptive—Sinister Interest, and Interest-begotten Prejudice.*

As between the two main departments of the human mind, viz. the *volitional* and the *intellectual*—according as it is the one or the other, the state of which is under consideration, as being subjected or exposed to the operation of *interest*,—termed, in so far as the direction in which it is considered as operating is considered as *sinister*, *sinister interest*, as above,—the result of the operation will receive a different description: in so far as it is the *volitional* department—in so far as it is the *will—delinquency*, with or without *immorality*,—or *immorality*,—with or without *delinquency*,—is the result: in so far as it is the intellectual faculty, *misjudgment*—with or without *misconduct*—is the result. As to *error*, though mostly employed as synonymous to *misjudgment*, it is not unfrequently employed as synonymous to *misconduct*, and therefore not fit to be employed in contradistinction to it.

Indigenous intellectual weakness—*adoptive* intellectual weakness—or, in one word, *prejudice—sinister interest* (understand self-conscious sinister interest)—lastly, *interest-begotten* (though not self-conscious) *prejudice*—by one or other of these denominations, may be designated (it is believed) the cause of whatever is on any occasion amiss, in the opinions or conduct of mankind.

Of these several distinguishable psychological causes of misjudgment and misconduct, the mutual relations may be stated as follows: Of the *intellectual department*, the condition—of the *intellectual faculties*, the operation—is, on every occasion, exposed to the action and influence of the *sensitive* and the *volitional: judgment—opinion*—is liable to be acted upon, influenced, and perverted, by *in-*

terest. On the occasion in question, suppose *misjudgment* alone, or *misconduct* alone, or both together, to have had place; — suppose a judgment more or less erroneous to have been pronounced — an opinion in some way or other erroneous to have been formed. In this case, in the production of the result, as above, *interest* may have had, or may not have had, a share: if no, the result has had for its cause mere *weakness* — intellectual weakness; — whether it be *indigenous* or *adoptive*, i. e. *prejudice:* if yes, then whatsoever of *misconduct* may happen to be included in it, has had for its cause, either *sinister interest* (i. e. *self-conscious* sinister interest), or *interest-begotten prejudice.*

§ 7. *Simultaneously operating Motives — co-operating, conflicting, or both.*

Seldom (it will readily be seen) does it happen, that a man's conduct stands exposed to the action of no more than one motive. Frequently, indeed — not to say commonly — does it happen, that, on one and the same occasion, it is acted upon by a number of motives, acting in opposite directions: in each of those two opposite directions respectively, sometimes by one, sometimes by more than one motive: and, on every such occasion, be it what it may, the action is, of course, the result of that one motive, or that group of simultaneously operating motives, of which, on that same occasion, the force and influence happen to be the strongest.

Be this as it may, on every occasion, *conduct* — the *course* taken by a man's conduct — is at the absolute command of — is the never-failing result of — the *motives*, — and thence, in so far as the corresponding interests are perceived and understood, of the corresponding *interests*, — to the action of which, his mind — his will — has, on that same occasion, stood exposed.

Employ the term *free-will* — to the exclusion of the term *free-will*, employ the term *necessity* — in respect of the truth of the above observations, the language so employed will not be found to be expressive of any real difference.

§ 8. Substitution of Motives. *Acts produced by one Motive, commonly ascribed to another. — Causes of this misrepresentation.*

The sort of motives, to the influence of which a man would in general be best pleased that his breast should be regarded as most sensible, — this, for the present purpose, may serve for the explanation of what is meant by *good* motives: the reverse may serve for *bad* motives. In his dealings with other men, it is seldom, however, that a man is not exposed to the *conjunct* action of motives, more than one. In so far as this sort of concurrence is observable, the sort of motive to which a man's conduct will be apt to be ascribed in preference, will vary with the relative position of him to whom, on the occasion in question, it happens to speak or think of it. The *best* motive that will be recognised as capable of producing the effect in question, is the motive to which the man himself, — and, in proportion as their dispositions towards him are amicable, other men in general, — will be disposed to ascribe his conduct, and accordingly to exhibit it in the character of the sole efficient cause, or at the least as the most operative among the efficient causes, by which such his conduct was produced.

Things being in this state, — if, among the causes by which the conduct in question was actually produced, a motive, of a complexion sufficiently respected, be to be found, this is the motive, to which, — at least in the character of a predominant one, — but most naturally, because most simply, in the character of *the* exclusively operative one, the conduct will be ascribed. But, if no such sufficiently respected motive can be found, then, instead of the actual motive, some such other motive will be looked out for and employed, as, being sufficiently favourable, shall, by the nearness of its connexion with the actual one, have been rendered most difficultly distinguishable from it. To speak shortly, if the actual motive do not come up to the purpose, another will, in the account given of the matter, be *substituted* to it: or, more shortly still, the motive will be *changed.*

And so *vice versa* in the case of *enmity.*

Thus it is that, for example, in political contention, no line of conduct can be pursued by either of two parties, but what, by persons of *the same* party, is ascribed to *good* motives; by persons of *the opposite* party, to *bad* motives: — and so in every case of *competition*, which (as most such cases have) has any thing in it of enmity.

On any such occasion, the motive which, though but one out of several actual and co-operating motives, or though it be but, as above, a *substituted* motive, is thus put forward, may be designated by the appellation of *the covering motive:* being employed to serve as a *covering*, to whatsoever actually operating motives would not have been so well adapted as itself to the purpose in view.

Follow a few examples :—

I. (No 1.) *Desire* corresponding to *the pleasures of the palate: Eulogistic covering, sympathy:* viz. as implied in some such expression as *love of good cheer — love of a social bowl* or *glass.* N.B. For pleasure of this sort taken by itself — *i. e.* for solitary gratification in this shape — a *covering* of the eulogistic cast would scarcely be to be found.

II. (No. 2.) *Sexual desire: Eulogistic covering, love:* viz. the *compound* affection, of which

the *component elements* are brought to view as above. To the single desire of having children, is the sexual intercourse ascribed by Rome-bred lawyers in the case of marriage: a desire for which there is no place, but in the breasts of the comparatively few who are in a state of relative affluence. *After* birth, — in how high a degree soever the child is an object of *love*, — *before* birth, to indigent parents, the same child could scarcely have been an object of *desire*.

III. (No. 4.) *Desire of the matter of wealth: Eulogistic covering, industry:* a desire, as above, which, if by it be meant the *desire of labour simply*, and for its own sake, has no existence.

(No. 5.) *Love of power:* — *Eulogistic coverings:* 1. *Love of country* — a man's *own* country, *i. e.* sympathy for the feelings of its inhabitants — present, or future, or both — taken in the aggregate. 2. *Love of mankind, philanthropy: i. e.* sympathy for the human race taken in the aggregate: such being the effects, to the production of which the exercise of power will, whether it *be* or no, be *said* to be directed. 3. *Love of duty:* another impossible motive, in so far as *duty* is understood as synonymous to *obligation*. An act, the performance of which is seen or supposed to be amicable to mankind at large, or to his own countrymen in particular — any such act a man may *love* to do, either on that consideration, or on any other: but, be it which it may, and let him find ever so much pleasure in the doing of it, what is not possible is — that a man should derive any pleasure from any such thought as that of being *forced* to do it. 4. *Sense of duty*. By this, — if by it be meant any thing but the *love of duty* as above, — will be meant *fear* of the several pains, which, in the character of *evil consequences* to the individual in question, may (as it appears to him) befall him, in case of a neglect on his part, in relation to that same duty: — fear of *legal punishment*, fear of *loss of amity* at the hands of this or that individual — fear of *loss of reputation* — fear of the wrath of God.

IV. (No. 7.) *Desire of amity:* viz. of obtaining or preserving a share, more or less considerable, in the *good-will*, and therein in the *eventual good offices*, of this or that particular individual. *Coverings:* 1. *Sympathy* at large, as towards that same individual. 2. *Gratitude*, as towards that same individual: *i. e. sympathy* produced by reflection on such or such benefits *already* received at his hands.

6. (No. 11.) *Antipathy; — ill-will:* viz. towards this or that particular individual. — In so far as prosecution, whether at the bar of a *legal* tribunal, or at the bar of *public opinion*, has been the instrument employed in the gratification of the desire, — *Covering*, *public spirit* (No. 10.); or *love of justice* (the compound affection) as above. So, — if the object, in which a gratification for the desire is sought, be an act of enmity at large, exercised without any such warrant, — the action may perhaps still, by the agent in question, or even in his behalf by a friend, be termed an act of *justice*, viz. of that justice, which is exercised by the infliction of suffering on a person to whom, with or without sufficient ground, misconduct in some shape or other has been imputed.

Of these six species of *desires* and *motives*, by the operation of which so large a portion of the business of human life is carried on, it is not very often that any one will, either by the man himself, or even by any other person, in so far as such other person speaks in the character of his friend, be recognised in quality of so much as *a co-operating cause*, much less as *the sole cause*, of the effect which, by the conjunct, or perhaps sole operation of it, has been produced. These *desires* and *motives* may accordingly be considered as *the unseemly parts of the human mind*. Of the sort of *fig-leaves*, commonly employed for the covering of them, specimens have now been given, as above.

A

FRAGMENT

ON

GOVERNMENT;

OR A

COMMENT ON THE COMMENTARIES:

BEING

AN EXAMINATION OF WHAT IS DELIVERED ON THE SUBJECT OF GOVERNMENT IN GENERAL,

IN THE

INTRODUCTION TO SIR WILLIAM BLACKSTONE'S COMMENTARIES.

WITH

A PREFACE,

IN WHICH IS GIVEN A CRITIQUE ON THE WORK AT LARGE.

BY JEREMY BENTHAM, ESQ.
OF LINCOLN'S INN.

" Rien ne recule plus le progrès des connoissances, qu'un mauvais ouvrage d'un Auteur célèbre : parce qu'avant d'instruire, il faut commencer par detromper."
MONTESQUIEU, *Esprit des Loix*, L. XXX. Ch. XV

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PREFACE

TO THE

FIRST EDITION, PUBLISHED IN 1776.

THE age we live in is a busy age; an age in which knowledge is rapidly advancing towards perfection. In the natural world, in particular, every thing teems with discovery and with improvement. The most distant and recondite regions of the earth traversed and explored — the all-vivifying and subtle element of the air so recently analyzed and made known to us, — are striking evidences, were all others wanting, of this pleasing truth.

Correspondent to *discovery* and *improvement* in the natural world, is *reformation* in the moral: if that which seems a common notion be, indeed, a true one, that in the moral world there no longer remains any matter for *discovery*. Perhaps, however, this may not be the case: perhaps among such observations as would be best calculated to serve as grounds for reformation, are some which, being observations of matters of fact hitherto either incompletely noticed, or not at all, would, when produced, appear capable of bearing the name of discoveries: with so little method and precision have the consequences of this fundamental axiom, *It is the greatest happiness of the greatest number that is the measure of right and wrong*, been as yet developed.

Be this as it may, if there be room for making, and if there be use in publishing, *discoveries* in the *natural* world, surely there is not much less room for making, nor much less use in proposing, *reformation* in the *moral*. If it be a matter of importance and of use to us to be made acquainted with *distant* countries, surely it is not a matter of much less importance, nor of much less use to us, to be made better and better acquainted with the chief means of living happily in our *own*: If it be of importance and of use to us to know the principles of the element we breathe, surely it is not of much less importance, nor of much less use, to comprehend the principles, and endeavour at the improvement of those *laws*, by which alone we breathe it in security. If to this endeavour we should fancy any author, especially any author of great name, to *be*, and as far as could in such case be expected, to *avow himself*, a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works: of a great part, at least, of the esteem and influence which these works might, under whatever title, have acquired.

Such an enemy it has been my misfortune (and not mine only) to see, or fancy at least I saw, in the Author of the celebrated COMMENTARIES *on the* LAWS *of* ENGLAND: an author whose works have had, beyond comparison, a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable), than any other writer who on that subject has ever yet appeared.

It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work, particularly this grand and fundamental one, the antipathy to reformation; or rather, indeed, of laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole. For, indeed, such an ungenerous antipathy seemed of itself enough to promise a general vein of obscure and crooked reasoning, from whence no clear and sterling knowledge could be derived; so intimate is the connexion between some of the gifts of the understanding, and some of the affections of the heart.

It is in this view, then, that I took in hand that part of the first volume to which the Author has given the name of INTRODUCTION. It is in this part of the work that is contained whatever comes under the denomination of *general principles*. It is in this part of the work that are contained such preliminary views as it seemed proper to him to give of certain objects, real or imaginary, which he found connected with his subject LAW by identity of name: two or three sorts of LAWS of *Nature*, the *revealed* LAW, and a certain LAW of *Nations*. It is in this part of the work that he has touched upon several topics which relate to all laws or institutions [*a*] in general, or at least to whole

[*a*] I add here the word *institutions*, for the sake of including rules of *Common* Law, as well as portions of *Statute* Law.

classes of institutions, without relating to any one more than to another.

To speak more particularly, it is in this part of his work that he has given a definition, such as it is, of that whole branch of law which he had taken for his subject; that branch, which some, considering it as a main stock, would term LAW without addition; and which he, to distinguish it from those others its *condividend branches* [*b*], terms law *municipal*:—an account, such as it is, of the nature and origin of *Natural* Society the mother, and of *Political* Society the daughter, of Law *municipal*, duly begotten in the bed of Metaphor:—a division, such as it is, of *a* law, individually considered, into what he fancies to be its *parts*:—an account, such as it is, of the method to be taken for *interpreting* any law that may occur.

In regard to the Law of England in particular, it is here that he gives an account of the division of it into its two branches (branches, however, that are no ways distinct in the purport of them, when once established, but only in respect of the source from whence their establishment took its rise), the *Statute* or *Written* law, as it is called, and the *Common* or *Unwritten*:—an account of what are called *General Customs*, or institutions in force throughout the whole empire, or at least the whole nation;—of what are called *Particular Customs*, institutions of local extent established in particular districts; and of such *adopted* institutions of a general extent, as are parcel of what are called the *Civil* and the *Canon* laws; all three in the character of so many branches of what is called the *Common Law*:—in fine, a general account of *Equity*, that capricious and incomprehensible mistress of our fortunes, whose features neither our Author, nor perhaps any one, is well able to delineate;—of *Equity*, who having in the beginning been a rib of *Law*, but since in some dark age plucked from her side, when sleeping, by the hands not so much of God as of enterprising Judges, now lords it over her parent sister:—

All this, I say, together with an account of the different districts of the empire over which different portions of the Law prevail, or over which the Law has different degrees of force, composes that part of our Author's work which he has styled the INTRODUCTION. His eloquent "Discourse on the Study of the Law," with which, as being a discourse of the rhetorical kind rather than of the didactic, I proposed not to intermeddle, prefaces the whole.

It would have been in vain to have thought of travelling over the whole of so vast a work. My design, therefore, was to take such a portion of it, as might afford a fair and adequate specimen of the character and complexion of the whole. For this purpose, the part here marked out would, I thought, abundantly suffice. This, however narrow in extent, was the most conspicuous, the most characteristic part of our Author's work, and that which was most his own. The rest was little more than compilation. Pursuing my examination thus far, I should pursue it, I thought, as far as was necessary for my purpose: and I had little stomach to pursue a task, at once so laborious and so invidious, any farther. If *Hercules*, according to the old proverb, is to be known *ex pede*; much more, thought I, is he to be known *ex capite*.

In these views it was that I proceeded as far as the middle of the definition of Law *municipal*. It was there I found, not without surprise, the digression which makes the subject of the present essay. This threw me at first into no small perplexity. To give no account of it at all;—to pass wholly *sub silentio*, so large, and in itself so material a part of the work I was examining, would seem strange: at the same time I saw no possibility of entering into an examination of a passage so anomalous, without cutting in pieces the thread of the discourse. Under this doubt, I determined, at any rate for the present, to pass it by; the rather as I could not perceive any connexion that it had with any thing that came before or after. I did so; and continuing my examination of the definition from which it digressed, I travelled on to the end of the Introduction. It then became necessary to come to some definitive resolution concerning this eccentric part of it: and the result was, that being loth to leave the enterprise I had begun in this respect imperfect, I sat down to give what I intended should be a very slight and general survey of it. The farther, however, I proceeded in examining it, the more confused and unsatisfactory it appeared to me: and the greater difficulty I found in knowing what to make of it, the more words it cost me, I found, to say so. In this way, and by these means, it was that the present Essay grew to the bulk in which the reader sees it. When it was nearly completed, it occurred to me, that as the digression itself, which I was examining, was perfectly distinct from, and unconnected with the text from which it starts, so was, or so at least might be, the *critique* on that digression, from the *critique* on the text. The former was by much too large to be engrafted into the latter: and since, if it accompanied it at all, it could only be in the shape of an Appendix, there seemed no reason why the same publication should include them both. To the former, therefore, as being the least, I determined to give that finish which I was able, and which I thought was ne-

[*b*] *Membra condividentia.*—SAUND. Log. L. I. c. 46.

necessary: and to publish it in this detached manner, as the first, if not the only part of a work, the principal and remaining part of which may possibly see the light some time or other, under some such title as that of "*A* COMMENT *on the* COMMENTARIES."

In the meantime, that I may stand more fully justified, or excused at least, in an enterprise to most perhaps so extraordinary, and to many doubtless so unacceptable, it may be of use to endeavour to state with some degree of precision, the grounds of that war which, for the interests of true science, and of liberal improvement, I think myself bound to wage against this work. I shall therefore proceed to mark out and distinguish those points of view in which it seems principally reprehensible, not forgetting those in which it seems still entitled to our approbation and applause.

There are two characters, one or other of which every man who finds any thing to say on the subject of Law, may be said to take upon him; — that of the *Expositor*, and that of the *Censor*. To the province of the *Expositor* it belongs to explain to us what, as he supposes, the Law *is*: to that of the *Censor*, to observe to us what he thinks it *ought to be*. The former, therefore, is principally occupied in stating, or in inquiring after *facts*: [c] the latter, in discussing *reasons*. The *Expositor*, keeping within his sphere, has no concern with any other faculties of the mind than the *apprehension*, the *memory*, and the *judgment*: the latter, in virtue of those sentiments of pleasure or displeasure which he finds occasion to annex to the objects under his review, holds some intercourse with the *affections*. That which *is* Law, is, in different countries, widely different: while that which *ought to be*, is in all countries to a great degree the same. The *Expositor*, therefore, is always the citizen of this or that particular country: the *Censor* is, or ought to be, the citizen of the world. To the *Expositor* it belongs to show what the *Legislator* and his underworkman the *Judge* have done *already*: to the *Censor* it belongs to suggest what the *Legislator ought* to do *in future*. To the Censor, in short, it belongs to *teach* that *science*, which, when by change of hands converted into an *art*, the LEGISLATOR *practises*.

Let us now return to our Author. Of these two perfectly distinguishable functions, the latter alone is that which it fell necessarily within his province to discharge. His professed object was to explain to us what the Laws of England *were*. "*Ita lex scripta est*," was the only motto which he stood engaged to keep in view. The work of *censure* (for to this word, in default of any other, I find it necessary to give a *neutral* sense), the work of *censure*, as it may be styled, or, in a certain sense, of *criticism*, was to him but a *parergon* — a work of supererogation: a work, indeed, which, if aptly executed, could not but be of great ornament to the principal one, and of great instruction, as well as entertainment, to the reader, but from which our Author, as well as those that had gone before him on the same line, might, without being chargeable with any deficiency, have stood excused: a work which, when superadded to the principal, would lay the Author under additional obligations, and impose on him new duties: which, notwithstanding whatever else it might differ in from the principal one, agrees with it in this, that it ought to be executed with impartiality, or not at all.

If, on the one hand, a hasty and indiscriminating condemner of what is established, may expose himself to contempt; on the other hand, a bigoted or corrupt defender of the works of power becomes guilty, in a manner, of the abuses which he supports: the more so if, by oblique glances and sophistical glosses, he studies to guard from reproach, or recommend to favour, what he knows not how, and dares not attempt, to justify. To a man who contents himself with simply stating an institution as he thinks it *is*, no share, it is plain, can justly be attributed (nor would any one think of attributing to him any share) of whatever reproach, any more than of whatever applause the institution may be thought to merit. But if not content with this humbler function, he takes upon him to give *reasons* in behalf of it, reasons whether *made* or found by him, it is far otherwise. Every false and sophistical reason that he contributes to circulate, he himself is chargeable with: nor ought he to be holden guiltless even of such as, in a work where *fact*, not *reason*, is the question he delivers as from other writers without censure. By officiously adopting them, he makes them his own, though delivered under the names of the respective authors: not much less than if delivered under his own. For the very idea of a *reason* betokens approbation: so that to deliver a remark under that character, and that without censure, is to adopt it. A man will scarcely, therefore, without some note of disapprobation, be the instrument of introducing, in the guise of a reason, an argument which he does not really wish to see approved. Some method or other he will take to wash his hands of it: some method or other he will take to let men

[c] In practice, the question of *Law* has commonly been spoken of as opposed to that of *fact*: but this distinction is an accidental one. That a law commanding or prohibiting such a *sort* of action, has been established, is as much a *fact*, as that an *individual* action of that sort has been committed. The establishment of a Law may be spoken of as a *fact*, at least for the purpose of distinguishing it from any consideration that may be offered as a *reason* for such Law.

see that what he means to be understood to do, is merely to report the judgment of another, not to pass one of his own. Upon that other, then, he will lay the blame: at least he will take care to repel it from himself. If he omits to do this, the most favourable cause that can be assigned to the omission is indifference — indifference to the public welfare — that indifference which is itself a crime.

It is wonderful how forward some have been to look upon it as a kind of presumption, and ingratitude, and rebellion, and cruelty, and I know not what besides, not to allege only, nor to own, but to suffer any one so much as to imagine, that an old-established law could in any respect be a fit object of condemnation. Whether it has been a kind of *personification* that has been the cause of this, as if the Law were a living creature, or whether it has been the mechanical veneration for antiquity, or what other delusion of the fancy, I shall not here inquire. For my part, I know not for what good reason it is that the merit of justifying a law when right, should have been thought greater than that of censuring it when wrong. Under a government of laws, what is the motto of a good citizen? *To obey punctually; to censure freely.*

Thus much is certain; that a system that is never to be censured, will never be improved: that if nothing is ever to be found fault with, nothing will ever be mended: and that a resolution to justify every thing at any rate, and to disapprove of nothing, is a resolution which, pursued in future, must stand as an effectual bar to all the *additional* happiness we can ever hope for; pursued hitherto, would have robbed us of that share of happiness which we enjoy already.

Nor is a disposition to find "every thing as it should be," less at variance with itself, than with reason and utility. The commonplace arguments in which it vents itself justify not what is established, in effect, any more than they condemn it; since whatever *now* is establishment, *once* was innovation.

Precipitate censure, cast on a political institution, does but recoil on the head of him who casts it. From such an attack it is not the institution itself, if well grounded, that can suffer. What a man says against it, either makes impression or makes none. If none, it is just as if nothing had been said about the matter; if it *does* make an impression, it naturally calls up some one or other in defence. For if the institution is in truth a beneficial one to the community in general, it cannot but have given an interest in its preservation to a number of individuals. By their industry, then, the reasons on which it is grounded are brought to light; from the observation of which, those who acquiesced in it before upon trust, now embrace it upon conviction. Censure, therefore, though ill-founded, has no other effect upon an institution than to bring it to that test, by which the value of those, indeed, on which prejudice alone has stamped a currency, is cried down, but by which the credit of those of sterling utility is confirmed.

Nor is it by any means from passion and ill-humour, that censure, passed upon legal institutions, is apt to take its birth. When it is from passion and ill-humour that men speak, it is with *men* that they are in ill-humour, not with laws; it is men, not laws, that are the butt of "arrogance." [*d*] Spleen

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[*d*] "*Arrogance.*" Our Author calls it "*the utmost arrogance**" to censure what has, at least, a better chance to be right, than the singular notions of any particular man;" meaning thereby certain ecclesiastical institutions. Vibrating, as it should seem, between passion and discretion, he has thought it necessary, indeed, to insert in the sentence that, which being inserted, turns it into nothing: After the word "censure," "with contempt," he adds, "and rudeness:" as if there needed a professor to inform us, that to treat any thing with contempt and rudeness is arrogance. "Indecency," he had already called it, "to set up private judgment in opposition to public;" and this without restriction, qualification, or reserve. This was in the first transport of a holy zeal, before discretion had come in to his assistance. This passage the Doctors *Priestley*† and *Furneaux*,‡ who, in quality of Dissenting Ministers, and champions of dissenting opinions, saw themselves particularly attacked in it, have not suffered to pass unnoticed; any more than has the celebrated author of the "*Remarks on the Acts of the 13th Parliament*,"‖ who found it adverse to his enterprise, for the same reason that is hostile to every other liberal plan of political discussion.

*** My edition of the Commentaries happens to be the first: since the above paragraph was written I have been directed to a later. In this later edition, the passage about "indecency" is, like the other about "arrogance," explained away into nothing. What we are now told is, that "to set up private judgment in [*virulent and factious*] opposition to public *authority*" (he might have have added — or to *private* either) is "indecency." [See the 5th edit. 8vo. p. 50, as in the 1st.] This we owe, I think, to Dr. Furneaux. The Drs. Furneaux and Priestley, under whose well applied correction our author has smarted so severely, have a good deal to answer for: They have been the means of his adding a good deal of this kind of rhetorical lumber to the plentiful stock there was of it before. One passage, indeed, a passage deeply tinctured with religious gall, they have been the means of clearing away entirely;§ and in this, at least, they have done good service. They have made him sophisticate; they have made him even expunge; but all the Doctors in the world, I doubt, would not bring him to confession. See his Answer to Dr. Priestley.

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* 4 Comm. p. 50. † See Remarks, &c.
‡ See Letters to Mr. Justice Blackstone, 1771. Second Edition.
‖ In the Preface.
§ See Furneaux, Letter VII.

and turbulence may indeed prompt men to quarrel with living individuals; but when they make complaint of the dead letter of the Law, the work of departed lawgivers, against whom no personal antipathy can have subsisted, it is always from the observation, or from the belief at least, of some real grievance. The Law is no man's enemy; the Law is no man's rival. Ask the clamorous and unruly multitude—it is never the Law itself that is in the wrong; it is always some wicked interpreter of the Law that has corrupted and abused it. [*e*]

Thus destitute of foundation are the terrors, or pretended terrors, of those who shudder at the idea of a free censure of established institutions: so little does the peace of society require the aid of those lessons which teach men to accept of any thing as a reason, and to yield the same abject and indiscriminating homage to the Laws here, which is paid to the despot elsewhere. The fruits of such tuition are visible enough in the character of that race of men who have always occupied too large a space in the circle of the profession; a passive and enervate race, ready to swallow any thing, and to acquiesce in any thing; with intellects incapable of distinguishing right from wrong, and with affections alike indifferent to either; insensible, short-sighted, obstinate; lethargic, yet liable to be driven into convulsions by false terrors; deaf to the voice of reason and public utility; obsequious only to the whisper of interest, and to the beck of power.

This head of mischief, perhaps, is no more than what may seem included under the former. For why is it an evil to a country, that the minds of those who have the Law under their management should be thus enfeebled? It is because it finds them impotent to every enterprise of improvement.

Not that a race of lawyers and politicians of this enervate breed is much less dangerous to the duration of that share of felicity which the state possesses at any given period, than it is mortal to its chance of attaining to a greater. If the designs of a Minister are inimical to his country, what is the man of all others for him to make an instrument of or a dupe? Of all men, surely none so fit as that sort of man who is ever on his knees before the footstool of Authority, and who, when those *above* him, or *before* him, have pronounced, thinks it a crime to have an opinion of his own.

Those who duly consider upon what slight and trivial circumstances, even in the happiest times, the adoption or rejection of a Law so often turns; circumstances with which the utility of it has no imaginable connexion—those who consider the desolate and abject state of the human intellect, during the periods in which so great a part of the still subsisting mass of institutions had their birth—those who consider the backwardness there is in most men, unless when spurred by personal interests or resentments, to run a-tilt against the colossus of authority—those, I say, who give these considerations their due weight, will not be quite so zealous, perhaps, as our Author has been, to terrify men from setting up what is now "private judgment," against what once was "public:" [*f*] nor to thunder down the harsh epithet of "arrogance" on those, who, with whatever success, are occupied in bringing rude establishments to the test of polished reason. They will rather do what they can to cherish a disposition at once so useful and so rare: [*g*] which is so little connected with the causes that make popular discontentments dangerous, and which finds so little aliment in those propensities that govern the multitude of men. They will not be for giving such a turn to their discourses as to bespeak the whole of a man's favour for the defenders of what is established: nor all his resentment for the assailants. They will acknowledge, that if there be some institutions which it is "arrogance" to attack, there may be others which it is effrontery to defend. Tourreil [*h*] has defended torture: torture established by the "public judgment" of so many

[*e*] There is only one way in which censure cast upon the Laws has a greater tendency to do harm than good; and that is when it sets itself to contest their validity; I mean, when abandoning the question of expediency, it sets itself to contest the right. But this is an attack to which old established laws are not so liable. As this is the last, though but too common resource of passion and ill-humour, and what men scarce think of betaking themselves to, unless irritated by personal competitions, it is that to which recent laws are most exposed. I speak of what are called *written* Laws; for as to *unwritten* institutions, as there is no such thing as any certain symbol by which their authority is attested, *their* validity, how deeply rooted soever, is what we see challenged without remorse. A radical weakness, interwoven into the very constitution of all *un*written law.

[*f*] See note [*d*].

[*g*] One may well say *rare*. It is a matter of fact about which there can be no dispute. The truth of it may be seen in the multitude of *Expositors* which the Jurisprudence of every nation furnished, ere it afforded a single *Censor*. When Beccaria came, he was received by the intelligent as an angel from heaven would be by the faithful. He may be styled the father of *Censorial Jurisprudence*. Montesquieu's was a work of the mixed kind. Before Montesquieu, all was unmixed barbarism. Grotius and Puffendorf were to Censorial Jurisprudence what the schoolmen were to Natural Philosophy.

[*h*] A French Jurist of the last age, whose works had like celebrity, and in many respects much the same sort of merits as our Author's. He was known to most advantage by a translation of Demosthenes. He is now forgotten.

enlightened nations. Beccaria ("indecent" and "arrogant" Beccaria!) has condemned it. Of these two, whose lot among men would one choose rather, — the Apologist's or the Censor's ?

Of a piece with the discernment which enables a man to perceive, and with the courage which enables him to avow, the defects of a system of institutions, is that accuracy of conception which enables him to give a clear account of it. No wonder, then, in a treatise partly of the *expository* class, and partly of the *censorial*, that if the latter department is filled with imbecility, symptoms of kindred weakness should characterize the former.

The former department, however, of our Author's work, is what, on its own account merely, I should scarce have found myself disposed to intermeddle with. The business of simple *exposition* is a harvest in which there seemed no likelihood of there being any want of labourers; and into which therefore I had little ambition to thrust my sickle.

At any rate, had I sat down to make a report of it in this character alone, it would have been with feelings very different from those of which I now am conscious, and in a tone very different from that which I perceive myself to have assumed. In determining what conduct to observe respecting it, I should have considered whether the taint of error seemed to confine itself to parts, or to diffuse itself through the whole. In the latter case, the least invidious, and, considering the bulk of the work, the most beneficial course, would have been to have taken no notice of it at all, but to have sat down and tried to give a better. If not the whole in general, but scattered positions only, had appeared exceptionable, I should have sat down to rectify those positions with the same apathy with which they were advanced. To fall in an adverse way upon a work simply *expository*, if that were all there were of it, would have been alike ungenerous and unnecessary. In the involuntary errors of the *understanding* there can be little to excite, or at least to justify, resentment. That which alone, in a manner, calls for rigid censure, is the sinister bias of the *affections*. If, then, I may still continue to mention as separate, parts which in the work itself are so intimately, and, indeed, undistinguishably blended, it is the *censorial* part alone that has drawn from me that sort of animadversion I have been led to bestow indiscriminately on the whole. To lay open, and if possible supply, the imperfections of the *other*, is an operation that might indeed of itself do service; but that which I thought would do still more service, was the weakening the authority of *this*.

Under the sanction of a great name, every string of words, however unmeaning — every opinion, however erroneous, will have a certain currency. Reputation adds weight to sentiments from whence no part of it arose, and which, had they stood alone, might have drawn nothing, perhaps, but contempt. Popular fame enters not into nice distinctions. Merit in one department of letters affords a natural, and in a manner irrecusable presumption of merit in another, especially if the two departments be such between which there is apparently a close alliance.

Wonderful, in particular, is that influence which is gained over young minds, by the man who, on account of whatever class of merit, is esteemed in the character of a *preceptor*. Those who have derived, or fancy themselves to have derived knowledge from what he knows, or appears to know, will naturally be for judging as he judges; for reasoning as he reasons; for approving as he approves; for condemning as he condemns. On these accounts it is, that when the general complexion of a work is unsound, it may be of use to point an attack against the whole of it without distinction, although such parts of it as are noxious as well as unsound be only scattered here and there.

On these considerations, then, it may be of use to show, that the work before us, in spite of the merits which recommend it so powerfully to the imagination and to the ear, has no better title on one account than on another, to that influence which, were it to pass unnoticed, it might continue to exercise over the judgment.

The Introduction is the part to which, for reasons that have been already stated, it was always my intention to confine myself. It is but a part even of this Introduction that is the subject of the present Essay. What determined me to begin with this small part of it is, the facility I found in separating it from every thing that precedes or follows it. This is what will be more particularly spoken to in another place. [*i*]

It is not that this part is among those which seemed most open to animadversion: it is not that stronger traces are exhibited in this part, than in another, of that spirit in our Author which seems so hostile to Reformation, and to that Liberty which is Reformation's harbinger.

It is not here that he tramples on the right of private judgment, that basis of every thing that an Englishman holds dear: [*k*] it is not here, in particular, that he insults our understandings with nugatory reasons; stands forth the professed champion of religious intolerance; or openly sets his face against civil reformation.

It is not here, for example, he would per-

[*i*] See the ensuing Introduction.
[*k*] See Note [*a*].

suade us, that a trader who occupies a booth at a fair is a *fool* for his pains; and on that account no fit object of the law's protection. [*l*]

It is not here that he gives the presence of *one* man at the *making* of a law, as a *reason* why *ten thousand* others that are to *obey* it, need know nothing of the matter. [*m*]

It is not here, that after telling us, in express terms, there must be "an actual breaking" to make burglary, he tells us, in the same breath, and in terms equally express, where burglary may be *without* actual breaking; and this *because* "the law will not suffer itself to be trifled with." [*n*]

It is not here, that after relating the Laws by which peaceable Christians are made punishable for worshiping God according to their consciences, he pronounces with equal peremptoriness and complacency, that every thing, yes, "every thing is as it should be." [*o*]

It is not here, that he commands us to believe, and that on pain of forfeiting all pretensions to either "sense or probity," "that the system of our jurisprudence is, in the whole and every part of it, the very quintessence of perfection. [*p*]

[*l*] "Burglary,"* says our Author, "cannot be committed in a tent or a booth erected in a market fair, though the owner may lodge therein; *for* the Law regards thus highly nothing but permanent edifices: a house, or church; the wall, or gate of a town: and it is the *folly* of the owner to lodge in so fragile a tenement." To save himself from this charge of folly, it is not altogether clear which of two things the trader ought to do: quit his business and not go to the fair at all; or leave his goods without any body to take care of them.

[*m*] Speaking of an Act of Parliament,† "There needs," he says, "no formal promulgation to give it the force of a Law, as was necessary by the Civil Law with regard to the Emperor's Edicts: *because* every man in England is, *in judgment of law*, party to the making of an act of parliament, being present thereat *by his representatives.*" This, for aught I know, may be good *judgment of law*; because any thing may be called judgment of law, that comes from a lawyer who has got a name: it seems, however, not much like any thing that can be called *judgment of common sense.* This notable piece of *astutia* was originally, I believe, judgment of Lord Coke: it from thence became judgment of our Author: and may have been judgment of more lawyers than I know of before and since. What grieves me is, to find many men of the best affections to a cause which needs no sophistry, bewildered and bewildering others with the like jargon.

[*n*] His words are:‡ "*There must be an actual breaking*, not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass) but a *substantial* and *forcible irruption.*" In the next sentence but two, he goes on and says—"But to come down a chimney *is* held a burglarious entry; for that is as much closed as the nature of things will permit. So also to knock at a door, and upon opening it to rush in, with a felonious intent; or under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house: *all these entries have been adjudged burglaries, though there was no actual breaking: for* the law will not suffer itself to be trifled with by such evasions." Can it be more egregiously trifled with than by such *reasons?* I must

* 4 Comm. ch. xvi. p. 226.
† 1 Comm. ch. ii. p. 178.
‡ 4 Comm. ch. xvi. p. 226.

I must own I have been ready to grow out of conceit with these useful little particles, *for*, *because*, *since*, and others of that fraternity, from seeing the drudgery they are continually put to in these Commentaries. The appearance of any of them is a sort of warning to me to prepare for some tautology, or some absurdity: for the same thing dished up over again in the shape of a reason for itself: or for a reason which, if a distinct one, is of the same stamp as those we have just seen. Other instances of the like hard treatment given to these poor particles will come under observation in the body of this essay. As to reasons of the first-mentioned class, of them one might pick out enough to fill a little volume.

[*o*] "In what I have now said," says he,‖ "I would not be understood to derogate from the rights of the national Church, or to favour a loose latitude of propagating any crude undigested sentiments in religious matters. Of *propagating*, I say; for the bare entertaining them, without an endeavour to diffuse them, seems *hardly* cognizable by any human authority. I only mean to illustrate the excellence of our present Establishment, by looking back to former times. *Every thing is now as it should be:* unless, perhaps, that heresy ought to be more strictly defined, and no prosecution permitted, even in the Ecclesiastical Courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions it seems *necessary* for the support of the national religion," (the national religion being such, we are to understand, as would not be able to support itself were any one at liberty to make objections to it), "that the officers of the Church should have power to censure heretics, but not to exterminate or destroy them."

*** Upon looking into a later edition (the fifth) I find this passage has undergone a modification. After "*Every thing is now as it should be*," is added, "*with respect to the spiritual cognizance, and spiritual punishment of heresy.*" After "*the officers of the Church should have power to censure heretics*," is added "*but not to harass them with temporal penalties, much less to exterminate or destroy them.*"

How far the mischievousness of the original text has been cured by this amendment, may be seen from Dr. Furneaux, Lett. II. p. 30, 2d edit.

[*p*] 1 Comm. 140. I would not be altogether positive, how far it was he meant this persuasion should extend itself in point of time; whether to those institutions only that happen to be in force at the individual instant of his writing: or whether to such opposite institutions also as, within

‖ 4 Comm. ch. iv. p. 49.

It is not here that he assures us in point of fact, that there never *has* been an alteration made in the law that men have not afterwards found reason to regret. [*q*]

It is not here that he turns the Law into a Castle, for the purpose of opposing every idea of "fundamental" reparation. [*r*]

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within any given distance of time from that instant, either *had* been in force, or were *about* to be.

His words are as follows: "All these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints; restraints in themselves so gentle and moderate, as will appear upon further inquiry, that no man of *sense* or *probity* would wish to see them slackened. For *all* of us have it in our choice to do *every thing* that a *good* man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow-citizens.

If the reader would know what these rights and liberties are, I answer him out of the same page, they are those, "in opposition to one or other of which *every* species of compulsive tyranny and oppression must act, having no other object upon which it can *possibly* be employed." The liberty, for example, of worshiping God without being obliged to declare a belief in the XXXIX Articles, is a liberty that no "*good man*,"—"no man of sense or probity," "would wish" for.

[*q*] 1 Comm. 70. If no reason can be found for an institution, we are to *suppose* one; and it is upon the strength of this supposed one we are to cry it up as reasonable: it is thus that the law *is justified of her children*.

The words are—"Not that the particular reason of every rule in the Law can, at this distance of time, be always precisely assigned; but it is sufficient that there be nothing in the rule *flatly* contradictory to reason, and then the Law will *presume* it to be well founded. And it hath been an ancient observation in the Laws of England," (he might with as good ground have added—*and in all other laws*) "That whenever a standing rule of Law, of which the reason, perhaps, could not be remembered or decerned, hath been [*wantonly*] broke in upon by *statutes* or *new resolutions*, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation."

When a sentiment is expressed, and whether from caution, or from confusion of ideas, a clause is put in, by way of qualifying it, that turns it into nothing; in this case, if we would form a fair estimate of the tendency and probable effect of the whole passage, the way is, I take it, to consider it as if no such clause were there. Nor let this seem strange. Taking the qualification into the account, the sentiment would make no impression on the mind at all: if it makes any, the qualification is dropped, and the mind is affected in the same manner nearly as it would be were the sentiment to stand unqualified.

This, I think, we may conclude to be the case with the passage above mentioned. The word "*wantonly*" is, in pursuance of our Author's standing policy, put in by way of salvo. *With* it the sentiment is as much as comes to nothing: *without* it, it would be extravagant. Yet in this extravagant form it is, probably, if in any, that it passes upon the reader.

The pleasant part of the contrivance is the mentioning of "*Statutes*" and "Resolutions," (Resolutions to wit, that is, Decisions of Courts of Justice) in the same breath; as if whether it were by the one of them or the other that a rule of law was broke in upon, made no difference. By a *Resolution* indeed, a *new* Resolution, to break in upon a *standing* rule, is a practice that in good truth is big with mischief. But this mischief, on what does it depend? Upon the rule's being a *reasonable* one? By no means: but upon its being a *standing*, an established one. Reasonable or not reasonable, is what makes comparatively but a trifling difference.

A new resolution made in the teeth of an old-established rule is mischievous—on what account? In that it puts men's expectations universally to a fault, and shakes whatever confidence they may have in the stability of any rules of Law, reasonable or not reasonable; that stability on which every thing that is valuable to a man depends. Beneficial be it in ever so high a degree to the party in whose favour it is made, the benefit it is of to *him* can never be so great as to outweigh the mischief it is of to the community at large. Make the best of it, it is general evil for the sake of partial good. It is what Lord Bacon calls setting the whole house on fire, in order to roast one man's eggs.

Here, then, the *salvo* is not wanted: a "new resolution can never be acknowledged to be contrary to a standing rule," but it must on that very account be acknowledged to be "*wanton*." Let such a resolution be made, and "inconveniences" in abundance will sure enough ensue; and then will appear—what? not by any means "the wisdom of the rule," but, what is a very different thing, the folly of breaking in upon it.

It were almost superfluous to remark, that nothing of all this applies in general to a statute; though particular Statutes may be conceived that would thwart the course of expectation, and by that means produce mischief in the same way in which it is produced by irregular resolutions. A new statute, it is manifest, cannot, unless it be simply a declaratory one, be made in any case, but it must break in upon some standing rule of Law. With regard to a Statute, then, to tell us that a "wanton" one has produced "inconveniences," what is it but to tell us that a thing that has been mischievous has produced mischief?

Of this temper are the arguments of all those doting politicians, who, when out of humour with a particular innovation without being able to tell why, set themselves to declaim against *all* innovation, because it is innovation. It is the nature of owls to hate the light: and it is the nature of those politicians who are wise by rote, to detest every thing that forces them either to find (what, perhaps, is impossible) reasons for a favourite persuasion, or (what is not endurable) to discard it.

[*r*] 3 Comm. 268, at the end of ch. xvii., which concludes with three pages against Reformation. Our Author had better, perhaps, on this occasion, have kept clear of allegories: he should have considered whether they might not be retorted on him with severe retaliation. He should have considered, that it is not easier to *him* to turn the Law into a Castle, than it is to the imaginations of impoverished suitors to people it with harpies. He should have thought of

It is not here that he turns with scorn upon those beneficient Legislators, whose care it has been to pluck the mask of Mystery from the face of jurisprudence. [*s*]

If here,* as every where, he is eager to hold the cup of flattery to high station, he has stopt short, however, in this place of idolatry. [*t*]

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the den of Cacus, to whose enfeebled optics, to whose habits of dark and secret rapine, nothing was so hateful, nothing so dangerous, as the light of day.

[*s*] 3 Comm. 322. It is from the decisions of Courts of Justice that those rules of Law are framed, on the knowledge of which depend the life, the fortune, the liberty of every man in the nation. Of these decisions, the Records are, according to our Author [1 Comm. 71], the most authentic histories. These Records were, till within these five-and-forty years, in Law-Latin: a language which, upon a high computation, about one man in a thousand used to fancy himself to understand. In this Law-Latin it is that our Author is satisfied they should have been continued, because the pyramids of Egypt have stood longer than the temples of Palmyra. He observes to us, that the Latin language could not express itself on the subject, without borrowing a multitude of words from our own: which is to help to convince us, that of the two, the former is the fittest to be employed. He gives us to understand that, taking it altogether, there could be no room to complain of it, seeing it was not more unintelligible than the jargon of the schoolmen, some passages of which he instances; and then he goes on: "This technical Latin continued in use from the time of its first introduction till the subversion of our ancient constitution under Cromwell; when, among many other innovations on the body of the Law, some for the better and some for the worse, the language of our Records was altered and turned into English. But at the Restoration of King Charles, this *novelty* was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued, without any sensible inconvenience, till about the year 1730, when it was again thought proper that the proceedings at Law should be *done* into English, and it was accordingly so ordered by statute 4 Geo. II. c. 26."

"This was done (continues our Author) in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered; but am *apt to suspect* that the people are now, after many years experience, *altogether* as ignorant in matters of law as before."

In this scornful passage, the words *novelty*—*done* into English—*apt* to *suspect*—*altogether* as ignorant—sufficiently speak the affection of the mind that dictated it. It is thus that our Author chuckles over the supposed defeat of the Legislature with a fond exultation which all his discretion could not persuade him to suppress.

The case is this. A large portion of the body of the Law was, by the bigotry or artifice of Lawyers, locked up in an illegible character, and in a foreign tongue. The statute he mentions obliged them to give up their hieroglyphics, and to restore the native language to its rights.

This was doing much; but it was not doing every thing. Fiction, tautology, technicality, circuity, irregularity, inconsistency remain. But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near.

The consequence is, that the law, and especially that part of it which comes under the topic of Procedure, *still* wants much of being generally intelligible. The fault, then, of the Legislature is their not having done *enough*. His quarrel with them is for having done any thing at all. In doing what they did, they set up a light, which, obscured by many remaining clouds, is still but too apt to prove an *ignis fatuus*: our Author, instead of calling for those clouds to be removed, deprecates all light, and pleads for total darkness.

Not content with representing the alteration as useless, he would persuade us too look upon it as mischievous. He speaks of "inconveniences." What these inconveniences are, it is pleasant to observe.

In the first place, many young practisers, spoilt by the indulgence of being permitted to carry on their business in their mother-tongue, know not how to read a Record upon the old plan. "Many clerks and attornies," says our Author, "are hardly able to read, much less to understand a Record of so modern a date as the reign of George the First."

What the mighty evil is here, that is to outweigh the mischief of almost universal ignorance, is not altogether clear: whether it is, that certain lawyers, in a case that happens very rarely, may be obliged to get assistance: or that the business in such a case may pass from those who do *not* understand it to those who do.

In the next place, he observes to us, "it has much enhanced the expense of all legal proceedings: for since the practisers are confined (for the sake of the stamp-duties, which are thereby considerably increased) to write only a stated number of words in a sheet; and as the English language, through the multitude of its particles, is much more verbose than the Latin; it follows, that the number of sheets must be very much augmented by the change."

I would fain persuade myself, were it possible, that this unhappy sophism could have passed upon the inventor. The sum actually levied on the public on that score is, upon the whole, either a proper sum, or it is not. If it *is*, why mention it as an evil? If it is *not*, what more obvious remedy than to set the duties lower?

After all, what seems to be the real evil, notwithstanding our Author's unwillingness to believe it, is, that by means of this alteration, men at large are in a somewhat better way of knowing what their Lawyers are about: and that a disinterested and enterprising Legislator, should happily such an one arise, would now with somewhat less difficulty be able to see before him.

[*t*] In the seventh chapter of the first book, the King has "*attributes;*"† he possesses "*ubiquity;*"‡ he is "*all-perfect and immortal.*"‖

These childish paradoxes, begotten upon servility by false wit, are not more adverse to manly sen-

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* *Vide infra*, ch. iii. par. 7, p. 103.

† 1 Comm. 242.

‡ 1 Comm. ch. vii. p. 234, 238, 242. First Edition.

‖ 1 Comm. ch. vii. p. 260. First Edition.

It is not then, I say, *this* part, it is not even any part of that Introduction, to which alone I have any thoughts of extending my examination, that is the principal seat of that poison, against which it was the purpose of this attempt to give an antidote. The subject handled in this part of the work is such as admits not of much to be said in the person of the Censor. Employed, as we have seen, in settling matters of a preliminary nature — in drawing outlines, it is not in this part that there was occasion to enter into the details of any particular institution. If I chose the Introduction, then, in preference to any other part, it was on account of its affording the fairest specimen of the whole, and not on account of its affording the greatest scope for censure.

Let us reverse the tablet. While with this freedom I expose our Author's ill deserts, let me not be backward in acknowledging and paying homage to his various merits; a justice due not to him alone, but to that Public, which now for so many years had been dealing out to him (it cannot be supposed altogether without title) so large a measure of its applause.

Correct, elegant, unembarrassed, ornamented, the *style* is such as could scarce fail to recommend a work still more vitious in point of *matter* to the multitude of readers.

He it is, in short, who, first of all institutional writers, has taught Jurisprudence to speak the language of the Scholar and the Gentleman; put a polish upon that rugged science; cleansed her from the dust and cobwebs of the office: and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage, from the toilette of classic erudition; enlivened her with metaphors and allusions; and sent her abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies.

The merit to which, as much perhaps as to any, the work stands indebted for its reputation, is the enchanting harmony of its numbers: a kind of merit that of itself is sufficient to give a certain degree of celebrity to a work devoid of every other. So much is man governed by the ear.

The function of the Expositor may be conceived to divide itself into two branches: that of *history*, and that of simple *demonstration*. The business of history is to represent the Law in the state it *has* been in, in past periods of its existence: the business of simple demonstration, in the sense in which I will take leave to use the word, is to represent the Law in the state it *is* in for the time being. [*v*]

Again, to the head of demonstration belong the several businesses of *arrangement*, *narration*, and *conjecture*. Matter of narration it may be called, where the law is supposed to be explicit, clear, and settled: matter of conjecture, or interpretation, where it is obscure, silent, or unsteady. It is matter of arrangement to *distribute* the several real or supposed institutions into different masses, for the purpose of a general survey; to determine the *order* in which those masses shall be brought to view; and to find for each of them a *name*.

The businesses of narration and interpretation are conversant chiefly about particular institutions. Into the details of particular institutions it has not been my purpose to

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sentiment, than to accurate apprehension. Far from contributing to place the institutions they are applied to in any clear point of view, they serve but to dazzle and confound, by giving to Reality the air of Fable. It is true, they are not altogether of our Author's invention: it is he, however, that has revived them, and that with improvements and additions.

One might be apt to suppose they were no more than so many transient flashes of ornament: it is quite otherwise. He dwells upon them in sober sadness. The attribute of "*ubiquity*," in particular, he lays hold of, and makes it the basis of a chain of reasoning. He spins it out into consequences: he makes one thing "*follow*" from it, and another thing be so and so "for the same *reason*:" and he uses emphatic terms, as if for fear he should not be thought to be in earnest. "From the ubiquity," says our Author [1 Comm. p. 260], "it *follows*, that the King can never be nonsuit; *for* a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in Court." — "For the same reason also the King is not said to appear by his Attorney, as other men do: for he always appears in contemplation of law in his *own proper* person."

This is the case so soon as you come to this last sentence of the paragraph. For so long as you are at the last but two, "it is the regal office, and *not* the royal person, that is always present." All this is so dryly and so strictly true, that it serves as the groundwork of a metaphor that is brought in to embellish and enliven it. The king, we see, *is*, that is to say, is *not* present in Court. The king's judges are present too. So far is plain downright truth. These judges, then, speaking metaphorically, are so many looking-glasses, which have this singular property, that when a man looks at them, instead of seeing his own face in them, he sees the king's. "His judges," says our Author, "are the mirror by which the king's image is reflected."

[*v*] The word *demonstration* may here seem, at first sight, to be out of place. It will be easily perceived that the sense here put upon it is not the same with that in which it is employed by logicians and mathematicians. In our own language, indeed, it is not very familiar in any other sense than theirs: but on the Continent it is currently employed in many other sciences. The French, for example, have their *demonstrateurs de botanique, d'anatomie, de physique expérimentale, &c.* I use it out of necessity; not knowing of any other that will suit the purpose.

descend. On these topics, then, I may say, in the language of procedure, *non sum informatus*. Viewing the work in this light, I have nothing to add to, or to except against, the public voice.

History is a branch of instruction which our Author, though not rigidly necessary to his design, called in, not without judgment, to cast light and ornament on the dull work of simple *demonstration:* this part he has executed with an elegance which strikes every one: with what fidelity, having not very particularly examined, I will not take upon me to pronounce.

Among the most difficult and the most important of the functions of the *demonstrator*, is the business of *arrangement*. In this our Author has been thought, and not, I conceive, without justice, to excel; at least in comparison of any thing in that way that has hitherto appeared. 'Tis to him we owe such an arrangement of the elements of Jurisprudence, as wants little, perhaps, of being the best that a technical nomenclature will admit of. A technical nomenclature, so long as it is admitted to mark out and denominate the principal heads, stands an invincible obstacle to every other than a technical arrangement. For to *denominate* in general terms, what is it but to arrange? and to arrange under heads, what is it but to *denominate* upon a large scale? A technical arrangement, governed then in this manner, by a technical nomenclature, can never be otherwise than *confused* and *unsatisfactory*. The reason will be sufficiently apparent, when we understand what sort of an arrangement that must be, which can be properly termed a *natural* one.

That arrangement of the materials of any science may, I take it, be termed a *natural* one, which takes such properties to characterize them by, as men in general are, by the common constitution of man's *nature*, disposed to attend to: such, in other words, as *naturally*, that is readily, engage, and firmly fix the attention of any one to whom they are pointed out. The materials, or elements here in question, are such actions as are the objects of what we call Laws or Institutions.

Now then, with respect to actions in general, there is no property in them that is calculated so readily to engage, and so firmly to fix the attention of an observer, as the *tendency* they may have *to*, or *divergency* (if one may so say) *from*, that which may be styled the common *end* of all of them. The end I mean is *Happiness:* [*w*] and this *tendency* in any act is what we style its *utility:* as this *divergency* is that to which we give the name of *mischievousness*. With respect, then, to such actions in particular as are among the objects of the Law, to point out to a man the *utility* of them, or the mischievousness, is the only way to make him see *clearly* that property of them which every man is in search of; the only way, in short, to give him *satisfaction*.

From *utility*, then, we may denominate a *principle*, that may serve to preside over and govern, as it were, such arrangement as shall be made of the several institutions, or combinations of institutions, that compose the matter of this science: and it is this principle that, by putting its stamp upon the several names given to those combinations, can alone render *satisfactory* and *clear* any arrangement that can be made of them.

Governed in this manner by a principle that is recognised by all men, the same arrangement that would serve for the jurisprudence of any one country, would serve with little variation for that of any other.

Yet more. The mischievousness of a bad law would be detected, at least the utility of it would be rendered suspicious, by the difficulty of finding a place for it in such an arrangement: while, on the other hand, a *technical* arrangement is a sink that with equal facility will swallow any garbage that is thrown into it.

That this advantage may be possessed by a natural arrangement, is not difficult to conceive. Institutions would be characterized by it in the only universal way in which they can be characterized; by the nature of the several *modes of conduct* which, by prohibiting, they constitute *offences*. [*x*]

These offences would be collected into classes denominated by the various modes of their *divergency* from the common *end;* that is, as we have said, by their various forms and degrees of *mischievousness;* in a word, by those properties which are *reasons* for their being made *offences:* and whether any such mode of conduct possesses any such property, is a question of experience. [*y*] Now, a bad Law is that which prohibits a mode of conduct that is *not* mischievous. [*z*] Thus would it be found impracticable to place the mode of conduct prohibited by a bad law under any denomination of offence, without asserting such a matter of fact as is contradicted by experience. Thus cultivated, in short, the soil of Jurisprudence would be found to repel,

[*w*] Let this be taken for a truth upon the authority of *Aristotle:* I mean by those who like the authority of Aristotle better than that of their own experience. Πασα τεχνη, says that philosopher, και πασα μεθοδος· ὁμοιως δε πραξις τε και προαιρεσις, αγαθου τινος εφιεσθαι δοκει· διο καλως απεφηναντο ταγαθον, ου παντα εφιεται. Διαζοξα δε τις φαινεται των (understand) τοιουτων ΤΕΛΩΝ. — Arist. Eth. ad Nic. L. I. c. 1.

[*x*] Offences, the reader will remember, may as well be offences of *omission*, as of *commission*. I would avoid the embarrassment of making separate mention of such laws as exert themselves in *commanding*. 'Tis on this account I use the phrase "*mode of conduct*," which includes *omissions* or *forbearances*, as well as *acts*.

[*y*] See note [*ee.*] [*z*] See note [*x*]

in a manner, every evil institution; like that country which refuses, we are told, to harbour any thing venomous in its bosom.

The *synopsis* of such an arrangement would at once be a compendium of *expository* and of *censorial* Jurisprudence: nor would it serve more effectually to instruct the *subject*, than it would to justify or reprove the *Legislator*.

Such a synopsis, in short, would be at once a map, and that an universal one, of Jurisprudence as it *is*, and a slight but comprehensive sketch of what it *ought to be*. For, the *reasons* of the several institutions comprised under it would stand expressed, we see, and that uniformly (as in our Author's synopsis they do in scattered instances), by the names given to the several classes under which those institutions are comprised. And what reasons? Not *technical* reasons, such as none but a Lawyer gives, nor any but a Lawyer would put up with: [*aa*] but reasons, such as were they in themselves what they might and ought to be, and expressed too in the manner they might and ought to be, any man might see the force of as well as he.

Nor in this is there any thing that need surprise us. The consequences of any Law, or of any act which is made the object of a Law — the only consequences that men are at all interested in — what are they but *pain* and *pleasure*? By some such words, then, as *pain* and *pleasure*, they may be expressed: and *pain* and *pleasure*, at least, are words which a man has no need, we may hope, to go to a Lawyer to know the meaning of. [*bb*] In the synopsis, then, of that sort of arrangement which alone deserves the name of a natural one, terms such as these—terms which, if they can be said to belong to any science, belong rather to Ethics than to Jurisprudence, even than to universal Jurisprudence, will engross the most commanding stations.

What, then, is to be done with those names of classes that are purely technical?— with offences, for example, against prerogative, with misprisions, contempts, felonies, præmunires? [*cc*] What relation is it that these mark out between the laws that concern the sorts of acts they are respectively put to signify, and that *common end* we have been speaking of? Not any. In a natural arrangement, what then would become of them? They would either be banished at once to the region of *quiddities* and *substantial forms*; or if, and in deference to attachments too inveterate to be all at once dissolved, they were still to be indulged a place, they would be stationed in the corners and bye-places of the Synopsis: stationed, not as now to *give* light, but to *receive* it. But more of this, perhaps, at some future time.

To return to our Author. Embarrassed, as a man must needs be, by this blind and intractable nomenclature, he will be found, I conceive, to have done as much as could reasonably be expected of a writer so circumstanced; and more and better than was ever done before by any one.

In one part, particularly, of his Synopsis,* several fragments of a sort of method which is, or at least comes near to, what may be termed a natural one, [*dd*] are actually to be found. We there read of "*corporal injuries*;" of "offences against *peace*;" against "*health*;" against "*personal security*;" [*ee*] "*liberty*;" "*property*;" —— light is let in, though irregularly, at various places.

In an unequal imitation of this Synopsis

[*aa*] *Technical* reasons: so called from the Greek τέχνη, which signifies an art, science, or profession.

Utility is that standard to which men in general (except in here and there an instance where they are deterred by prejudices of the religious class, or hurried away by the force of what is called *sentiment* or *feeling*)—utility, as we have said, is the standard to which they refer a law or institution in judging of its title to approbation or disapprobation. Men of Law, corrupted by interests, or seduced by illusions, which it is not here our business to display, have deviated from it much more frequently, and with much less reserve. Hence it is that such reasons as pass with Lawyers, and with no one else, have got the name of *technical* reasons; reasons peculiar to the *art*, peculiar to the profession.

[*bb*] The *reason* of a Law, in short, is no other than the *good* produced by the mode of conduct which it enjoins, or (which comes to the same thing) the *mischief* produced by the mode of conduct which it prohibits. This *mischief*, or this *good*, if they be real, cannot but show themselves somewhere or other in the shape of *pain* or *pleasure*.

[*cc*] See in the Synoptical Table prefixed to our Author's *Analysis*, the last page comprehending Book IV.

* It is that which comprises his fourth Book, intitled PUBLIC WRONGS.

[*dd*] *Fragmenta methodi naturalis.* — LINNÆI *Phil. Bot.* Tit. *Systemata*, par. 77.

[*ee*] This title affords a pertinent instance to exemplify the use that a natural arrangement may be of, in repelling an incompetent institution. What I mean is the sort of filthiness that is termed *unnatural*. This our Author has ranked in his class of *Offences against "personal security,"* and, in a subdivision of it, intitled "*Corporal Injuries.*" In so doing, then, he has asserted a fact: he has asserted that the offence in question is an offence against personal security; is a corporal injury; is, in short, productive of unhappiness *in that way*. Now this is what, in the case where the act is committed *by consent*, is manifestly not true. *Volenti non fit injuria*. If then the Law against the offence in question had no other title to a place in the system than what was founded on this *fact*, it is plain it would have none. It would be a bad law altogether. The mischief the offence is of to the community in this case is in truth of quite another nature, and would come under quite another class. When *against* consent, there indeed it does belong really to this class: but then it would come under another name. It would come under that of *Rape*.

that has lately been performed upon what is called the *Civil Law, all* is technical: all, in short, is darkness: scarce a syllable by which a man would be led to suspect that the affair in hand were an affair that happiness or unhappiness was at all concerned in.[*ff*]

To return, once more, to our Author's Commentaries. Not even in a *censorial* view would I be understood to deem them altogether without merit. For the institutions commented on, where they are capable of good reasons, good reasons are every now and then given: in which way, so far as it goes, one half of the censor's task is well accomplished. Nor is the dark side of the picture left absolutely untouched. Under the head of "Trial by Jury," are some very just and interesting remarks on the yet-remaining imperfections of that mode of trial:* and under that of "Assurances by matter of "Record," on the lying and extortious jargon of *Recoveries*.† So little, however, are these particular remarks of a piece with the general disposition that shows itself so strongly throughout the work, indeed so plainly adverse to the general maxims that we have seen, that I can scarce bring myself to attribute them to our Author. Not only disorder is announced by them, but remedies, well-imagined remedies, are pointed out. One would think some Angel had been sowing wheat among our Author's tares. [*gg*]

With regard to this Essay itself, I have not much to say. The principal and professed purpose of it is, to expose the errors and insufficiencies of our Author. The business of it is therefore rather to *overthrow* than to *set up*; which latter task can seldom be performed to any great advantage where the former is the principal one.

To guard against the danger of misrepresentation, and to make sure of doing our Author no injustice, his own words are given all along: and, as scarce any sentence is left unnoticed, the whole Comment wears the form of what is called a perpetual one. With regard to a discourse that is simply institutional, and in which the writer builds upon a plan of his own, a great part of the satisfaction it can be made to afford depends upon the order and connexion that are established between the several parts of it. In a comment upon the work of another, no such connexion, or at least no such order, can be established commodiously, if at all. The order of the Comment is prescribed by the order, perhaps the disorder, of the text.

The chief employment of this Essay, as we have said, has necessarily been *to overthrow*. In the little, therefore, which has been done by it in the way of *setting up*, my view has been not so much to think for the reader, as to put him upon thinking for himself. This I flatter myself with having done on several interesting topics; and this is all that at present I propose.

Among the few positions of my own which I have found occasion to advance, some I observe which promise to be far from popular. These, it is likely, may give rise to very warm objections: objections which in themselves I do not wonder at, and which in their motive I cannot but approve. The people are a set of masters whom it is not in a man's power in every instance fully to please, and at the same time faithfully to serve. He that is resolved to persevere without deviation in the line of truth and utility, must have learnt to prefer the still whisper of enduring approbation, to the short-lived bustle of tumultuous applause.

Other passages too there may be, of which some farther explanation may perhaps not unreasonably be demanded. But to give these explanations, and to obviate those objections, is a task which, if executed at all, must be referred to some other opportunity. Consistency forbad our expatiating so far as to lose sight of our Author: since it was the line of his course that marked the boundaries of ours.

[*ff*] I think it is Selden, somewhere in his *Table-talk*, that speaks of a whimsical notion he had hit upon when a schoolboy, that with regard to *Cæsar* and *Justin*, and those other personages of antiquity that gave him so much trouble, there was not a syllable of truth in any thing they said, nor in fact were there ever really any such persons; but that the whole affair was a contrivance of parents to find employment for their children. Much the same sort of notion is that which these technical arrangements are calculated to give us of Jurisprudence: which in them stands represented rather as a game at *Crambo* for Lawyers to whet their wits at, than as that Science which holds in her hands the happiness of nations.

Let us, however, do no man wrong. Where the success has been worse, the difficulty was greater. That detestable chaos of institutions which the analyst last mentioned had to do with, is still more embarrassed with a technical nomenclature than our own.

* 3 Comm. ch. xxiii. p. 387.

† 2 Comm. ch. xxi. p. 360.

[*gg*] The difference between a generous and determined affection, and an occasional, and as it were forced contribution, to the cause of Reformation, may be seen, I think, in these Commentaries, compared with another celebrated work on the subject of our Jurisprudence. Mr. Barrington, whose agreeable miscellany has done so much towards opening men's eyes upon this subject—Mr. Barrington, like an active general in the service of the public, storms the strongholds of chicane, wheresoever they present themselves, and particularly fictions, without reserve. Our Author, like an artful partisan in the service of the profession, sacrifices a few, as if it were to save the rest.

Deplorable, indeed, would have been the student's chance for salutary instruction, did not Mr. Barrington's work in so many instances furnish the antidote to our Author's poisons.

HISTORICAL PREFACE,

INTENDED FOR

THE SECOND EDITION.

I. The Bookseller's obliging attention, in applying for my permission to do what he had a full right to do without any such permission, had produced on my part a desire to make, in some shape or other, a return for it. I could think of none more suitable than the supplying him with a few recollections, relative to the effects, public and private, which followed this my first attempt, and the then unseen causes in which they have for some time appeared to me to have had their root.

I had gone some length, when the conception struck me, that, by being put together in a certain order, the facts might be made productive of an incomparably more useful effect: and in this hope I must find what consolation I can for the consumption of a quantity of time much exceeding my original expectations. The change consists, in the adding, as deduced from the particular facts, a confirmation of those general conceptions, in the development and application of which, no small portion of the aggregate mass of my intervening works have been employed, namely, that no system or form of government ever had, or ever could have had, for its actual and principal end in view, the good of any other persons, than the very individuals by whom, on each occasion, the powers of it were exercised: that, in particular, this has been the case with the least bad of all bad governments — the English; that of the Anglo-American United States being the first of all governments to which the epithet of *good*, in the positive sense of the word, could with propriety be attached: that, in England in particular, in this case have been all the individuals, and all the bodies, among whom the powers of government have, at any time, been shared; and in a more particular manner, such of the functionaries as have been at the head of the judicial department; functionaries by whom, under the notion and pretence of exercising no other than judicial power, legislative power has, with the connivance and in subservience to the *sinister* interest of the supreme and sole ostensible Legislature, been all along usurped and exercised.

What at the same time occurred to me was — that those all-comprehensive conclusions, of which in my view the facts are demonstrative, and which will accordingly, in this comparatively short trifle, be seen expressed in the most direct terms, and without any the smallest doubt, disguise, or reserve, — are the same as those which, in the Memoirs of Bubb Doddington and of Horace Walpole, as well as in many others, by which of late years such new and instructive lights of the same colour have been spread over the field of Government, suggest themselves to an observant mind, but have not in either of those works received any such determinate expression: and that thus, in the minds of some readers, this little additional Fragment, thus incidentally pinned upon a former Fragment, might have the farther use, of serving as a sort of key to the mysteries, as yet but incompletely revealed, in those no less instructive than interesting anterior, and in every sense greater, works.

As to claim to confidence, the relative time of publication gives to this Preface, so far as it goes, the advantage over those works. For the correctness of the narration, it affords a sort of security, which in those instances has no place: the narrative not having in either of them been intended for publication, till the Author should be out of the way of all personal responsibility in respect of it.*

II. When the Fragment made its appearance, the sensation it produced was for some time not inconsiderable. To the unqualified admiration which the Commentaries had for so many years been in possession of, it constituted the first considerable exception, perhaps the very first exception, bearing any thing like a general aspect, that had ever been seen in print. No name being in the title-page, nor any information concerning the author obtainable from the bookseller, conjecture set itself to work. More than one father was found for it: each of the very first class: no minor one: Lord Mansfield, Lord Camden, and Mr. Dunning: the latter, five years afterwards, cabineted and ennobled under the title of Lord Ashburton.

It was by Dr. Johnson that it was fathered upon Dunning, that prime leader of the King's Bench Bar. Much about that time, I be-

* This Preface was first printed in 1828, during Mr. Bentham's lifetime.

longed to a dinner club, of which Johnson was the Despot. It was not, however, immediately from his mouth that the conjecture reached me: it came through some other member, to whom he had mentioned it. Completely erroneous as it was, it was not perhaps completely groundless: the sagacity of his deluded but powerful mind was exemplified by it. The eloquence of Dunning was eminently and exclusively of the logical cast; not any the slightest ray of sentimentality was ever seen to issue from it. As to myself, in the days of my studentship, the chief part of my attendance was paid at the King's Bench. If, in my style, appropriate aptitude in any shape or degree is discernible, it is probably in no small degree to Dunning that it is due. Precision, correctness, clearness, guardedness, in expression, — closeness in argumentation, — seemed to me his characteristic features: in these, combined with force, he seemed to me altogether without a rival. To these he added a sort of controversial insinuation, such as belonged to his purposes, and not to mine. That which I here speak of is that which I heard from him in public; for in private, at that time, I never had had any the slightest intercourse with him. At the Bar, of all men that I had ever heard, he had been the one whom I had heard with the greatest pleasure and attention; the one, whose style in speaking, it seemed to me, that on all occasions it would be matter of the highest satisfaction to me to be able in any way to imitate.

When the style has thus been mentioned, every thing has been mentioned in which the Lexicographer's conjecture could find any the slightest support. It proves the collateral fact — that not only the affections, but the acquirements, of the pre-eminent lawyer who was the subject of it, were altogether unknown, to the miserable and misery-propagating ascetic, and instrument of despotism, by whom it was delivered. In the Fragment, marks of some little general acquaintance with the field of science and general literature may be seen here and there peeping out. The office of his father — a country Attorney, whose abode was in the little town from which the son, on his elevation, took his title — had been the University of John Dunning. Whatever analogy may, in respect of certain faculties, have had place between the illustrious advocate and the obscure reformist, — in respect of feelings and wishes with relation to the universal interest, nothing could be much more opposite. Some grounds for this assurance will be presently seen.

The two other conjectures were still more completely groundless: and, though coming from professional men, as completely destitute of, or rather opposite to, manifest probability, as conjectures can easily be. I speak of the intrinsic evidence afforded by the work, compared with the high political situation, and professionally known characters, of these its reputed authors.

As to Lord Camden, nothing could be much less assorted to his character or situation than a work of the complexion of the Fragment. On the hill of forensic ambition, Lord Camden's place had for years been on the summit; the Author's was at the very bottom. To Lord Camden, in his situation, nothing could be more completely wanting than all inducement to assume and keep up the tone of juvenility and tyro-ship, which will be seen pervading the work, and painting in genuine colours the state of the Author's mind.

For improvements in the state of the Law, the Author had long been under the stimulus of that appetite, which age, the grand moderator of most appetites, has left hitherto undamped. To Lord Camden, all improvement in that line was an object of undisguised aversion. For this assurance, the direct evidence afforded by documents of a public nature — the direct evidence — negative and positive together, will of itself, if my recollection does not greatly deceive me, afford tolerably sufficient warrant; and, if so, the little private incidents which will be seen presently, will receive their explanation from it, and operate in the character of circumstantial evidence in confirmation of it. In favour of innovation in any such shape, not a syllable, I am confident, is to be found in any speech of his that has been handed down to us. If this be correct, here then, though but negative, is the direct evidence. As to positive evidence, the same sources would be found to afford that which is but too conclusive. I recollect not, nor would it be worth the search, at what exact time my eyes were first wounded by it. The following little history will enable the reader, should he think it worth his while, to find it.

Some time after the appearance of the Fragment, the House of Commons was found to contain a small knot of young men, in whose minds a disposition to contribute to the improvement of the Law had begun to manifest itself. William Eden, who afterwards entered into the diplomatic career, and was raised to the Peerage by the title of Lord Auckland, was one of them; probably enough (for I have no recollection about the others) at the head of them. The first fruit of their labours was the production of a bill, which had for its object the clearing the Statute-Book of a few insignificant samples of its antique rubbish. If I recollect right, there were half a dozen of them. Altogether incapable were they of doing good in any shape. On the other hand, they did no harm in any shape: always excepted the encumbering the Statute-Book, contributing to the confusion

with which it covers the field of legislation, and loading, with so much useless lumber, the memory and the purse. Of one of these samples alone, the remembrance still dwells with me. Date, the 27th of Edward I.; language, French; object, preventing the importation of certain pieces of coined metal called *pollards* or *crokards*. I know not how it happened, nor is it material: it was with that commodity as with *corn* at present, the abundance of it was a nuisance: severe penalties were employed for the exclusion of it. The reader need scarce be informed that the danger of an excess in that article could not be very menacing at the time of the bringing in of Mr. Eden's Bill. In the Commons it was suffered to pass: but, in the House of Lords, it found armed against it an authority altogether irresistible.

It was Lord Camden's. From such authority, in a place where authority is every thing, very few words were sufficient. I remember reading them in the newspapers. Of the words themselves I have no recollection, nor are they worth searching for: as to the purport of them, what I am confident of, is, that it would be found in the Book on *Fallacies*, probably in Mr. Dumont's edition of it in French; and moreover, that it would serve for the exclusion, as well of the most important improvement, as of the minute projected benefit which it was thus employed to crush.

Not even by any of the most determined anti-reformists of the present day, with or without the mask of a reformist on his countenance, would the *reform*, if such it may be called, be termed either *intemperate* or *immoderate*. Seeing it thus dealt with, I was chagrined to the degree that may be imagined: chagrined, and at that time even astounded; for at that time, no suspicion to the prejudice of the liberalism of that head of the Whig lawyers had, I believe, as yet presented itself to my mind.

III. Among the effects of the work, such as it was, was a sort of concussion, produced by it in the sort of world it belonged to: in the world of politics, but more particularly in the world of law: more particularly still, in the higher regions; the inhabitants of which, in this as in other professions, form a sort of celestial conclave, of the secrets of which, whatsoever observation is endeavoured to be made from the subjacent low grounds, is made through a medium impregnated with awe, admiration, and conjecture.

The peep here given into its mysteries will, perhaps, be found neither uninteresting nor uninstructive: it may be assistant to the grand purposes which the work itself has for its objects — objects which may be seen containing the germ of every thing which, on the same field, has been sown by the same hand since. A more particular object is the throwing light into the den of the long-robed Cacus. — Cacus felt the light, and trembled.

The more extensive, and indeed all-comprehensive object is, the pointing attention to the imperfections which even at that time of day were seen swarming in the frame of the government, and to the ricketiness of the only foundations in which, on the ground of argument, it had ever found support. No such imperfection having place but what brought profit, in some shape or other, to those among whom the power was shared, their interest of course was, that those same imperfections should, in their whole mass, remain for ever unremoved, and therefore be at all times as little as possible in view.

As a basis for all such operations as should be directed to this same object, the Fragment, at the same time, Fragment as it was, undertook to set up, and may be seen setting up accordingly, the greatest happiness of the greatest number, in the character of the proper, and only proper and defensible, end of government; as the only standard by which any apt judgment could be formed on the propriety of any measure, or of the conduct of any person, occupied in making opposition, or giving support to it. At that time of day, so far as regards the general frame of the Government, scarcely in any one of those imperfections did the Author of the Fragment see the effect of any worse cause than inattention and prejudice: he saw not in them then, what the experience and observations of nearly fifty years have since taught him to see in them so plainly, the elaborately organized, and anxiously cherished and guarded products of sinister interest and artifice.

Under the name of the *principle of utility*, (for that was the name adopted from David Hume), the Fragment set up, as above, the *greatest happiness* principle in the character of the standard of right and wrong in the field of Morality in general, and of Government in particular. In the field of Government, it found in this country the *original contract* in possession of that character.

The existence of that pretended agreement (need it now be said?) was and is a fable: authors of the fable, the Whig lawyers. The invention, such as it was, had been made by them for their own purposes, and nothing could have been better contrived: for, the existence of the contract being admitted, the terms remained to be settled: and these would of course be, on each occasion, what the interest of the occasion required that they should be. It was in this offspring of falsehood and sinister interest that the Fragment beheld the phantom, on the shoulders of which, the Revolution that substituted Guelphs to Stuarts, and added corruption to

force, had till then had its sole declared support. Against this phantom, the Fragment will be seen making declared war: the only war but one that had ever been made against it, on any side, and the only war without exception that had ever been made against it, on the side and in favour of the people. Against this attack, thus made, no defence has, I believe, ever been attempted: scarcely since that time has the chimera been seen to show itself; scarcely, at any rate, under its own name. Such as it was, it was the offspring of Fiction; meaning here by the word *Fiction*, that which is meant by it in law-language.

A fiction of law may be defined — a wilful falsehood, having for its object the stealing legislative power, by and for hands which could not, or durst not, openly claim it, — and, but for the delusion thus produced, could not exercise it.

Thus it was that, by means of mendacity, usurpation was, on each occasion, set up, exercised, and established.

A sort of partnership was thus formed: formed, in so far as a partnership can be said to have place, between a master and his at all times removable servants: a partnership, having for its object the extracting, on joint account, and for joint benefit, out of the pockets of the people, in the largest quantity possible, the produce of the industry of the people. Monarch found force; lawyers, fraud: thus was the capital formed. Creatures of a day, and for years together, neither possessing present nor certainty of future existence, the representatives of the people, now such convenient partners, were not as yet ripe for admittance. Parties in the concern as yet but those two: — monarch and lawyers. Whatever was the fraud thus practised, partners on both sides found their account in it: interests of both provided for of course.

The monarch, not being acknowledged in the capacity of sole legislator, had every thing to gain, by suffering these his, at all times, removable creatures, thus to exercise the power belonging to that office; for, with the instrument thus constructed, and always at hand — an instrument which continually increasing experience showed to be so fit for use — depredation and oppression might at all times be exercised: exercised in shapes and degrees in which he could not have dared to exercise them by himself in a direct way, or to propose in an open way to the representatives of the people.

As little could the authors of this power-stealing system fail to find *their* account in it: since, for the sake of the profit received by him as above, their master could do no otherwise than connive all along at those other lies and devices, by which depredation and oppression were acted by them for their own benefit. Here again was another source of profit to the head partner: for, in virtue and to the extent of his power of patronage, — upon each vacancy, their office, with the annexed plunderage, became his; his — not to retain indeed, but at any rate *his* to give.

Mendacity is a name too soft for falsehood thus applied; applied to such purposes, and by men so situated: for, in comparison of the suffering thus produced, the greatest ever produced by any thing to which the word is applied in the intercourse between individual and individual, would be found inconsiderable. An operation, by which the nature and effects of it would be placed in their full and true light, is obvious and simple. Run over the field of law, as laid down in any of the books: pick out the several parts in which a fiction in any shape has been employed; the most extensively and mischievously operative will be found in Blackstone: for others, the books of judicial procedure called *Books of practice*, would be to be looked at: set down the several fictions, under the several heads they belong to; in each instance, the particular mischief to the public, together with the profit to the judge or judges of the judicatory (called the *court*, for the purpose of letting in the servants to a share of the worship paid to the master) are the articles to be looked for; if honestly looked for, in no case would there be much difficulty in finding them; in the profit made out of each fabrication, would be seen the final cause of it.

One pre-eminently serviceable and all-comprehensive effect there is, to which, if to no other, they would every one of them be found contributory. This is general debility in the understanding of the deluded people: for, the more prostrate that debility, the more flagrant the ulterior degree of depredation and oppression, to which they might thus be brought to submit. Of the degree of debility produced, no better measure need be given, than the fact of men's having been in this way made to regard falsehood as an instrument not only serviceable but necessary to justice.

In others, this vice was not only punished all the while by these appointed guardians of virtue, but painted in its proper colours. That which is vice in all others, how could it in them be virtue? how, but that to them belonged the power of making *wrong* and *right* change natures, and determining what shall be *morality* as well as what shall be *law*; making as well the one as the other thus dependent — not on their effects on the happiness of the community at large, but on the ever-changeable good pleasure of the possessors of power, by what means soever obtained, and in what manner soever exercised; thus, in regard to morality: and in regard to truth, the power of determining, if not what shall

be truth, what, to all practical purposes, shall be taken for it. To produce ductility, produce debility. No recipe was ever more effectual: no time at which the virtue of it has been more thoroughly understood than at present. But for this, how could judges have been suffered to make law, or priests gospel, as they have been and still are?

Though in the Fragment the mask was not taken off so completely or forcibly as here, still the effects produced by any such disclosure may, without much difficulty, be imagined. Nowhere, till this little work appeared, nowhere had there been a heart to declare — nowhere, perhaps, even an eye clearly to see — that, in the hands of these arbiters of every man's destiny, this pretended product of matchless wisdom — this object of veneration to the deluded multitude — had never been any thing better than a cover for rascality. By no former hand had the gauntlet been thrown down in the face of the brotherhood: that gauntlet, which, though so repeatedly offered again to learned vizards no eye has ever yet seen the possibility of taking up.

IV. The effects produced on sinister interest — on sinister interest in these high places — by the wounds thus given to it, may without much difficulty be imagined. But the greatest happiness of the greatest number requires, that they should be not only imagined but proved: and this they shall now be, in so far as natural probability, aided by whatever support it may be thought to receive from the character of the narrator, can gain credence, for the indication given of a set of actings and workings, of which, for the most part, the mind, in its most secret recesses, was the theatre. These effects the reader will see in the deportments of the various personages — keepers and workers of the state engines — in relation to the present work and another by the same hand; and among them will be found the several shining lights, to which, by the conjecturists, who thereby so clearly proved themselves not to have been members of the above-mentioned conclave, the work was, as above, ascribed.

He will see the great lawyers of the age — those of the one party as well as those of the other — concurring (and he will learn to judge whether it was not by concert) in a system of deportment and discourse having for its effect — (and he will judge, whether it had not also for its object) — the keeping covered up in the napkin the talents, such as they were, by which the unwelcome performance had been produced. He will see the hand of a great statesman employing itself at length in the endeavour to draw them out of the napkin, and put them to use.

But for the great purposes which have been seen, never would the patience of the public have been tried by any such string of personal anecdotes, in which an insignificant individual cannot but be the most prominent figure. In themselves the facts, are much too trivial to afford a warrant even for the time employed in bringing them to view — a time which, considering the engagements, the performance of which has thus been delayed,* cannot be thought of without remorse. One consolation is, as already observed — (and this it is that constituted the temptation) — that, to the all-comprehensive theory of which those engagements required the establishment, these anecdotes will afford the confirmation given by particular experience.

Fundamental principles of the Constitutional branch of the all-comprehensive Code now forming, three: —

1. *End-indicating* principle, the *greatest-happiness* principle.

2. *Obstacle-indicating* principle, the *universal self-preference-announcing* principle.

3. *Means-indicating* principle, the *interest-junction-prescribing* principle. To him to whom the House of Commons' Votes, or even the newspaper indications given of them, are familiar, neither a warrant, nor a key will be found wanting for these denominations, laconic as they are.

Of all the great public men who will here pass under review, one alone will be seen, to whom the greatest happiness principle, and the Author of the Fragment, in respect of the proclamation and applications made of it, was not, according to all appearance, an object of aversion. Of this aversion, the cause lay (it will be seen) in the nature of the species, of the class, and of the situation of the class on the one part; not in the nature of the individuals on either part. In that same situation, the conduct of any other individuals would, without material variation, have been the same: the individuals in question being of both parties; men, in every sense as *good* as any that are ever likely to be in those same situations so long as the form of government is what it is.

Sinister interests, two in the same breast — lawyer's interest and ruling statesman's interest: lawyer's interest, hostile to that of all suitors, and of all those who may have need to be so, that is to say — of all who are not lawyers. Ruling statesman's interest, hostile to all subjects' interest, in a form of government, which, to the *inclination* common to all breasts, adds in the ruling hands adequate *power:* power, to an amount sufficient for winding up to the pitch of perfection the system of *depredation* and *oppression:* power, by means of the *corruption* and

* See Codification, Proposal, Appendix xi. Acceptance given by the Portuguese Cortes to the offer of an all-comprehensive code.

delusion, which are the essence of this form of government, in addition to that physical *force* and those means of *intimidation* and *remuneration*, which belong of necessity to *every* form of government.

Of the three confederated interests, that of the lawyer tribe is in a more particular degree mischievous: mischievous, in as much as, to their share in the common sinister interest, they add one which is peculiar to themselves, and in as much as, by the peculiar strength given to their minds by exercise, they take the lead of all the other members of the confederacy, and are the men by whose exertion whatsoever is most difficult of that which is wished to be done, is done.

And thus will be seen an exemplification of the *obstacle-indicating—the universal-self-preference indicating* — principle.

So long as the form of Government continues to be what it is,— not better and better, but continually worse and worse,—must the condition of the people be, until the sinister sacrifice — the sacrifice of the interest of the many to the interest, joint or several, of the one or the few — shall have been consummated. In that which Austrian Italy — in that which English Ionia — in that which Ireland is — may be seen even now that which England is hastening to be. Forms continuing what they are, Englishmen cannot too soon prepare themselves for being shot, sabred, hanged, or transported, at the pleasure of the placed and momentarily displaceable creatures, of a Monarch, free from *all* check, but the useless one of an Aristocracy, sharing with him in the same sinister interest. Precedents have already been established: and, by whomsoever made, whether by those who claim to make law, or by those who in the very act disclaim it, every thing for which a precedent has been made is regarded as justified. Of the several particular interests of the Aristocrat in all his shapes, including the fee-fed lawyer, and the tax-fed or rent-fed priest, all prostrate at the foot of the throne — is composed the everlastingly and unchangeably ruling interest. Opposite to the interest of the greatest number — opposite through the whole field of Government — is that same ruling interest. That which this interest requires, is — that the quantity of power, wealth, and factitious dignity, in the possession and at the disposal of the ruling few, should be at all times as great as possible. That which the interest of the subject many requires, is — that the quantity of power and wealth at the disposal of the ruling few should at all times be as small as possible: of these necessary instruments, the smallest quantity; of that worse than useless instrument—factitious dignity, not an atom: no such instrument of corruption and delusion, no such favoured rival, and commodious substitute, to meritorious and really useful service: no such essentially disproportionate mode of remuneration, while, for really useful service, apt notification would afford the only remuneration, which in the shape of honour can be proportionate. Can opposition be more complete? But, to be governed by men, themselves under the dominion of an interest opposite to one's own, what is it but to be governed by one's enemies? In or out of office; possessors or expectants; Tories or Whigs; leaning most to the Monarchical side, or most to another side equally hostile to that of the people — what matter is it in which of these situations a man is, if to all the interest, he adds more than the power, of an enemy? Vain, therefore — vain for ever, will be all hope of relief, unless and until the form given to the Government is such, that those rulers in chief, whose particular interests are opposite to the universal interest, shall have given place to others whose particular interests have been brought into coincidence with that same universal interest; in a word, till the *interest-junction-prescribing* principle, as above, shall have been carried into effect. In the Anglo-American United States, this problem — has it not been solved?

Six public characters must now be brought upon the stage; Mr. or Sir Alexander Wedderburne, Lord Mansfield, Earl of Shelburne, Lord Camden, Mr. Dunning, Colonel Barré: denominations those which belonged to them at the time spoken of.

In the case of Lord Shelburne, it will be seen how ill-assorted the picture of the statesman is with those of the lawyers that precede and follow it. But the interpolation is unavoidable; without it, the other personages could not have been brought to view.

V. The first personage to be produced is Wedderburne; at the time here spoken of, Solicitor-General; afterwards, with the title of Lord Loughborough, Chief-Justice of the Common Pleas, and under that and the subsequent title of Earl of Rosselyn, Lord Chancellor.

The Fragment had not been out long, when a *dictum* which it had drawn from him, showed me but too plainly the alarm and displeasure it had excited. The audacious work had come upon the carpet: in particular, the principle of utility which it so warmly advocates: this principle, and the argument in support of it, in opposition to the Whig-Lawyer fiction of the *original contract*. "What say *you* to it?" said somebody, looking at Wedderburne. *Answer* — "It is a *dangerous* one." This appalling word, with the application made of it to the principle, contains all that was reported to me. Of the rest of the conversation nothing; any more than of the other parties to it: for on this,

as on other similar occasions, what came to me come through cautious strainers: attached to me, more or less, by principle and affection, but to the adversary by pressing interests. The *dictum*, such as it is, though but from this one member of the conclave, will be a sufficient key to whatsoever might otherwise seem mysterious in the language or deportment of those others.

Warm from the mouth of the oracle, the response was brought to me. What I saw but too clearly was — the alarm and displeasure of which it was the evidence: what I did not see was — the correct perception couched in it; the perception, I mean, of the tendency of the principle with reference to the particular interest of the particular class, to the head of which the already elevated lawyer was on his way.

Till within a few years — I am ashamed to think how few — did this same response remain a mystery to me. The principle of utility a dangerous principle! Dangerous, to endeavour to do what is most useful! The proposition (said I to myself) is a self-contradictory one. Confusion of ideas on his part (for I could find no other cause) was the cause to which I attributed it. The confusion was in mine. The man was a shrewd man, and knew well enough what he meant, though at that time I did not. By this time my readers, most of them, know, I hope, what he meant, as well as he. The paraphrase, by which upon occasion they would expound it, would be to some such effect as this: — "By *utility*, set up as the object of pursuit and standard of right and wrong in the practice of government, what this man means to direct people's eyes to is — *that* which, on each occasion, is most useful to all those individuals taken together, *over* whom Government is exercised. But to *us*, by whom the powers of government are exercised over them, — to us, so far from being most useful, that which would be most useful to them, would, on most occasions, be calamitous. Let this principle but prevail, it is all over with us. It is our interest, that the mass of power, wealth, and factitious dignity we enjoy at other people's expense, be as great as possible: it is theirs, that it be as small as possible. Judge, then, whether it is not dangerous to *us*. And who should *we* think of but ourselves?"

Thus far Wedderburne. What this one lawyer said, all those others thought. And who knows how many hundred times they may not have said it?

Not long after, I found myself in company with him. It was the first time and the only one. It was at the house of my intimate friend *Lind*, of whom presently. Any account given of me by him could not but have been in an eminent degree favourable. Wedderburne eyed me, but did not speak to me. He was still Solicitor-General. With all deference, I ventured some slight question to him. It was of a sort that any one could have put to any one. Answer short and icy.

VI. I come now to Lord Mansfield. Not many days from the publication of the Fragment had elapsed, when he had not only taken cognisance of it, but been delighted by it. There was in those days a *Mr. Way*, who was, or had been, in office under him, and whom, it should seem, he had been in the habit of employing to read to him at odd times. Be this as it may, he was employed in reading this little work. Some connexions of mine were intimate with Mr. Way. The effects produced by it on the language and deportment of the noble and learned hearer, were reported to them by this reader, and it may be imagined they were not long in reaching me. Some of the remarks that dropt from his Lord were also mentioned. While this or that passage was reading — "Now," cried his Lordship, "he seems to be slumbering:" while this or that other — "Now he is awake again." Which were the sleepy parts, which the animated and animating ones, was at that time a mystery to me: to me, it was at length cleared up: whether it be so to the reader, he will presently have to determine.

This was not the only ground I had for expecting a favourable notice on the part of Lord Mansfield. On that occasion it had happened to me to minister, as will be seen presently, to an antipathy of his: on another occasion it fell in my way to minister to his self-complacency. I think, it was between the publication of the Fragment on Government, and that of the Introduction to Morals and Legislation, that I took my second trip to Paris. In the passage-boat from Dover I joined company with *David Martin*. David Martin was a Scotchman: he was a portrait painter; he had painted a portrait of Lord Mansfield; his errand to Paris was to procure an artist, to make an engraving of it. From an English hand, an engraving that would be satisfactory was not to be had for less than 1500 guineas. *Strange* (I remember his mentioning) was the artist, by whom that price had been required. The young painter's errand to Paris was to import a cheaper one. The expedition was not altogether fruitless. Two engravings there are, and I believe no more than two considerable ones, of Lord Mansfield. One represents him in the zenith of his political career; the other, near the close of it. The earliest is that for which his admirers are indebted to the brush, and in no small degree to the graver, of David Martin. While at Paris, Martin and I took up our quarters in the same lodging-house. His inquiries brought

him to an engraver, whose name was *Littret de Montigny;* they entered into an agreement; I drew up the articles of it. The subject was not without its difficulties; the language French: I am but a sorry Frenchman now; I was, I imagine, not quite so bad an one then. My performance went through the hands of several Frenchmen, artists as well as others; one alteration alone being made in it; the substitution of the word *art* to the word *metier*, which, with unconsciously offensive impropriety, I had employed. The artist was imported; but perseverance failed: the task of finishing fell back into the hand of the painter, as above.

Martin was familiar at Ken Wood. To the noble and learned patron, the Parisian expedition could not be an uninteresting one: particulars were called for and given: — the document was produced. He read it and took particular notice of it: it received his unqualified approbation. The draught was, in the whole complexion of it, one of the ordinary track of business. He inquired who the draughtsman was, and was informed.

From the first morning on which I took my seat on one of the hired boards, that slid from under the officers' seats in the area of the King's Bench (it was about ten years before the publication of the *Fragment*), at the head of the gods of my idolatry, had sitten the Lord Chief-Justice. What his politics were, I did not comprehend; but, being his, they could not but be right. Days and weeks together have I made my morning pilgrimage to the chief seat of the living idol, with a devotion no less ardent and longing, and somewhat less irrational, than if it had been a dead one. Summons to the interior would have been admission into Paradise. No such beatification was I predestinated to receive. The notice taken of my *Fragment* had kindled my hopes; the notice taken of my draught had revived them; they were revived a second time, and with no better result.

Among my long-robed disciples, the first in the order of time (George Wilson, silk-gownsman, and head of the Norfolk circuit, being second, and Romilly third) was John Lind. Having received the Holy Ghost — as much of it at least, whatever it be, as the bishop could give him — he had gone from Baliol College, Oxford, to a chaplainship at the sublime Porte. Dismissed for being too agreeable to his Excellency's mistress, he was, in his passage through Warsaw, retained to read English to a Prince *Czartorinski*, father or uncle to Prince Adam, whose correspondence with me appears in my *Papers on Codification*, and uncle or cousin to the amiable, the virtuous, the unfortunate Stanislaus, last Polish King of the Aristocratico-Monarchico-Anarchical Republic of Poland. With the Prince he had not been long, before he was taken from him by the King. With the rank of Privy Counsellor he was made Director of a corps of 400 Cadets, organized by him, under the orders of the King, to serve as a seminary of liberal education, and a rampart against priestcraft. Every thing could not be begun at once: education at large remained in the hands of Jesuits.

While he was occupied in this charge, the time came for a nephew of the King's, Prince Stanislaus Poniatowski, to be sent upon his travels. The care of him was given to John Lind. It was the time of the first *partition*. Lind had not been many weeks in London, when, under the title of "*Letters on Poland*," he produced an octavo volume, in which the atrocity of the transaction was painted in lively and appropriate colours. Aided by his commissions and his address, it procured for the author high and favourable notice. He was well received at the Prime Minister's — Lord North's. He was well received at the house of his Honourable and Right Reverend Brother, and at the card-table of his not less Reverend Wife. He was rather too much at that Table; sometimes have I seen him returning from it with a tolerably well-filled purse, but too often with an empty one. His connexion with the King of Poland assisted his celebrity in bringing him acquainted with Lord Mansfield, with whom Stanislaus, during a year's stay in England, had been intimate. Lind was, in fact, the Resident of Poland at the Court of London, though, as being a subject of the King of England, he could not be received as the representative of a foreign potentate. Twice or thrice a-week, as regularly as the post went out, he used to write a letter to his master. Occasion pressing, I remember with what pride I one day officiated as his deputy. In the sunshine of official favour, he produced another political work. It was entitled, "*Remarks on the Acts of the Thirteenth Parliament, &c.*" It touches, however, upon no others than those which related to the Colonies. The foundation he had from me: it constitutes the first section of the work. I had committed to writing, in the compass of those few pages, the state of the question, as it had presented itself to me. He informed me of his project. Recollecting this paper, I put it into his hand. Little did I expect to see it figuring away in print, much less without the alteration of a word, and in a situation so leading and conspicuous.

This second work received the commendations of Lord Mansfield. The freedom with which his Lordship's Quebec Bill is treated in it was pardoned by him; in declaration and appearance at least: in that part I had not any share; but it can scarce be that he did not think I had. The basis, on which the whole work rested, could not have been unobserved by him. Lind being so much with

Lord Mansfield, his Lordship could not but hear again of me. In fact he did hear of me; mention, as having been made of me, was every now and then reported to *me;* to the last, however, I heard nothing *as from him.*

If not by Horace Walpole's Memoirs, by the general histories of the time, I must suppose the reader more or less acquainted with the character of Lord Mansfield. If so, he cannot have turned over many pages in the Fragment, without seeing, that the principles displayed in it stand in as direct opposition to the so well known biases and endeavours of the great Ultra-Tory, as can easily be imagined.

To me all this neglect remained a mystery. The Chief-Justice had retired from office, perhaps from life, before my inquiries had led me any further into Constitutional law than the Fragment shows. Till a dozen years ago or less, (will it be believed?) I knew not what was meant by influence. For I know not how long, my mind remained fast bound in the silken chains thrown around it by his eloquence. When quibbles stood in the way of his purpose, he would speak slightingly of them, and I thought him liberal. Invectives rained upon him, but I thought him calumniated. As the American controversy, the badness of the only arguments employed against bad government, whether on the one side of the water or the other, had left me sticking to it. Party, I belonged to none: I knew not what sort of a thing party was. In that book of Lind's, I had placed the question, as above, on the ground of the greatest happiness of the greatest number, meaning always in both countries taken together. With me it was a matter of calculation: pains and pleasures, the elements of it. No party had argued the question, or taken it up, on that ground. No party had any stomach for calculation: none, perhaps, would have known very well how to go about it, if they had. The battle was fought by assertion. *Right* was the weapon employed on both sides. "We have a *right* to be as we now choose to be," said people on the American side. "We have a right to continue to make you what we choose you should be," said rulers on the English side. "We have a right to legislate over them, but we have no *right* to tax them," said Lord Camden, by way of settling the matter: as if irreconcileable interests could be reconciled by a distinction without a difference. When our self-styled Representatives join with King, Lords, and Soldiers, in forcing us to give *them* money,—speaking to the King, they say—we *give* it you. "Doing this," said the Whig Chancellor, "is not making laws:" revenue laws are not laws. By the same reason, it may be proved, that if, before he takes your purse, a highwayman says *Give it me*, this will not be robbing you.

I have been running wild: age does so upon stories of younger years. I come back to the aversion. I come back to the fruit of it — the neglect which sat so heavy upon me. What remains is — to reconcile the belief of it, with the delight afforded by the same work at the same time, as proved to me by the unquestionable evidence above mentioned. The task will not be a difficult one.

There was a heart-burning between the noble and learned Lord, and the Author of the Commentaries. In the King's Bench, while his Lordship was Chief, Sir William was Puisne. To the Puisne, sitting on the same Bench with the scorning and overpowering Chief, was sitting in hot water. "*I have not been consulted, and I will be heard,*" said another of his Puisnes once in my hearing: it was Willes, son to the Chief Justice. But to return to Blackstone. The state of humours could no longer be concealed, when, for quiet, the weaker party was glad to slip down from the King's Bench into the Common Pleas. All this put together — if the Fragment be looked into in this view, there will not, it is believed, be much difficulty in discovering, which were the sleepy, which the awakening parts. In some were seen the tormentor of his tormentor; hence the delectation: in others, a liberalism and a logic, threatening his despotism and his rhetoric; hence the aversion.

VII. Now opens a very different scene: chief place, Bowood. In the year 1781 and not before, not less than five years after its publication, the Fragment — for such was the declaration made — produced me a visit from the Earl of Shelburne; that visit, kindness, — and that sort and degree of esteem, which it belongs to any person, rather than to the object of it, to call by its appropriate name. Nothing could have been more unexpected. By Lord Mansfield I was disappointed; at Lord Shelburne's I was indemnified: at Ken Wood, I should have been mortified and disgusted; at Bowood I was caressed and delighted. A novel — nor that altogether an uninteresting one — might be made, out of a correct and unvarnished picture, of the incidents, to which that visit, to a garret at Lincoln's-Inn, gave birth. Fifty years hence, if I have nothing else to do, I will set about it.

Of esteem, not to speak of affection, marks more unequivocal one man could not receive from another, than, in the course of about twelve years, I received from Lord Shelburne. But for such only as belong to the great public purpose in view, can time or room be found here. One thing will be found not altogether foreign to it. Though not its existence, my attachment to the great cause of mankind received its first encouragement, and its first development, in the affections I found in that heart, and the company I found in that house. Amongst the friend-

ships it gave me, was Dumont's; one that it helped to form, was Romilly's.

Some weeks had elapsed, when the visit to Lincoln's Inn produced one of some minutes to Shelburne House, and *that*, one of some weeks to Bowood. This had not lasted many days, when the purpose of it, or at least one purpose, was declared to me. A scene took place, the remembrance of which is, at more than forty years distance, as fresh in my mind as if it had been but yesterday. The rest of the company used to sit down to supper: I not. A little before they repaired to the supper table, I used to retire for the night. In my way was a room, on a table in which, the guests used to receive or deposit the lights they had need of in passing to and from their several apartments. Repairing to it one evening for my candles,—in the act of taking them up, I was met by the Master of the House, with those which he came to deposit. "Mr. Bentham," said he, candles in hand—"Mr. Bentham," in a tone somewhat hurried, as his manner sometimes was, "what is it you can do for me?" My surprise could not but be visible. Candles still in hand—"Nothing at all, my Lord," said I; "nothing that I know of: I never said I could: I am like the Prophet *Balaam:* the word that God putteth into my mouth—that alone can I ever speak." For discernment he was eminent; for quickness of conception not less so. He took this for what it was meant for—a declaration of independence. He deposited his candles; I went off with mine. If by this rencontre any expectation of his was disappointed,—neither his kindness, nor the marks of his esteem, were lessened. Some years after, more than once did it happen to me *to do something for him.* But, so it happened, it was always in pursuit of my own views of things—in the pursuit of the *greatest happiness* principle; and whatever was done, nothing did he know of it till after it was done. I shall again have to speak of him presently.

VIII. Another cause may perhaps have had its share in producing the visit of Lord Shelburne to the assailant of the Commentaries: a *breach* (I mean) between the Lord and the Commentator. The fact was once mentioned, but neither time nor particulars ever known to me. If it was by the above supposed *confederacy* that the visit was so long retarded, and at that time this *breach* recent,—by *that* stimulus was perhaps given the force, by which at last *their* trammels were broken through.

Blackstone seems to have had something about him, that rendered breaches with him not difficult. It was while I was a child without a guide,—idling, trembling, and hiding myself at Queen's College Oxford,—that the Commentator, then Fellow of All Souls, took possession of the new created Law Professorship. Browne, Provost of Queen's, was then Vice-Chancellor. Professor served Vice-Chancellor with notice, accompanying it with a claim of precedence. The Vice-Chancellor, when in the streets, was, and I suppose is, preceded by a stick with silver on it, called *a mace*, and a man called a *beadle* to carry it. "Let him walk," said Browne, "before my Beadle."

Lord Shelburne had been the making of Blackstone. The Lord had been in personal favour with George III. He introduced the Lecturer, and made the Monarch sit to be lectured: so he himself told me. The lecturer, as any body may see, shewed the King how Majesty is God upon earth: Majesty could do no less than make him a Judge for it. Blasphemy is—saying any thing a Judge can gratify himself, or thinks he can recommend himself, by punishing a man for. If tailoring a man out with God's *attributes*, and under that very name, is blasphemy, none was ever so rank as Blackstone's. The Commentaries remain unprosecuted; the poison still injected into all eyes: piety is never offended by it: it *may be* perhaps, should piety in high places ever cease to be a tool of despotism.

I, too, heard the lectures; age, sixteen; and even then, no small part of them with rebel ears. The *attributes*, I remember, in particular, stuck in my stomach. No such audacity, however, as that of publishing my rebellion, was at that time in my thoughts.

IX. Now as to Lord Camden. The preparatory mention of Lord Shelburne was necessary to the mention of his political associates and advisers, and in particular this their Chief. I was already at Bowood, when the Ex-Chancellor, with his unmarried daughter, made their appearance. The marked kindness and attention shown to me in that family, could leave no doubt as to the manner in which I had been spoken of to the grave personage. From the very first, however, the manner of his address to me carried with it in my eyes a sort of coldness and reserve. This being the first time of my seeing him,—I was not in a condition to form an immediate judgment, whether such was his general manner, or whether there was any thing in it, that applied in a particular manner to myself.

Of the drift of my book, and the sort of sensation it had made, it is not in the nature of the case he should have been ignorant: not a syllable on the subject did he ever say to me. He saw the countenance that was shown to me by every body else: no such countenance did *he* ever show to me. No advance did I ever make to him: to him, in his situation, it belonged, not to me, in mine, to make advances. On no occasion did he ever make any to me.

Not many days had elapsed, when a little incident helped to strengthen my suspicions. One evening after dinner, Miss Pratt was singing: I was accompanying her on a violin. "Not so loud! Not so loud! Mr. Bentham!" cried Lord Camden, tone and manner but too plainly indicating displeasure.

"You eat too much, Mr. Bentham!" said he one day to me; nor was there any want of hearers. "You eat too much. Reading so much as you do, two or three ounces a-day should be enough for you." The fact was — all the rest of the company sat down to two meals of meat: I, unless when forced, never to more than one. At that one, if excess was ever observed, none was ever experienced. Two purposes seemed as if aimed at: representing me as a glutton, and representing me as that sort of bookworm, by which nothing could ever be "*done for*" his noble friend. In a similar strain was what little he ever said to me. "But your own deportment:" says somebody — "may there not have been something in it that was displeasing to him?" To this point I shall speak presently.

A man of such celebrity, and who had for so many years occupied the first places in the law, could not fail of awakening, in a man in my situation and of *my* turn of mind, a desire to form some conception of the bent of *his*. I observed his conversation; I observed the books he opened, and set before him. I watched with particular interest every opportunity of observing, whether the system of law ever presented itself to his mind, as being, in any part of it, or as to any point in it, susceptible of melioration. By nothing I could ever catch, could I ever divine that any such conception had ever entered into his head: — with the exception of here and there an anecdote, such as the sphere he had always moved in could not fail to have furnished him with, I heard nothing in his talk that might not have been heard in any drawing-room, or in any coffeehouse.

X. I come now to John Dunning.

It was one evening after dinner that he made his appearance. He came fresh from Bristol, of which city he was Recorder. I found him standing in a small circle, recounting his exploits. They were such as, when associated with the manner in which he spoke of them, and the feelings that sat on his countenance, brought up to me Lord Chief-Justice Jefferies. He had been the death of two human beings: he looked and spoke as if regretting there had not been two thousand. Upon my approach, the scowl that sat on his brow seemed more savage than before. The cause I had not at the time any suspicion of: the effect was but too visible. As I came up, he was wiping his face: the weather was warm, and he had in various ways been heated. It was the tail only of a sentence that I heard. It appeared to me incorrect: I expressed a hope that it was so. Subdued and respectful (I well remember) was my tone; for, notwithstanding the freedom to which no member of the Bar could have been unaccustomed, — the temerity, such as it was, was by no means unaccompanied with the fear of giving offence. The scowl was deeper still: he made no answer: he took no further notice of me: bystanders smothered a titter as well as they could. Supper was soon after served: it was a meal of which I never partook. He went off the next morning: I saw no more of him: I had seen quite as much as was agreeable to me.

In conversation with Lord Shelburne once, an observation of mine was — that what *Junius* says of the practice of the long robe, when he calls it "the indiscriminate defence of Right and *Wrong*," is not precisely true; for that, upon the whole, *Wrong*, in his quality of best customer, enjoys a pretty decided preference. "Natural enough," replied my noble friend: and I remember hearing it observed of Dunning, that he never seemed to do the thing so much *con amore*, as when the wrong was on *his* side.

XI. Last comes Colonel Barré.

On his arrival at Bowood, he too found me already established there: Barré was a perfect man of the world. Dunning was sitting for one of Lord Shelburne's seats: Barré for another. Speeches are assigned to him in the Debates, and mention is made of him in Junius: — similes are there ascribed to "Mr. Burke;" "sarcasms" to "Colonel Barré." But his great merit was martyrdom: he had suffered under the third of the Georges, as of late Sir Robert Wilson under the fourth. Being a soldier of fortune, he was regarded as being, in a more exclusive degree, the property of his patron. When the patron became Minister, an indemnity, value £3000 a-year, was given to the *protegé*. During his ministry, the patron occupied the villa at Streatham, at which Brewer Thrale used to entertain Burke, Johnson, and their associates. I was sitting there after dinner with Lord Shelburne and Barré, — no one else present but Lady Shelburne, — when the print was brought in, which represents Lord Shelburne giving the dole to Barré in the character of *Belisarius:* both are striking likenesses.

Now as to what passed at Bowood between him and me. Towards others, his deportment was easy: towards myself, stately, distant, and significant. What (said I to myself) can I do to propitiate this minor divinity? Except from the sort of reports which give nothing but the surface, he was altogether unknown to me. In my portmanteau I had imported two articles: — an unfinished quarto in print, of which pre-

sently, — and a manuscript of between a dozen and a score of pages. It was an attack upon *Deodands*. When a man, who has a child and a waggon, loses the child by the waggon's going over it, — a notion, that my paper had been labouring to produce, was — that the loss of the child would be suffering enough, without the loss of the waggon's being added to it. Different has been, and continues to be, the opinion of the sages of the law; so, of course, of those who worship them. — "English" are all our institutions: this, as well as every other.

The Colonel being a soldier, not a lawyer, while presenting him with this specimen of them, little did I think of encountering in his mind any very formidable prepossession. Vain confidence!

One day, finding him alone at the common reading-table, I put into his hand my little paper. A day or two after, I ventured to ask whether it had been looked at. "Mr. Bentham," said he, returning it with a look and tone of scorn, "*you have got into a scrape.*"

"Scrape, Colonel! what scrape? I know of no scrape the case admits of." No answer. The unfortunate paper was pocketed. I went my way, and there the matter ended.

"You are a greenhorn: you know nothing of the world. You wrote that book of your's; you made your foolish attacks upon the lawyers; you thought it would be a treat to us to see you running at them: you are a silly fellow; you don't know how necessary they are to us. What have we to do with *Deodands?* You thought to cut a figure; you have *got yourself into a scrape.*" In this paraphrase, I found the interpretation — the only one I could ever find — for the appalling riddle. A confirmation, which this interpretation received, will be seen presently. It was not, however, received till some years afterwards.

Meantime, a little incident rendered me a little more fortunate: it recovered for me more or less of the ground which the Deodand had lost me. It was at the dawn of the French Revolution. Some of the leading men were in London. The Lansdowne House cook not being yet arrived from the country (it was the autumn of 1788), the dinner was given at Colonel Barré's. Circumstances were such, that I could not well have been left out of the invitation. In the drawing-room, the conversation turned upon the House of Common's debates. The Colonel's name had been looked for and not found. The remark touched upon a sore place — so I found afterwards. Embarrassment was visible. I stept in to his relief. "*M. le Colonel,*" said I, "*est comme le Dieu dans la fable: il ne paroit que dans les grandes occasions.*" A buzz of applause run round: the Colonel, whom *I* had got out of *this scrape*, was most conspicuous and most audible.

It was two or three years after this that the enigma of the *scrape* received the solution above hinted at. When my proposal, for a Penitentiary System upon the *Panopticon* plan, had received acceptance, Colonel Barré, with every body else, knew of it.

Speaking to a common friend who had been acting officially on the occasion of it, — "I am glad," said he, "to see Mr. Bentham turning his hand to useful things." Seeing that I do not betray his name, the friend, whether he remembers it or no, will, I hope, pardon me.* Why was the one thing *useful*, while the other was so much otherwise as to have got me into a *scrape?* The reader has, perhaps, already answered for me. Neither the lawyer tribe, nor any other section of the ruling few, had any *visible* interest in the evils to which the *Panopticon* plan would have applied a remedy. A prison, in which all the prisoners could, at all times, be seen at a glance by the keeper, — without his being seen by any of them, or changing his place, — was more intelligible than a *deodand:* and, if a man, who had then the whole Ministry with him — Pitt, Dundas, Rose, every body — could be said to be in a *scrape*, it could not be a very pitiable one.

I have mentioned the Colonel's embarrassment. The cause of it was this; I knew it not till afterwards. Person and manner imposing; self-possession perfect. But ignorance was extraordinary; extraordinary even in Honourable House: indolence, no less so. From Dunning, the patron used to extract his information; to Barré, he was forced to administer it. "The trouble I used to have in fighting him up," (that was Lord Shelburne's expression to me one day) "is altogether inconceivable."

The inaptitude of the showy soldier may perhaps furnish an additional means of interpretation for the "*What-can-you-do-for-me?*"

The Ministry (Lord North's) was already tottering. In America, the war of misgovernment, against the only possible good government, was unpromising. Profiting by the weakness of England, Ireland had raised herself within an ace of independence. It was her *quinquennium;* it was her golden age: by universal confession, it was an age of concord, tranquillity, morality, festivity, and happiness. But for the sinister aristocratical interest of her Whig Chief, Charlemont, — she would have substituted, to her still increasing misery, that felicity which can never be seen on this side of the Atlantic, till it has been imported from the other.

As Ministry darkened, Opposition brightened. Always on the watch for men of talents

* Sir Evan Nepean, successively Under-Secretary of State, and Secretary to the Admiralty. Since this sheet was sent to press, his decease has been announced in the newspapers.

in all lines, Lord Shelburne was *now* on the look-out for recruits in the line of politics. He had felt the want of them; it has been seen how. Dunning could not be at the Bar or at Chambers, and in the House, at the same time.

XII. This greatest happiness principle had been declared "*dangerous:*" of course every consistent application of it: this was from Alexander Wedderburne. Comes now a confirmation by Lord Camden and Mr. Dunning: words different, for so circumstances required: meaning, the same. The *Introduction to Morals and Legislation*, was not published till 1789: it had been printed, the greatest part of it, in 1781; the second edition of it is now in the press. In the trunk, which accompanied me to Bowood, in 1781, was a copy of it: it had not been long there, before it was in Lord Shelburne's hands.

All the entreaties I could use were insufficient, to prevent him from treating the Ladies with it at the breakfast table. Not to speak of the general complexion of it, in one particular it was peculiarly ill adapted to such an auditory. In some eight or ten places, the reader will, in the second edition, meet with the word *sexual*. In the place of this, stands, in the first edition, a word, more appositely stationed in a medical advertisement, than in the places in which I had seated it. When the word bolted out, some little embarrassment was the consequence. At length, the word *certain* presented itself to the noble Lecturer, — and, by the help of the substantive significative of the subject-matter, together with the pause and the confusion, constituted a succedaneum, and that a tolerably adequate one. — The Lectures had not been numerous, when, to my no small relief, an influx of company put an end to them.

Before I left Bowood, — Lord Shelburne, after observing to me, "how new the subject was to him, and how ill qualified he was of himself to appreciate a work, in which so much depth of thought had been displayed," informed me, "that his intention was to submit it to the consideration of men better qualified than himself to comprehend its merits, and derive the profit that was to be derived from it;" and, in this view, Lord Camden and Mr. Dunning were particularized."

I had not been long in London, on my return from Bowood, when I received a visit from Lord Shelburne. "I will deal plainly with you," said he: "I told you I should put your book into the hands of Lord Camden and Mr. Dunning. I have done so. Lord Camden acknowledged its merits in the character of a theoretical work; but he confessed he had found some difficulty in comprehending it, and if such is the case with me (said he), I leave you to imagine how it may be with the generality of readers." Thus far Lord Shelburne. Of Dunning's opinion I recollect not any particulars: it was but too plainly of the same cast.

Here was a second "*scrape:*" — another work, by the same man, by whom nothing "*could be done for*" the head of a party: a work which had nothing to do with "*useful things.*" Thus incomprehensible was it to the wisest of the wise. It has not been so to babes and sucklings. Two boys of sixteen have been giving a spontaneous reading to it: in the person of a tailor, it has found a spontaneous and unpaid Editor, who, having read it as an amateur, gives himself in this way a second reading of it. It is the basis of that one in French, for which so much *use* has been found, or at least thought to be found, in other countries.

Of the effects, of that report, on me, — a conception may be formed from the above-mentioned dates. The work would not have come out when it did, in 1789, but for George Wilson.

XIII. One objection remains: and my hypothesis must, if possible, be cleared of it. "Nothing intentionally disagreeable in you did any of these personages see," says somebody: "this, you may have credit for, without much difficulty. But, in the *tout ensemble* of a man, there may be disagreeable matter to any amount, without his intending it. Can you be quite sure, that something of this sort may not have had place in your case? for, if yes, then *this*, and not your reforms and improvements, may have been the thing that set them against you: and if so, your proof fails."

The answer will, I hope, be a tolerably satisfactory one. In the case of Wedderburne, the *person* had not been seen: the *work* was not only the sole object of displeasure, but the declared cause of it.

In the case of Lord Mansfield, the *person* was never seen in such sort as to be known in conjunction with the name. In the case of the disdainful soldier, not only the contempt, but the cause of it, was declared: declared before any other had any time for coming into existence.

For the two remaining cases, I must take other ground. If, in the eyes of the two great lawyers, or either of them, cause of personal disgust towards the Author had had place, and that in such degree as to extend itself to the work, — let it be judged whether the effect could have failed to be still more sensible on that sex, whose sensibility, in such a case, is naturally so much more acute. True it is, that what, on this or that individual occasion, may have been the sort of sentiment produced in the mind of this or that individual of the one sex, by the person or deportment of this or that one of the other, is not of itself of any great political moment.

But whether, — on the part of those who are obeyed and paid, as guardians of the happiness of the species, — there be a conspiracy, and that a standing one, and till the Anglo-American United States afforded one exception, a universal one — a conspiracy against that of which they are the professed guardians — this is no such trifle.

To close the evidence against the conspiracy, I must now call two Ladies. What I have to say is not of a nature to point any sentiment of disrespect towards either of them: and, if it were, they are not in a condition to be much affected by it.

1. Enter, first, Miss Pratt. When upon my fiddle's overpowering her voice, the part of Hogarth's enraged musician was played by her noble and learned father, his rage was rendered the less distressing to me by his daughter's not appearing to be a sharer in it. Not that there was not war between us: not that she was not the aggressor; but, whatever was the cause of the war, it was any thing but *that*. I remember not whether it was before or after this, that a letter came to me, as from a gentleman, who had been of the company, alluding to offence received from me, and suggesting the propriety of a rencontre. The gentleman was a quiet gentleman, and nothing had passed between us. — It was a forgery: the forger was discovered; it was Miss Pratt. Flagrant was the enormity. The investigation had not been indelicate. Vengeance would have been justice. But mediatrixes surrounded me. Mercy took the place of justice. The father was neither party nor privy. This was the first time of my seeing the lady; it was also the last. More than thirty years had elapsed, when the aunt of the late Marquis of Londonderry, being in company with a friend of mine, took notice of the pleasant days she had that year passed at Bowood. The adversary she had made to herself was not unremembered.

At this time, or some subsequent one, I received in the bosom of the same family, a general invitation from her now noble brother, the present Marquis. Sensibility to the kindness was not wanting. But he had not been witness to any thing of what had fallen on me from his father: without business or special invitation, I never went anywhere: and a house in which the head is cold, is not a house to visit at. This last piece of evidence is upon my brief; but in a court of justice I should pause before I called the witness. The invitation was of the number of those, which are not quite so likely to be remembered by the giver as by the receiver.

2. Next comes *Mrs. Dunning*. Her husband, on his arrival at Bowood, found her there, and he left her there. Her stay was considerable — *her* voice, too, my fiddle had accompanied, as also her piano, on which she was a proficient. No complaint of overloudness there. The aversion, whatever it may be, that had been conceived by the husband — had it been shared in by the wife? About ten or eleven years had elapsed, when an incident occurred, which may be regarded perhaps as affording some proof of the negative.

Lord Ashburton had paid the debt of nature. One day, at Lansdowne House, the master of it took me aside, and in express terms, after an eulogium pronounced on the dowager, gave it me as his opinion, that should my wishes point that way, disappointment was not much to be apprehended. The case was sufficiently intelligible. The Lady's only son — the present Lord — was a minor, and in tender age. "Your son," said he, "requires a guardian. Mr Bentham would be a faithful one. Your brothers are engrossed by other cares." No such conversation had indeed been mentioned to me; but circumstances sufficiently spoke it. My surprise was considerable: gratitude not inferior. But the offer was of the sort of those which may be received in any numbers, while at most only one at a time can be profited by. I have mentioned brothers. The founder of the *Baring* dynasty was one of them. He and I were good friends.

Much of all this is but too little to the purpose. But what *is* to the purpose is — that, in a family, in which whatever is best in aristocratical manners was at the highest pitch of refinement, whatever aversion was entertained by the great Law Lords was peculiar to the confederacy, and was not shared in by those who, had any ordinary cause of disgust had place, would naturally have been most sensible to it.

XIV. A tolerably satisfactory solution (the reader may now perhaps think) has been given, for the tardiness of the advances made by Lord Shelburne to the Author of the Fragment, coupled and contrasted with the cordiality of them, when made. On this hypothesis, the cognizance he took of it was not less early than that taken of it by the lawyer tribe, including his above-mentioned learned advisers. His disposition towards the Author was thereupon of the kind afterwards manifested. Meantime they, seeing to what it led, and looking upon their influence on him as endangered by it, concurred in the endeavour to prevent his making any such advances. At length, came some incident or reflection, the effect of which was — his breaking loose from their trammels. When at last the young intruder made his appearance in the circle, — thereupon, with or without concert, came the practice of doing what the nature of the case admitted of, towards keeping down his influence, and preserving their own views on political subjects

from being supplanted — supplanted by other views so opposite as they saw *his* to be.

In itself nothing can be more unimportant than the little intrigue was, if there was one: no one can be more fully sensible to its unimportance, than he is, who, if there was one, was the subject of it. But, in regard to the State and form of Government in this country, what it proves, so far as it proves any thing, is of no mean importance. It is — that, under the Government under which we live, the particular interest of the rulers is in direct opposition to almost every thing that is good; —to all reform, to all considerable melioration, even to the stopping of the career of abuse in any line; and thence, on almost all points, to the universal interest: and that, as it can never fail to be in their inclination, so is it at all times in their power to make sacrifice — continual and all-comprehensive sacrifice — of that same universal interest, to that same particular and sinister interest.

Under such a form of Government, the ruler, in all his shapes, deriving an advantage, immediate or unimmediate, from every thing by which the universal interest receives injury;—feeling that sinister interest assaulted, by almost every thing, by which service in any shape is rendered to the universal interest; — beholds an adversary, not to say an enemy, in every man by whom any such service is endeavoured to be rendered.

As to the Lawyer, — to the sinister interest which is common to him, with all others, by whom, in a government so constituted, the powers of government are exercised, — this man adds another sinister interest, peculiar to his own tribe: an interest, in that system, by which, while not so much as a chance for justice is allowed to any but a comparatively few, even those few are kept in a state of oppression: oppressed, by factitious delay, vexation, and expense, created by lawyers, in the situation of judges and legislators, for the sake of the profit extracted by the fraternity out of the expense.

The consequence is a confederacy — a perpetual and indissoluble confederacy — among the ruling few of all classes, to defend themselves and one another, against all such endeavours, as, by service rendered to the universal interest, act thereby in necessary opposition to that particular and sinister interest. Of this confederacy, whatsoever be the state of parties, the ruling men of all parties are members: members, linked together against the universal interest, by that particular and sinister interest, in which they are all of them partakers: for, whatsoever may be the hostility of the two sinister interests to one another, the hostility of both to the only right and proper interest is much more extensive and unchangeable. On any of the points, on which that system of corruption, depredation, and oppression, in which they have a common interest, rests, let any serious attack be made, — mutual hostility vanishes, and alliance against the common adversary takes the place of it.

XV. Only one piece of evidence more. It is however a sweeping one.

Among my friends was and is one, who, during the period in question, to a judgment fully competent, added materials not less adequate, to the forming the most correct conception, respecting the state of the affections in certain of the personages above mentioned, with relation to those whose interest in this as in all countries composes the universal interest. I asked him once, and begged of him to consider, whether, on the part of them, or any of them, on any occasion whatsoever, it had ever happened to him to observe any symptoms of real regard for the universal interest: in a word, whether, according to the best observation he could make, any object, beyond the field of the general scramble for power, ever found a place in their affections. Those on the Tory side — Wedderburne and Lord Mansfield — were out of the question. — Lord Camden, Dunning, and Barré, were particularly mentioned. His answer was clear, deliberate, and decisive: — it was in the negative.

XVI. A natural enough object of curiosity will be the sort of sensation, produced by the little work, in the mind of the learned Author, whose great work is the subject of it. Some small satisfaction, on this point likewise, it happens to be in my power to afford. It had not long been out, when, from one quarter or another, the intelligence was brought to me. The question had been asked him — I never knew from whom — for in telling such tales out of school great caution was in every instance observed: be this as it may, a question had been asked him — whether he knew who the Author was? "No," was the answer; "not his name: all I know of him is where he comes from: — he is a Scotchman." The conjecture had much better grounds than those others that have been mentioned. The Scotch minds were less ill-suited than the English to the sort of business he saw done. The Scotch law having for its foundation the Roman, — the range of thought, in the field of law, is necessarily much less narrow, among Scotch than among English lawyers. By the arguments in the Fragment, their sinister interests, their interest-begotten prejudices, their reputation, are not so directly struck at, as those of their southern brethren. As to *fiction*, in particular, compared with the work done by it in English law, the use made of it in theirs is next to nothing. No need have they had of any such clumsy instruments.

They have two others, and of their own making, by which things of the same sort have been done with much less trouble. *Nobile officium* gives them the creative power of legislation: this, and the word *desuetude* together, the annihilative. Having less need of insincerity than the English, — language has with them been less impudently insincere. When the English said James the Second had *abdicated* his throne, — the contrary being true in the eyes of every body, — the Scotch said he had *forfeited* it. So much as to intrinsic evidence.

Now as to extrinsic. By the sort of notices taken of the Fragment by Lord Mansfield, as above, a suspicion might naturally enough be produced in the mind of the harassed Puisne, that the adversary was a sort of sad dog, of the Scotch breed, set upon him by the overbearing Chief.

A question somebody else put to the Author of the Commentaries was — whether it was his intention to make any answer to the critique? "No," was the reply: "not even if it had been better written." But, though he made not any answer to it, nor any express mention of it by its name, he did not altogether refrain from noticing it. In the preface to the then next edition of his work, (and, I take for granted, to all the subsequent ones) there are allusions to it. Intimation is given, that the work would be the better, instead of the worse, for the attack thus made on it. So far as regarded the currency of his work, — if ever I entertained expectations of seeing it lessened, as for aught I know I did, they were pretty effectually disappointed. What, at that time, I had not sufficiently perceived was — that, for the sort of work that *his* is, the demand was in its nature boundless: for the sort of work that mine was, the demand is bounded by very narrow limits. What the law *is*, or is likely to be taken to be, — every man, if it were possible, and not too much trouble to him, would know. What the law *ought* to be, is as yet of the number of those things, about which few indeed, — on any points, except such few and comparatively narrow ones, in which it has happened to a man to take some particular interest, — either know any thing or care.

We never met: two years, however, had not elapsed, before we were on better terms. The Penitentiary System had for its first patrons Mr. Eden (the Mr. Eden above spoken of) and Sir William Blackstone. They framed in conjunction — and without exposure to sale, circulated — the draught of a Bill for that purpose. A copy (I do not remember how) found its way into my hands. Some friend of mine (I think) gave it me, without saying how he had come by it. It gave rise on my part to my second work, entitled, *A View of the Hard Labour Bill*, written and published in 1778. A copy of it, communicated, as far as I remember, in the same way, went to Mr. Eden, and another to Mr. Justice Blackstone. In the mode of communication, I followed the example that had been set me. The tone of this second comment, though free, and holding up to view numerous imperfections, was upon the whole laudatory: for my delight at seeing symptoms of ever so little a disposition to improvement, where none at all was to be expected, was sincere, and warmly expressed. From Mr. Eden, the communication produced an answer of some length; cold, formal, distant, and guarded; written, as a man writes, when he feels what he is not willing to acknowledge: no desire expressed of any verbal communication. He was then on the eve of his departure for the now United States, with Governor Johnstone, and I forget who else, with proper chains in their hands: — chains which the refractory Americans were to be invited to put upon their necks. Between twenty and thirty years after, the earliest of the works edited by M. Dumont having come out, I had the pleasure of numbering a nephew of his Lordship's, Sir Frederick Eden, among my declared disciples, and not many years ago the pain of losing in him a highly valued friend.

From the Judge I received a note, which still exists, I believe, somewhere: of every thing that is material in the terms of it, I have preserved the memory. After thanks, and so forth, in the third person, — "some of the observations," said he, "he believed had already occurred to the framers of the Bill" (not mentioning himself as one of them), "and many others were well deserving of their attention." To any reader of this work, if any such there be by whom that other of mine has been perused, the frigid caution with which the acknowledgment is thus guarded — the frigid caution so characteristic of the person as well as the situation, will not have been unexpected.

That the Fragment was not unknown to either of them, may readily be imagined: if so, to no man who has read it, will there be any thing wonderful in their reserve.

To all this correspondence, George Wilson was of course privy; "Bentham," said he to me one day, "don't you feel now and then some compunction, at the thought of the treatment your Fragment gives to Blackstone? Of all the men that ever sat on a Westminster Hall Bench, he is perhaps the only one that ever attempted any thing that had the good of the people, or the improvement of the law, for its object, independently of professional interest and party politics: think of the treatment he has received from you." I did think of it: — and, had any

good come from it in this instance, the more I had thought of it, with the greater satisfaction should I have thought of it. Little did I think — little, I am persuaded, did even *he* think—that, after the improvements made afterwards in the system — and by the universal opinion of that time they were no slight ones — it would have terminated in an hermetically-sealed Bastile, in which, at an expense to the public of £1000 a-head for lodging alone, no more than six hundred will be provided for when the number is completed, instead of two thousand at no more than £15 a-head; annual expense between £30 and £40 a-year per head, instead of £12, which, upon the death of the first contractor, would have ceased. Such at least has been the computation made by an intelligent and honest hand.

Be this as it may, was it for the Author of the Fragment to see cause of compunction in the effect thus produced in the case of Blackstone? No: unless it be for Bell and Lancaster to feel compunction for whatever good has been done by "*Excellent Church*" and her associates, towards the instruction of the people. In what instance, by any supporters of "*Matchless Constitution*," has this or any thing else been done, with any the least tinge of good in it, but with the feelings with which ancient Pistol ate the leek, and the hope of defeating or obstructing something better?

XVIII. "Such being the tendency, such even the effects of the work, what became of it? how happened it, that, till now, not so much as a second edition had been made of it?" Questions natural enough; and satisfaction, such as can be, shall accordingly be given: words as few as possible.

Advertisements, none. Bookseller did not, Author could not, afford any. Ireland pirated. Concealment had been the plan: — how advantageous, has been already visible. Promise of secresy had accordingly been exacted: parental weakness broke it. No longer a great man, the Author was now a nobody. In catalogues, the name of *Lind* has been seen given to him. On the part of the men of politics, and in particular the men of law on all sides, whether endeavour was wanting to suppression, may be imagined.

*** Attached to my copy of the work, I see a newspaper attack and defence of it. The bookseller desires it: he shall have it. The assailant was never known to me: defender, John Lind: his intention not known to me till executed.

THREE LETTERS
ON THE
FRAGMENT ON GOVERNMEN.

(From the Morning Chronicle of the 6th, 10th, and 26th July, 1776.)

LETTER THE FIRST.

Of an Examination into the merits of a Critique on BLACKSTONE'S COMMENTARIES, *lately published under the Title of* A FRAGMENT ON GOVERNMENT.

THIS Book being favourably spoke of by a gentleman whose good sense is generally admired, I was induced, at an expense of 3*s.* 6*d.* to purchase it. It did not appear to have been ushered into the world in the usual mode of advertising, for on inquiry after it at several booksellers, they knew nothing of its being published; probably the Author, whoever he is, had reasons for introducing it as privately as possible. The mode is peculiar, and so indeed appears the work itself.

Not to allow the Author to be a man of education, and perhaps great reading, would be offending common sense: his quotations amply prove that he possesses both; and his ingenious play upon words, in those passages chosen from Blackstone, where he delights in ringing the changes on their meaning with more glee than ever ringer tuned the sonorous bell, seems to tell us that he is not altogether deficient in logical learning and abstracted reasoning. To what end, however, has he wrote, read, transcribed, studied, reasoned, or pondered, was a consequential question with me, after I had perused all he had thrown together in the preface (which he calls a Critique on Blackstone at large) and afterwards in his introduction with five chapters — one, On the formation of government; 2d, On forms of government; 3d, On the British constitution; 4thly, On the right of the supreme power to make laws; and 5thly, On the duty of such power to make laws. But after this disquisition, I found nothing further gratifying than that this Fragment on Government, instead of being either the gleanings from other writings on subjects under that name, or an illustration of what they might doubtfully contain, was neither more nor less than a warm attack on a few pages from Blackstone's Introduction to his Commentaries, which the *Fragment Author* confesses to be much offended at, and therefore he conceived the design of pointing out some of the capital blemishes in that work, or rather, as he terms it, of laying open and exposing the universal inaccuracy, which seemed to him to pervade the whole.

There is something promising in this language! It is bold, significant, and peremptory.

It argues *conscious and superlative* wisdom in the author, and invites his reader to proceed; for who that has read Blackstone, and admired him even for those merits which the Fragment attributes to him, but would willingly have the sun of wisdom shine upon them, and be undeceived in such their admiration of a work "*promising a general vein of obscure and crooked reasoning, from whence no sterling knowledge could be derived.*" But when we seriously consider its import, what is it? what is the kind of man that writes and reasons? and what is the effect of both? I answer — either to create a disgust in *weak* minds for Blackstone's Commentaries, without a material cause, or with men of experience and of better judgment to show the writer's literary talents, metaphysically and logically exerted; for though, as he confesses that his logomachy has been beyond description laborious and irksome, yet it at last amounts to no more than "a tedious and intricate war of words," put together in very harsh order, by a conceited writer, who seems envious of Blackstone's fame, and desirous of trimming his laurel, by putting himself, if not above, at least in competition with him. Had he submitted his syllogisms with a small share of humility, and avoided that positive preceptive manner which runs through his whole book, we must have been pleased with it as a specimen of his abilities; but his sentiments on the Introduction to the Commentaries, in their present clothing, I fear will make but few converts to his way of thinking, and (if any) they will be among the meanest of his readers. D.

LETTER THE SECOND.

Of an Examination into the merits of a Critique on BLACKSTONE'S COMMENTARIES, *lately published under the Title of* A FRAGMENT ON GOVERNMENT.

SIR, From the reception which I find my former letter has met with among my friends in the circle of the law, there is no necessity for my making the smallest apology to your readers for the intrusion of the present. I doubt not, if the author of the Fragment gives himself the trouble to read me under the above-mentioned head, but he will feel the force of what I advance, with a self-conviction that he has principally wrote in vain. The sale of his book (however extensive) will be no criterion whereby to determine this, because curiosity may lead his readers to contribute for his emolument, beyond the charge of paper and print, not advertising, for little expense on that account appears to have attended this his publication. If, however, he wrote for *fame only*, pecuniary profit was not his pursuit, and he may disregard the *limited* number his bookseller sells of this book for him, provided he succeeds in tickling his readers' ears, so as to bring reproach and reprehension on the Commentaries; to do which he has spared no trouble. Labour appears in the produce of almost every line he has wrote, and as he has palpably bewildered himself, it follows with men of superior judgment that he has laboured in vain; that is to say, though he has ingeniously flourished his reasoning on what he calls the obscurity, or absurdity of Blackstone's description of society and its consequences, yet, as I have already said, it amounts to nothing!

He tells us, that the passage in Blackstone's Introduction, proposed by him for examination, occupies seven pages, from the 47th to the 53d inclusive. To defeat the validity of which, he has filled no less than 56 pages in his Fragment. In general they are sensible, and he has said a great deal to convince us, or rather with intent to convince, which is widely different, that Blackstone was a perfect *blockhead* in all he wrote in those self-same seven pages, and knew not what he was about when he talked of *society*, *state of nature*, and *original contract*, and that he has confused the definition of the one with the other, in contradiction sometimes to his own ideas of *either*.

With respect to society, the Fragment argues truly, and it gives us perhaps a good notion of what results from it. But does it say more than Blackstone, or not? Certainly yes — or the author must have been an extraordinary writer indeed, if *in fifty-six pages* he had not put together a little more than Blackstone has done in *seven*. But after all, has he said more in effect? Certainly not! for having discussed, according to his (confessed) ingenious (though peculiar) mode, the import of society, sometimes in opposition to Blackstone, sometimes nearly with him, what does he proceed to say? Why, that "It may be, he has misunderstood his meaning." The context is then spun out for several pages, to prove to us that the darkness of the whole paragraph from Blackstone is rendered so, more from himself, than any real construction which a reader of it, less contemplative, nice, or exceptious, could possibly put upon it. The consequence therefore is, that the *Fragment*, in this particular, says *a great deal*, meaning much logical and ambi-dextrous sense to *little* purpose.

Soon after it has said, "It may be possible that its author has misunderstood Blackstone," it makes him confess the paragraph spoken of from that gentleman, to be a riddle which he cannot solve. Why then say so much about it? why traduce from its merit, or attempt to perplex the truth of it? The answer is plain: to show the author's integrity, and derogate, if possible, from the de-

fects of the universally admired Commentaries.

The author of the Fragment having now tired himself in his journey after truth, on the word Society, for no other purpose than to tell us this riddle of *his own* is unsolveable; he then assures us from himself *only*, that "it were of use it should be seen to be so, that peace may be restored to the desponding student, who, prepossessed with the hopes of a rich harvest of instruction, makes a crime to himself of his inability to reap, what in truth Blackstone never sowed."

Fine writing indeed! and if every student sits down to Blackstone in that way of thinking, which is next to impossible, he will read with prejudice, and poison will attend on every line he reads. — The purpose of these letters is to anticipate such reading, which I have no doubt will succeed. D.

LETTER THE THIRD.

By John Lind, Esq. afterwards Barrister at Law, *to* D., *Author of two Letters** *on* A FRAGMENT ON GOVERNMENT.

SIR, Though it be *your* opinion, that "the Fragment says a *great deal* to *little* purpose,"† and though it be *my* opinion that with respect to yourself this is very true; yet I cannot bring myself to participate in the regret you seem to feel at having expended three shillings and sixpence in the purchase of this — to *you* unimproving — performance. What advantage has not the world derived from this petty expense? Two such letters as yours are surely impayable.

We have indeed your *own* word for the excellency of your first letter, as well as for the candour and discernment of "your friends in the circle of the law." So favourably, you assure us, did they receive this first letter, that "not *the smallest apology*" was necessary for the second. I have not the honour, I fear, of being included in the circle of your friends, but if *my* word be of any weight, you may be assured, Sir, that the second is equal to the first: no apology then will be necessary for a third.

But leaving you to improve as *little* as you please by the perusal of the Fragment, and your friends in the circle of the law, or in any other circle, to improve as *much* as they *can* by the perusal of your letters; I will only beg leave to examine what are the objections which you make to the Fragment. The first relates to the manner of introducing the work to the knowledge of the public. It was done, it seems, too *privately*, nay even irregularly. It was not *advertised* so often as it should have been.

At the court of Apollo, as well as at other courts, there are, it seems, certain gentlemen ushers, certain masters of the ceremonies, or, to give them a denomination more expressive of their function, certain *flappers*, without whose friendly help it is a mark of impertinence in a writer to offer his work, and ill-breeding in a reader to receive it.

Whether such be the custom with gentlemen-ushers, or with flappers, at the court of Laputa, or any other court, I know not; having never descended so low, as to quit my garret for a court. But such (I know it to my cost) is the custom with the flappers in the literary world: these inserters of advertisements, they must be paid. And hence you insinuate, that the author was led by motives of avarice to spare this expense.

I love to clear things as I go. To this objection, then, I shall confine myself in this present letter; and it is, without doubt, an objection of the first magnitude. I appeal to the proprietors of the public papers, and to the receivers at the stamp-office. Were the author a staunch friend to the liberty of the press, he would certainly have thrown more money into the pockets of the former; as certainly, were he a staunch friend to Government, he would have thrown more money into the *caisse* of the latter. I have, however, my fears that the book will make its way, notwithstanding the shameful negligence of the author in this particular. Should this be the case, what is to be done?

Consult your friends in the circle of the law. It is possible there may be found among them some of *that race*, whom this *Fragment-writer* (as you elegantly call him) has treated so cavalierly in the 18th and 19th pages of his preface. Cannot they convert what you call "a peculiar," into a *clandestine* mode of ushering the work into the world? Cannot they prove that the doing "it privately," was in effect adding to the *publicity* — just as you have proved, that by saying a *great deal* more, he has in effect said *no* more than another had said before him? You have discovered that the author "had reasons for introducing his work *privately*:" meaning all the while, for making it as *public* as possible: your friends have but one step farther to make: they have only to assign these reasons — a malicious intention of defrauding his Majesty of his revenues, and the printers of the papers of their dues, &c. This is no bad ground for a special pleader to go to work upon.

* See Morning Chronicles of July 6 and July 10, 1776.

† See D.'s Second Letter. By "*a great deal*," D. informs us that he "*means* much logical and ambi-dextrous sense." These phrases are to explain the *less intelligible* one of "*a great deal*." Who shall explain the explainer? Not I; rather will I follow his sagacious hint, and say nothing about them; lest — to borrow his own language — I should "traduce from the merits," and "derogate from the defects of them."

You see, Sir, I defend no man when he is in the wrong. *Amicus Socrates, Amicus Plato, sed magis amica veritas.* The objection I have now considered is peculiarly *your own.* I do not believe any two men in England could have hit upon it; and here, you see, I give up my author to you entirely.

My candour on this occasion will, I hope, entitle me to the favour of your attention, when I come to consider two other objections which are not so peculiarly your own.

A. B

P. S. I should have done myself the honour of writing to you much sooner, had I not waited for what the printer seemed to promise, "A continuation of your very instructive letters."*

* After the appearance of this letter, intimation (I understood from Lind) was conveyed from Blackstone or his friends to the author of this defence, that the matter (it was thought) had better be dropt. Lind being intimate with Lord Mansfield, and at that time not with any other man who was in the way to know, it was from that quarter, I imagine, that the information was derived.

A

FRAGMENT

ON

GOVERNMENT.*

INTRODUCTION.

I. The subject of this examination is a passage contained in that part of Sir W. Blackstone's Commentaries on the Laws of England, which the Author has styled the Introduction. This Introduction of his stands divided into four Sections. The *first* contains his discourse "*On the* Study *of the* Law." The *second*, entitled "*Of the* Nature *of* Laws *in general*," contains his speculations concerning the various objects, real or imaginary, that are in use to be mentioned under the common name of Law. The *third*, entitled "*Of the* Laws *of* England," contains such general observations, relative to these last-mentioned Laws, as seemed proper to be premised before he entered into the details of any parts of them in particular. In the *fourth*, entitled, "*Of the* Countries *subject to the* Laws *of* England," is given a statement of the different territorial extents of different branches of those Laws.

II. 'Tis in the *second* of these Sections, that we shall find the passage proposed for examination. It occupies in the edition I happen to have before me (1768), which is the *first* (and all the editions, I believe, are paged alike), the space of *seven* pages; from the 47th to the 53d, inclusive.

III. After treating of "Law *in general*," of the "Law of *Nature*," "Law of *Revelation*," and Law of *Nations*," branches of that imaginary whole, our Author comes at length to what he calls "Law *Municipal*:" that sort of Law to which men in their ordinary discourse would give the name of Law without addition; the only sort, perhaps, of them all (unless it be that of *Revelation)* to which the name can, with strict propriety, be applied: in a word, that sort which we see made in each nation, to express the will of that body in it which governs. On this subject of Law *Municipal* he sets out, as a man ought, with a *definition* of the phrase itself; an important and fundamental phrase, which stood highly in need of a definition, and never so much as since our Author has defined it.

IV. This definition is ushered in with no small display of accuracy. First, it is given entire: it is then taken to pieces, clause by clause; and every clause, by itself, justified and explained. In the very midst of these explanations — in the very midst of the definition — he makes a sudden stand. And now it bethinks him that it is a good time to give a dissertation, or rather a bundle of dissertations, upon various subjects: On the *manner* in which *Governments were* established — On the different *forms* they assume when they *are* established — On the peculiar excellence of that form which is established in *this country* — On the *right* which, he thinks it necessary to tell us, the Government in every country has, of making Laws — On the *duty* of making Laws, which, he says, is also incumbent on the Government. — In stating these two last heads, I give, as near as possible, his own *words;* thinking it premature to engage in discussions, and not daring to decide without discussion, on the *sense.*

V. The digression we are about to examine is, as it happens, not at all involved with the body of the work from which it starts. No mutual references or allusions: no supports or illustrations communicated or received. It may be considered as one small work inserted into a large one; the containing and the contained, having scarce any other connexion than what the operations of the

* In Mr. Bentham's own copy of this work he has made the following note:—"This was the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor-wisdom on the field of law.

press have given them. It is this disconnexion that will enable us the better to bestow on the latter a separate examination, without breaking in upon any thread of reasoning, or any principle of order.

VI. A general statement of the topics touched upon in the digression we are about to examine, has been given above. It will be found, I trust, a faithful one. It will not be thought, however, much of a piece, perhaps, with the following, which our Author himself has given us: "This," says he,* meaning an explanation he had been giving of a part of the definition above spoken of, "will naturally lead us into a short inquiry into the nature of society and civil government: [a] and the natural inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing Laws."

VII. No very explicit mention here, we may observe, of the *manner* in which Governments have been established, or of the different *forms* they assume when established; no very explicit intimation that these were among the topics to be discussed. None at all of the *duty* of Government to make Laws: none at all of the *British Constitution;* though, of the four other topics we have mentioned, there is no one on which he has been nearly so copious as on this last. The *right* of Government to make Laws, that delicate and invidious topic, as we shall find it when explained, is that which, for the moment, seems to have swallowed up almost the whole of his attention.

VIII. Be this as it may, the contents of the dissertation before us, taken as I have stated them, will furnish us with the matter of five chapters:—one, which I shall entitle "FORMATION *of* GOVERNMENT;"—a second, "FORMS *of* GOVERNMENT;"—a third, "BRITISH CONSTITUTION;"—a fourth, "RIGHT *of the* SUPREME POWER *to make* LAWS;"—a fifth, "DUTY *of the* SUPREME POWER *to make* LAWS."

CHAPTER I.

FORMATION OF GOVERNMENT.

I. THE first object which our Author seems to have proposed to himself in the dissertation we are about to examine, is to give us an idea of the *manner* in which Governments were formed. This occupies the first paragraph, together with part of the second: for the *typographical* division does not seem to quadrate very exactly with the *intellectual.* As the examination of this passage will unavoidably turn in great measure upon the words, it will be proper the reader should have it under his eye.

II. "The only true and natural foundations of *society*," says our Author,† "are the wants and the fears of individuals." Not that we can believe, with some theoretical writers, that there ever was a time when there was no such a thing as *society;* and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an *original contract,* and chose the tallest man present to be their governor. This notion, of an actually existing unconnected *state of nature,* is too wild to be seriously admitted; and besides, it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first *society,* among themselves; which every day extended its limits, and when it grew too large to subsist with convenience in that pastoral state, wherein the Patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent; and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though *society* had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement, of *society:* And this is what we mean by the *original contract* of *society:* which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to

* 1 Comm. p. 47.

[a] To make sure of doing our Author no injustice, and to show what it is that he thought would "naturally lead us into" this "inquiry," it may be proper to give the paragraph containing the explanation above mentioned. It is as follows:—"But farther: Municipal Law is a rule of civil conduct, prescribed *by the supreme power in a state.*" "For Legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite, to the very essence of a Law, that it be made" (he might have added, "*or at least supported*") "by the supreme power. Sovereignty and Legislature are indeed convertible terms; one cannot subsist without the other." 1 Comm. p. 46.

† 1 Comm. p. 47.

the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all, it was impossible that protection could be certainly extended to any.

For when *society* is once formed, *government* results of course, as necessary to preserve and to keep that *society* in order. Unless some superior were constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a *state of nature*, without any judge upon earth to define their several rights, and redress their several wrongs."—Thus far our Author.

III. When leading terms are made to chop and change their several significations; sometimes meaning one thing, sometimes another, at the upshot perhaps nothing; and this in the compass of a paragraph; one may judge what will be the complexion of the whole context. This, we shall see, is the case with the chief of those we have been reading: for instance, with the words "society,"—"state of nature,"—"original contract,"—not to tire the reader with any more. "*Society*," in one place, means the same thing as "*a state of nature*" does: in another place, it means the same as "*Government*." Here, we are required to believe there *never was* such a state as a state of nature; there, we are given to understand there *has been*. In like manner, with respect to an *original contract*, we are given to understand that such a thing never existed; that the notion of it is even ridiculous: at the same time that there is no speaking nor stirring without supposing that there was one.

IV. First, Society means a *state of nature*. For if, by "*a state of nature*," a man means any thing, it is the state, I take it, men are in or supposed to be in, before they are under *government:* the state men quit when they enter into a state of government; and in which, were it not for government, they would remain. But by the word "*society*" it is plain at one time that he means that state. First, according to him, comes *society;* then afterwards comes *government*. "For when society," says our Author, "is once formed, government results of course; as necessary to preserve and keep that society in order."* And again, immediately afterwards,—"A state in which a superior has been constituted, whose commands and decisions all the members are bound to obey," he puts as an explanation (nor is it an inapt one) of a state of "*government:*" and "unless" men were in a state of that description, they would still "remain," he says, "as in a *state of nature*." By *society*, therefore, he means, once more, the same as by a "*state of nature:*" he *opposes* it to *government*. And he speaks of it as a state which, in this sense, has actually existed.

V. Secondly, This is what he tells us in the beginning of the *second* of the two paragraphs: but all the time the *first* paragraph lasted, *society* meant the same as *government*. In shifting, then, from one paragraph to another, it has changed its nature. 'Tis "the foundations of *society*,"† that he first began to speak of; and immediately he goes on to explain to us, after his manner of explaining, the foundations of *government*. 'Tis of a "formal beginning" of "society,"‡ that he speaks soon after; and by this formal beginning, he tells us immediately, that he means, "the *original contract* of *society*,"‡ which contract entered into, "a *state*,"‖ he gives us to understand, is thereby "instituted," and men have undertaken to "submit to Laws."§ So long, then, as this first paragraph lasts, "*society*," I think, it is plain, cannot but have been meaning the same as "*government*."

VI. Thirdly, All this while, too, this same "*state of nature*" to which we have seen "*society*" (a state spoken of as existing) put synonymous, and in which, were it not for *government*, men, he informs us, in the next page, would "*remain*,"§ is a state in which they never *were*. So he expressly tells us. This "notion," says he, "of an actually existing unconnected state of nature," (that is, as he explains himself afterwards,§ "a state in which men have no judge to define their rights, and redress their wrongs), is too wild to be seriously admitted."‡ When he admits it, then, himself, as he does in his next page, we are to understand, it seems, that he is bantering us: and that the next paragraph is (what one should not otherwise have taken it for) a piece of pleasantry.

VII. Fourthly, The *original contract* is a thing, we are to understand, that never had existence: perhaps not in *any* state: certainly, therefore, not in *all*. "Perhaps, in no instance," says our Author, "has it ever been formally expressed at the first institution of a state."¶

VIII. Fifthly, Notwithstanding all this, we must suppose, it seems, that it had in *every* state: "yet in nature and reason," says our Author, "it must always be understood and implied."¶ Growing bolder in the compass of four or five pages, where he is speaking of our own Government, he asserts roundly,** that such a contract was actually made at the first formation of it. "The legislature would be changed," he says, "from that which *was*

* *Vide supra*, p. 11.

† 1 Com. p. 47, *supra*, p. 6. ‡ Ib. p. 7. ‖ Ib. p. 8. § 1 Com. p. 48, *supra*, p. 8. ¶ Ib. p. 46, *supra*, p. 7.

** 1 Comm. p. 52.

originally set up by the general consent and fundamental act of the society."

IX. Let us try whether it be not possible for something to be done towards drawing the import of these terms out of the mist in which our Author has involved them. The word "SOCIETY," I think, it appears, is used by him, and that without notice, in two senses that are opposite. In the one, SOCIETY, or a STATE OF SOCIETY, is put *synonymous* to a STATE OF NATURE; and stands *opposed* to GOVERNMENT, or a STATE OF GOVERNMENT: in this sense it may be styled, as it commonly is, *natural* SOCIETY. In the other, it is put *synonymous* to GOVERNMENT, or a STATE OF GOVERNMENT; and stands *opposed* to a STATE OF NATURE: in this sense it may be styled, as it commonly is, *political* SOCIETY. Of the difference between these two states, a tolerably distinct idea, I take it, may be given in a word or two.

X. The idea of a natural society is a *negative* one: the idea of a political society is a *positive* one. 'Tis with the latter, therefore, we should begin.

When a number of persons (whom we may style *subjects*) are supposed to be in the *habit* of paying *obedience* to a person, or an assemblage of persons, of a known and certain description (whom we may call *governor* or *governors*) such persons altogether (*subjects* and *governors*) are said to be in a state of *political* SOCIETY.*

XI. The idea of a state of *natural* SOCIETY is, as we have said, a *negative* one. When a number of persons are supposed to be in the habit of *conversing* with each other, at the same time that they are not in any such habit as mentioned above, they are said to be in a state of *natural* SOCIETY.

XII. If we reflect a little, we shall perceive, that, between these two states, there is not that explicit separation which these names, and these definitions, might teach one, at first sight, to expect. It is with them as with light and darkness: however distinct the ideas may be, that are, at first mention, suggested by those *names*, the *things* themselves have no determinate bound to separate them. The circumstance that has been spoken of as constituting the difference between these two states, is the presence or absence of an *habit of obedience*. This habit, accordingly, has been spoken of simply as *present* (that is, as being *perfectly* present) or, in other words, we have spoken as if there were a *perfect* habit of obedience, in the *one* case: it has been spoken of simply as *absent* (that is, as being *perfectly* absent) or, in other words, we have spoken as if there were *no* habit of obedience at all, in the *other*. But neither of these manners of speaking, perhaps, is strictly just. Few, in fact, if any, are the instances of this habit being perfectly *absent*; certainly none at all, of its being perfectly *present*. Governments, accordingly, in proportion as the habit of obedience is more perfect, recede from; in proportion as it is less perfect, approach to, a state of nature: and instances may present themselves, in which it shall be difficult to say whether a habit, perfect, in the degree in which, to constitute a government, it is deemed necessary it *should* be perfect, *does* subsist or *not*. [*b*]

* *Vide infra*, par. 12, note [*b*].

[*b*] 1. A *habit* is but an assemblage of *acts*: under which name I would also include, for the present, *voluntary forbearances*.

2. A *habit of obedience*, then, is an assemblage of *acts of obedience*.

3. An *act of obedience* is any act done in pursuance of an *expression of will* on the part of some *superior*.

4. An *act of* POLITICAL *obedience* (which is what is here meant) is any act done in pursuance of an expression of will on the part of a person governing.

5. An *expression of will* is either *parole* or *tacit*.

6. A *parole expression of will* is that which is conveyed by the *signs* called *words*.

7. A *tacit expression of will* is that which is conveyed by any other *signs* whatsoever: among which none are so efficacious as *acts of punishment*, annexed in time past, to the non-performance of acts of the same sort with those that are the objects of the will that is in question.

8. A *parole* expression of the will of a superior is a *command*.

9. When a *tacit* expression of the will of a superior is supposed to have been uttered, it may be styled a *fictitious command*.

10. Were we at liberty to coin words after the manner of the Roman lawyers, we might say a)(*quasi*-command.

11. The STATUTE LAW is composed of *commands*: the COMMON LAW, of)(*quasi*-commands.

12. An act which is the object of a command actual or fictitious; such an act, considered before it is performed, is styled a *duty* or a *point of duty*.

13. These definitions premised, we are now in a condition to give such an idea, of what is meant by the *perfection* or *imperfection* of a *habit of obedience* in a society, as may prove tolerably precise.

14. A *period* in the duration of the society; the number of *persons* it is composed of during that period; and the number of *points of duty* incumbent on each person being given;—the habit of obedience will be more or less *perfect*, in the ratio of the number of acts of *obedience* to those of *disobedience*.

15. The habit of obedience in this country appears to have been more perfect in the time of the Saxons than in that of the Britons: unquestionably it is more so now than in the time of the Saxons. It is not yet so perfect, as well contrived and well digested laws in time, it is to be hoped, may render it: but absolutely perfect, till man ceases to be man, it never *can* be.

A very ingenious and instructive view of the progress of nations, from the least perfect states

XIII. On these considerations, the supposition of a *perfect state of nature*, or, as it may be termed, a state of *society perfectly natural*, may, perhaps, be justly pronounced what our Author for the moment seemed to think it, an extravagant supposition: but then, that of a *government* in this sense *perfect*, or, as it may be termed, a state of society *perfectly political*, a state of *perfect political union*, a state of *perfect submission* in the *subject*, of *perfect authority* in the *governor*, is no less so. [c]

XIV. A remark there is, which, for the more thoroughly clearing up of our notions on this subject, it may be proper here to make. To some ears, the phrases, "state of nature," "state of political society," may carry the appearance of being *absolute* in their signification: as if the condition of a man, or a company of men, in one of these states, or in the other, were a matter that depended altogether upon themselves. But this is not the case. To the expression, "state of nature," no more than to the expression, "state of political society," can any precise meaning be annexed, without reference to a party different from that one who is spoken of as being in the state in question. This will readily be perceived. The difference between the two states lies, as we have observed, in the *habit of obedience*. With respect, then, to a habit of obedience, it can neither be understood as subsisting, in any person, nor as not subsisting, but with reference to some other person. For one party to *obey*, there must be another party that is obeyed. But this party who is obeyed, may at different times be different. Hence may one and the same party be conceived to obey and *not* to obey at the same time, so as it be with respect to different *persons*, or, as we may say, to different *objects of obedience*. Hence it is, then, that one and the same party may be said to *be* in a state of nature, and *not* to be in a state of nature, and that at one and the same time, according as it is this or *that* party that is taken for the other object of comparison. The case is, that in common speech, when no particular object of comparison is specified, all persons in general are intended: so that when a number of persons are said simply to be in a state of nature, what is understood is, that they are so as well with reference to one another, as to all the world.

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of political union to that highly perfect state of it in which we live, may be found in LORD KAMES' *Historical Law Tracts*.

16. For the convenience and accuracy of discourse, it may be of use, in this place, to settle the signification of a few other expressions relative to the same subject. Persons who, with respect to each other, are in a state of *political society*, may be said also to be in a state of *political union* or *connexion*.

17. Such of them as are *subjects* may, accordingly, be said to be in a state of *submission*, or of *subjection*, with respect to *governors*: such as are *governors*, in a state of *authority* with respect to *subjects*.

18. When the subordination is considered as resulting originally from the *will*, or (it may be more proper to say) the *pleasure* of the party governed, we rather use the word "*submission*:" when from that of the party governing, the word "*subjection*." On this account it is that the term can scarcely be used without apology, unless with a note of disapprobation: especially in this country, where the habit of considering the *consent* of the persons governed as being in some sense or other involved in the notion of all *lawful*, that is, all *commendable* government, has gained so firm a ground. It is on this account, then, that the term "*subjection*," excluding as it does, or, at least, not including such consent, is used commonly in what is called a BAD sense: that is, in such a sense as, together with the idea of the object in question, conveys the *accessary* idea of disapprobation. This accessary idea, however, annexed as it is to the *abstract* term "subjection," does not extend itself to the *concrete* term "subjects"—a kind of inconsistency of which there are many instances in language.

[c] It is true that every person must, for some time at least after his birth, necessarily be in a state of subjection with respect to his parents, or those who stand in the place of parents to him; and that a perfect one, or at least as near to being a perfect one, as any that we see. But for all this, the sort of society that is constituted by a state of subjection thus circumstanced, does not come up to the idea that, I believe, is generally entertained by those who speak of a *political* society. To constitute what is meant in general by that phrase, a greater *number* of members is required, or, at least, a *duration* capable of a longer continuance. Indeed, for this purpose, nothing less, I take it, than an *indefinite* duration is required. A society, to come within the notion of what is ordinarily meant by a *political* one, must be such as, in its nature, is not incapable of continuing for ever in virtue of the principles which gave it birth. This, it is plain, is not the case with such a family society, of which a parent, or a pair of parents, are at the head. In such a society, the only principle of union which is certain and uniform in its operation, is the natural weakness of those of its members that are in a state of subjection; that is, the children: a principle which has but a short and limited continuance. I question whether it be the case even with a family society, subsisting in virtue of *collateral* consanguinity; and that for the like reason. Not but that even in this case a habit of obedience, as perfect as any we see examples of, may subsist for a time; to wit, in virtue of the same *moral* principles which may protract a habit of *filial* obedience beyond the continuance of the *physical* ones which gave birth to it: I mean affection, gratitude, awe, the force of habit, and the like. But it is not long, even in this case, before the bond of connexion must either become imperceptible, or lose its influence by being too extended.

These considerations, therefore, it will be proper to bear in mind in applying the definition of political society above given [in par. 10] and in order to reconcile it with what is said further on [in par. 17.]

XV. In the same manner we may understand, how the same man, who is *governor* with respect to one man or set of men, may be *subject* with respect to another: how among governors some may be in a *perfect* state of *nature* with respect to each other; as the Kings of France and Spain: others, again, in a state of *perfect subjection;* as the Hospodars of Wallachia and Moldavia with respect to the Grand Signior: others, again, in a state of manifest but *imperfect subjection;* as the German States with respect to the Emperor: others, again, in such a state in which it may be difficult to determine whether they are in a state of *imperfect subjection* or in a *perfect* state of *nature;* as the King of Naples with respect to the Pope. [*d*]

XVI. In the same manner, also, it may be conceived, without entering into details, how any single person, born, as all persons are born, into a perfect subjection to his parents,* that is, into a state of perfect political society with respect to his parents, may from thence pass into a perfect state of nature; and from thence successively into any number of different states of political society, more or less perfect, by passing into different societies.

XVII. In the same manner, also, it may be conceived how, in any political society, the same man may, with respect to the same individuals, be, at different periods, and on different occasions, alternately in the state of governor and subject: to-day concurring, perhaps active, in the business of issuing a *general* command for the observance of the whole society, amongst the rest of another man in quality of *Judge:* to-morrow, punished, perhaps, by a *particular* command of that same Judge, for not obeying the general command which he himself (I mean the person acting in character of governor) had issued. I need scarce remind the reader how happily this alternate state of *authority* and *submission* is exemplified among ourselves.

XVIII. Here might be a place to state the different shares which different persons may have in the issuing the same command: to explain the nature of *corporate action:* to enumerate and distinguish half-a-dozen or more different modes in which *subordination* between the same parties may subsist: to distinguish and explain the different senses of the words "*consent*," "*representation*," and others of connected import; *consent* and *representation*, those interesting but perplexing words, sources of so much debate, and sources or pretexts of so much animosity. But the limits of the present design will by no means admit of such protracted and intricate discussions.

XIX. In the same manner, also, it may be conceived, how the same set of men, considered *among themselves*, may at one time be in a state of nature; at another time in a state of government. For the habit of obedience, in whatever degree of perfection it be necessary it should subsist in order to constitute a government, may be conceived, it is plain, to suffer interruptions: at different junctures, it may take place and cease.

XX. Instances of this state of things appear not to be unfrequent. The sort of society that has been observed to subsist among the American Indians may afford us one. According to the accounts we have of those people, in most of their tribes, if not in all, the habit we are speaking of appears to be taken up only in time of war: it ceases again in time of peace. The necessity of acting in concert against a common enemy, subjects a whole tribe to the orders of a common Chief. On the return of peace, each warrior resumes his pristine independence.

XXI. One difficulty there is that still sticks by us. It has been started, indeed but not solved. This is to find a note of distinction — a characteristic mark — whereby to distinguish a society in which there *is* a habit of obedience, and that at the degree of perfection which is necessary to constitute a state of government, from a society in which there is *not:* a mark, I mean, which shall have a visible determinate commencement; insomuch that the instance of its first appearance shall be distinguishable from the last at which it had not as yet appeared. 'Tis only by the help of such a mark that we can be in a condition to determine, at any given time, whether any given society is in a state of government, or in a state of nature. I can find no such mark, I must confess, any where, unless it be this: — the establishment of names of office: the appearance of a certain man, or set of men, with a certain name, serving to mark them out as objects of obedience; such as King, Sachem, Cacique, Senator, Burgomaster, and the like. This, I think, may serve tolerably well to distinguish a set of men in a state of political union among *themselves*, from the *same* set of men not yet in such a state.

XXII. But suppose an incontestible political society, and that a large one, formed; and from that a smaller body to break off: by this breach, the smaller body ceases to be in a state of political union with respect to the larger; and has thereby placed itself, with respect to that larger body, in a state of nature — What means shall we find of as-

[*d*] The kingdom of Naples is feudatory to the Papal See: and in token of fealty, the King, at his accession, presents the Holy Father with a white horse. The royal vassal sometimes treats his lord but cavalierly: but always sends him his white horse.

* *Vide supra*, par. 13, note [*c*].

certaining the precise juncture at which this change took place? What shall be taken for the *characteristic mark* in this case? The appointment, it may be said, of new governors with new names. But no such appointment, suppose, takes place. The subordinate governors, from whom alone the people at large were in use to receive their commands under the old government, are the same from whom they receive them under the new one. The habit of obedience, which these subordinate governors were in, with respect to that single person, we will say, who was the supreme governor of the whole, is broken off insensibly and by degrees. The old names by which these subordinate governors were characterized, while they were subordinate, are continued, now they are supreme. In this case it seems rather difficult to answer.

XXIII. If an example be required, we may take that of the DUTCH provinces with respect to SPAIN. These provinces were once branches of the Spanish monarchy. They have now, for a long time, been universally spoken of as independent states; independent as well of that of Spain as of every other. They are now in a state of nature with respect to Spain. They were once in a state of political union with respect to Spain: namely, in a state of subjection to a single *governor*, a King, who was King of Spain. At what precise juncture did the dissolution of this political union take place? At what precise time did these provinces cease to be subject to the King of Spain? This, I doubt, will be rather difficult to agree upon. [*e*]

XXIV. Suppose the defection to have begun, not by entire provinces, as in the instance just mentioned, but by a handful of fugitives, this augmented by the accession of other fugitives, and so, by degrees, to a body of men too strong to be reduced, the difficulty will be increased still farther. At what precise juncture was it that ancient ROME, or that modern VENICE, became an independent state?

XXV. In general, then, At what precise juncture is it, that persons subject to a government, become, by disobedience, with respect to that government, in a state of nature? When is it, in short, that a *revolt* shall be deemed to have taken place? and when, again, is it, that that revolt shall be deemed to such a degree successful, as to have settled into *independence?*

XXVI. As it is the obedience of individuals that constitutes a state of submission, so is it their disobedience that must constitute a state of revolt. Is it, then, every act of disobedience that will do as much? The affirmative, certainly, is what can never be maintained: for then would there no such thing as government to be found any where. Here, then, a distinction or two obviously presents itself. Disobedience may be distinguished into *conscious*, or *unconscious;* and that with respect as well to the *law* as to the *fact*. [*f*] Disobedience that is unconscious with respect to either, will readily, I suppose, be acknowledged not to be a revolt. Disobedience, again, that is conscious with respect to *both*, may be distinguished into *secret* and *open;* or, in other words, into *fraudulent* and *forcible*. [*g*] Disobedience that is only fraudulent, will likewise, I suppose, be readily acknowledged not to amount to a revolt.

XXVII. The difficulty that will remain, will concern such disobedience only as is both *conscious* (and that as well with respect to *law* as *fact*) and *forcible*. This disobedience, it should seem, is to be determined neither by *numbers* altogether (that is, of the persons supposed to be disobedient) nor by *acts*, nor by *intentions:* all three may be fit to be taken into consideration. But having brought the difficulty to this point, at this point I must be content to leave it. To proceed any farther in the endeavour to solve it, would be to enter into a discussion of particular local jurisprudence. It would be entering upon the definition of Treason, as distinguished from Murder, Robbery, Riot, and other such crimes, as, in comparison with Treason, are spoken of as being of a more private nature. Suppose the definition of Treason settled, and the commission of an act of Treason is, as far as regards the per-

[*e*] Upon recollection, I have some doubt whether this example would be found historically exact. If not, that of the defection of the Nabobs of Indostan may answer the purpose. My first choice fell upon the former; supposing it to be rather better known.

[*f*] 1. Disobedience may be said to be *unconscious with respect to the fact*, when the party is ignorant either of his having done the act itself, which is forbidden by the law, or else of his having done it in those *circumstances*, in which alone it is forbidden.

2. Disobedience may be said to be *unconscious* with respect to the *law*, when, although he may know of his having done the *act* that is in reality forbidden, and that under the *circumstances* in which it is forbidden, he knows not of its being forbidden, or at least of its being forbidden in these *circumstances*.

3. So long as the business of spreading abroad the knowledge of the law continues to lie in the neglect in which it has lain hitherto, instances of disobedience *unconscious with respect to the law* can never be otherwise than abundant.

[*g*] If examples be thought necessary, Theft may serve for an example of *fraudulent* disobedience; Robbery of *forcible*. In Theft, the *person* of the disobedient party, and the *act* of disobedience, are both endeavoured to be kept secret. In Robbery, the *act* of disobedience, at least, if not the *person* of him who disobeys, is manifest and avowed.

son committing it, the characteristic mark we are in search of.

XXVIII. These remarks it were easy to extend to a much greater length. Indeed, it is what would be necessary, in order to give them a proper fulness, and method, and precision. But that could not be done without exceeding the limits of the present design. As they are, they may serve as hints to such as shall be disposed to give the subject a more exact and regular examination.

XXIX. From what has been said, however, we may judge what truth there is in our Author's observation, that "when society" (understand *natural* society) "is once formed, government" (that is, political society) (whatever quantity or degree of Obedience is necessary to constitute political society) "results *of course;* as necessary to preserve and to keep that society in order." By the words, "*of course*," is meant, I suppose, *constantly* and *immediately;* at least constantly. According to this, political society, in any sense of it, ought long ago to have been established all the world over. Whether this be the case, let any one judge from the instances of the Hottentots, of the Patagonians, and of so many other barbarous tribes, of which we hear from travellers and navigators.

XXX. It may be, after all, we have misunderstood his meaning. We have been supposing him to have been meaning to assert a *matter of fact*, and to have written, or at least begun, this sentence in the character of an *historical observer:* whereas, all he meant by it, perhaps, was to speak in the character of a *Censor*, and, on a case supposed, to express a *sentiment of approbation.* In short, what he meant, perhaps, to persuade us of, was, not that "government" *does actually* "result" from natural "society;" but that it were better that it *should;* to wit, as being necessary to "preserve and keep" men "in that state of order," in which it is of advantage to them that they should be. Which of the above-mentioned characters he meant to speak in, is a problem I must leave to be determined. The distinction, perhaps, is what never so much as occurred to him; and indeed the shifting insensibly, and without warning, from one of those characters to the other, is a failing that seems inveterate in our Author; and of which we shall probably have more instances than one to notice.

XXXI. To consider the whole paragraph (with its appendage) together, something, it may be seen, our Author struggles to overthrow, and something to establish. But *how* it is he would overthrow, or *what* it is he would establish, are questions I must confess myself unable to resolve. "The preservation of mankind," he observes, "was effected by single families." This is what, upon the authority of the Holy Scriptures, he assumes; and from this it is that he would have us conclude the notion of an original contract (the same notion which he afterwards adopts) to be ridiculous. The force of this conclusion, I must own, I do not see. Mankind was preserved by single families — Be it so. What is there in this to hinder "individuals" of those families, or of families descended from those families, from meeting together "afterwards in a large plain," or any where else, "entering into an *original* contract," or any other contract, "and choosing the tallest man," or any other man, "present," or absent, to be their Governor? The "flat contradiction" our Author finds between this supposed transaction and the "preservation of mankind by single families," is what I must own myself unable to discover. As to the "actually existing unconnected state of nature" he speaks of, "the notion of which," he says, "is too wild to be seriously admitted," whether this be the case with it, is what, as he has given us no notion of it at all, I cannot judge of.

XXXII. Something positive, however, in one place, we seem to have. These "single families" by which the preservation of mankind was effected — these single families, he gives us to understand, "formed the first society." This is something to proceed upon. A society, then, of one kind or the other — a natural society, or else a political society, was formed. I would here then put a case, and then propose a question. In this society, we will say no *contract* had as yet been entered into; no *habit of obedience* as yet formed. Was this, then, a *natural* society merely, or was it a *political* one? For my part, according to my notion of the two kinds of society as above explained, I can have no difficulty. It was a merely *natural* one. But, according to our Author's notion, which was it? If it *was* already a *political* one, what notion would he give us of such an one as shall have been a *natural* one? and by what change could such precedent natural one have turned into *this* political one? If this was *not* a political one, then what sort of a Society are we to understand any one to be which *is* political? by what mark are we to distinguish it from a natural one? To this, it is plain, our Author has not given any answer; at the same time that to give an answer to it was, if any thing, the professed purpose of the long paragraph before us.

XXXIII. It is time this passage of our Author were dismissed. As among the expressions of it are some of the most striking of those which the vocabulary of the subject furnishes, and these ranged in the most harmonious order, on a distant glance nothing can look fairer: a prettier piece of tinsel-work one should seldom see exhibited from

the show-glass of political erudition. Step close to it, and the delusion vanishes. It is then seen to consist partly of self-evident observations, and partly of contradictions; partly of what every one knows already, and partly of what no one can understand.

XXXIV. Throughout the whole of it, what distresses me is, not meeting with any positions, such as, thinking them false, I find a difficulty in proving them so: but the not meeting with any positions, true or false, (unless it be here and there a self-evident one), that I can find a meaning for. If I can find nothing positive to accede to, no more can I to contradict. Of this latter kind of work, indeed, there is the less to do for any one else, our Author himself having executed it, as we have seen, so amply.

The whole of it is, I must confess, to me a riddle: more acute by far than I am, must be the Œdipus that can solve it. Happily it is not necessary, on account of any thing that follows, that it should be solved. Nothing is concluded from it. For aught I can find, it has in itself no use, and none is made of it. There it is, and as well might it be any where else, or no where.

XXXV. Were it then possible, there would be no use in its being solved: but being, as I take it, *really* unsolvable, it were of use it should *be seen* to be so. Peace may, by this means, be restored to the breast of many a desponding student, who now, prepossessed with the hopes of a rich harvest of instruction, makes a crime to himself of his inability to reap what, in truth, his Author has not sown.

XXXVI. As to the Original Contract, by turns embraced and ridiculed by our Author, a few pages, perhaps, may not be ill bestowed in endeavouring to come to a precise notion about its reality and use. The stress laid on it formerly, and still, perhaps, by some, is such as renders it an object not undeserving of attention. I was in hopes, however, till I observed the notice taken of it by our Author, that this chimera had been effectually demolished by Mr. HUME. [*h*] I think we hear not so much of it now as formerly. The indestructible prerogatives of mankind have no need to be supported upon the sandy foundation of a fiction.

XXXVII. With respect to this, and other fictions, there was once a time, perhaps, when they had their use. With instruments of this

[*h*] 1. In the third volume of his TREATISE *on* HUMAN NATURE.

Our Author, one would think, had never so much as opened that celebrated book: of which the criminality in the eyes of some, and the merits in the eyes of others, have since been almost effaced by the splendour of more recent productions of the same pen. The magnanimity of our Author scorned, perhaps, or his circumspection feared, to derive instruction from an enemy: or, what is still more probable, he knew not that the subject had been so much as touched upon by that penetrating and acute metaphysician, whose works lie so much out of the beaten tract of Academic reading. But here, as it happens, there is no matter for such fears. Those men who are most alarmed at the dangers of a free inquiry; those who are most intimately convinced that the surest way to truth is by hearing nothing but on one side, will, I dare answer almost, find nothing of that which they deem poison in this third volume. I would not wish to send the reader to any other than this, which, if I recollect aright, stands clear of the objections that have of late been urged, with so much vehemence, against the work in general.* As to the two first, the Author himself, I am inclined to think, is not ill-disposed, at present, to join with those who are of opinion, that they might, without any great loss to the science of Human Nature, be dispensed with. The like might be said, perhaps, of a considerable part, even of this. But after all retrenchments, there will still remain enough to have laid mankind under indelible obligations. That the foundations of all *virtue* are laid in *utility*, is there demonstrated, after a few exceptions made, with the strongest force of evidence: but I see not, any more than Helvetius saw, what need there was for the exceptions.

2. For my own part, I well remember, no sooner had I read that part of the work which touches on this subject, than I felt as if scales had fallen from my eyes. I then, for the first time, learned to call the cause of the People the cause of Virtue.

Perhaps a short sketch of the wanderings of a raw but well-intentioned mind, in its researches after moral truth, may, on this occasion, be not unuseful: for the history of one mind is the history of many. The writings of the honest, but prejudiced, Earl of Clarendon, to whose integrity nothing was wanting, and to whose wisdom little but the fortune of living something later; and the contagion of a monkish atmosphere: these, and other concurrent causes, had listed my infant affections on the side of despotism. The Genius of the place I dwelt in, the authority of the State, the voice of the Church in her solemn offices: all these taught me to call Charles a Martyr, and his opponents rebels. I saw innovation, where indeed innovation, but a glorious innovation, was, in their efforts to withstand him. I saw falsehood, where indeed falsehood was, in their disavowals of innovation. I saw selfishness, and an obedience to the call of passion, in the efforts of the oppressed to rescue themselves from oppression. I saw strong countenance lent in the sacred writings to Monarchic government; and none to any other. I saw *passive obedience* deep stamped with the seal of the Christian Virtues of humility and self-denial.

Conversing with lawyers, I found them full of the virtues of their Original Contract, as a recipe of sovereign efficacy for reconciling the accidental necessity of resistance with the general duty of submission. This drug of theirs they administered to me to calm my scruples. But my unpractised stomach revolted against their opiate. I bid them open to me that page of history in which the solemnization of this important con-

* By Dr. BEATTIE, in his *Essay on the Immutability of Truth.*

temper, I will not deny but that some political work may have been done, and that useful work, which, under the then circumstances of things, could hardly have been done with any other. But the season of *Fiction* is now over: insomuch, that what formerly might have been tolerated and countenanced under that name, would, if now attempted to be set on foot, be censured and stigmatized under the harsher appellations of *encroachment* or *imposture*. To attempt to introduce any *new* one, would be *now* a crime: for which reason there is much danger, without any use, in vaunting and propagating such as have been introduced already. In point of politica discernment, the universal spread of learning has raised mankind in a manner to a level with each other, in comparison of what they have been in any former time: nor is any man now so far elevated above his fellows, as that he should be indulged in the dangerous licence of cheating them for their good.

XXXVIII. As to the fiction now before us, in the character of an *argumentum ad hominem*, coming when it did, and managed as it was, it succeeded to admiration.

That compacts, by whomsoever entered into, *ought* to be kept;—that men are *bound* by compacts, are propositions which men, without knowing or inquiring why, were disposed universally to accede to. The observance of promises they had been accustomed to see pretty constantly enforced. They had been accustomed to see Kings, as well as others, behave themselves as if bound by them. This proposition, then, "that men are bound by *compacts*;" and this other, "that, if one party performs not his part, the other is released from his," being propositions which no man disputed, were propositions which no man had any call to prove. In theory they were assumed for axioms: and in practice they were observed as rules. [*i*] If, on any occasion, it was thought proper to make a show of proving them, it was rather for form's sake than for any thing else; and that, rather in the way of momento or instruction to acquiescing auditors, than in the way of proof against opponents. On such an occasion, the common-place retinue of phrases was at hand: *Justice*, *Right Reason* required it; the *Law* of *Nature* commanded it, and so forth: all which are but so many ways of intimating that a man is firmly persuaded of the truth of this or that moral proposition, though he either thinks he *need not*, or finds he *can't*, tell *why*. Men were too obviously and too generally interested in the observance of these rules, to entertain doubts concerning the force of any arguments they saw employed in their support. It is an old observation, how Interest smooths the road to Faith.

XXXIX. A compact, then, it was said, was made by the King and People: the terms of it were to this effect:—The People, on their part, promised to the King a *general obedience*: the King, on his part, promised to *govern* the People in such a *particular* manner always, as should be *subservient* to their happiness. I insist not on the words: I undertake only for the sense; as far as an imaginary engagement, so loosely and so variously worded by those who have imagined it, is capable of any decided signification. Assuming, then, as a general rule, that promises, when made, ought to be observed; and, as a point of fact, that a promise to this effect in particular had been made by the party in question, men were more ready to deem themselves qualified to judge when it was such a promise was *broken*, than to decide directly and avowedly on the delicate question, when it was that a King acted so far in *opposition* to the happiness of his People, that it were better no longer to obey him.

XL. It is manifest, on a very little consideration, that nothing was gained by this manœuvre after all: no difficulty removed by it. It was still necessary, and that as much as ever, that the question men studied to avoid should be determined, in order to determine the question they thought to substitute in its room. It was still necessary to determine, whether the King in question had, or had not, acted so far in *opposition* to the happiness of his people, that it were better no longer to obey him; in order to determine, whether the promise he was sup-

contract was recorded. They shrunk from this challenge; nor could they, when thus pressed, do otherwise than our Author has done, confess the whole to be a fiction. This, methought, looked ill. It seemed to me the acknowledgement of a bad cause, the bringing a fiction to support it. "To prove fiction, indeed," said I, "there is need of fiction; but it is the characteristic of truth to need no proof but truth. Have you then really any such privilege as that of coining facts? You are spending argument to no purpose. Indulge yourselves in the licence of supposing that to be true which is not, and as well may you suppose that proposition itself to be true, which you wish to prove, as that other whereby you hope to prove it." Thus continued I, unsatisfying and unsatisfied, till I learnt to see that *utility* was the test and measure of all virtue; of loyalty as much as any: and that the obligation to minister to general happiness was an obligation paramount to and inclusive of every other. Having thus got the instruction I stood in need of, I sat down to make my profit of it. I bid adieu to the original contract: and I left it to those to amuse themselves with this rattle, who could think they needed it.

[*i*] A *compact* or *contract* (for the two words, on this occasion at least, are used in the same sense) may, I think, be defined a pair of promises, by two persons reciprocally given, the one promise in consideration of the other.

posed to have made, had or had not been broken. For what was the supposed purport of this promise? It was no other than what has just been mentioned.

XLI. Let it be said, that part at least of this promise was to govern in *subservience to Law:* that hereby a more precise rule was laid down for his conduct, by means of this supposal of a promise, than that other loose and general rule to govern in subservience to the *happiness of his people:* and that, by this means, it is the letter of the *Law* that forms the tenor of the rule.

Now true it is, that the governing in opposition to Law, is *one* way of governing in opposition to the happiness of the people: the natural effect of such a contempt of the Law being, if not actually to destroy, at least to threaten with destruction, all those rights and privileges that are founded on it: rights and privileges on the enjoyment of which that happiness depends. But still it is not this that can be safely taken for the entire purport of the promise here in question: and that for several reasons. *First*, Because the most mischievous, and under certain constitutions the most feasible, method of governing in opposition to the happiness of the people, is, by setting the Law itself in opposition to their happiness. *Second*, Because it is a case very conceivable, that a King may, to a great degree, impair the happiness of his people without violating the letter of any single Law. *Third*, Because extraordinary occasions may now and then occur, in which the happiness of the people may be better promoted by acting, for the moment, in *opposition* to the Law, than in *subservience* to it. *Fourth*, Because it is not any single violation of the Law, as such, that can properly be taken for a breach of his part of the contract, so as to be understood to have released the people from the obligation of performing theirs. For, to quit the fiction, and resume the language of plain truth, it is scarce ever any single violation of the Law that, by being *submitted to*, can produce so much mischief as shall surpass the probable mischief of *resisting* it. If every single instance whatever of such a violation were to be deemed an entire dissolution of the contract, a man who reflects at all would scarce find any where, I believe, under the sun, that Government which he could allow to subsist for twenty years together. It is plain, therefore, that to pass any sound decision upon the question which the inventors of this fiction substituted instead of the true one, the latter was still necessary to be decided. All they gained by their contrivance was, the convenience of deciding it obliquely, as it were, and by a side wind; that is, in a crude and hasty way, without any direct and steady examination.

XLII. But, after all, for what *reason* is it, that men *ought* to keep their promises? The moment any intelligible reason is given, it is this: that it is for the *advantage* of society they should keep them; and if they do not, that as far as *punishment* will go, they should be *made* to keep them. It is for the advantage of the whole number that the promises of each individual should be kept: and, rather than they should not be kept, that such individuals as fail to keep them should be punished. If it be asked, how this appears? the answer is at hand: — Such is the benefit to gain, and mischief to avoid, by keeping them, as much more than compensates the mischief of so much punishment as is requisite to oblige men to it. Whether the dependence of *benefit* and *mischief* (that is, of *pleasure* and *pain*) upon men's conduct in this behalf, be as here stated, is a question of *fact*, to be decided, in the same manner that all other questions of fact are to be decided, by testimony, observation, and experience. [*k*]

XLIII. This, then, and no other, being the *reason* why men should be made to keep their promises, viz. that it is for the advantage of society that they should, is a reason that may as well be given at once why *Kings*, on the one hand, in governing, should in general keep within established Laws, and (to speak universally) abstain from all such measures as tend to the unhappiness of their subjects: and, on the other hand, why *subjects* should obey Kings as long as they so conduct themselves, and no longer; why they should obey, in short, *so long as the probable mischiefs of obedience are less than the probable mischiefs of resistance:* why, in a word, taking the whole body together, it is their *duty* to obey just so long as it is their *interest*, and no longer. This being the case, what need of saying of the one, that *he* PROMISED so to *govern;* of the other, that they PROMISED so to *obey*, when the fact is otherwise?

XLIV. True it is, that, in this country,

[*k*] The importance which the observance of promises is of to the happiness of society, is placed in a very striking and satisfactory point of view, in a little apologue of MONTESQUIEU, entitled, *The History of the Troglodytes.** The Troglodytes are a people who pay no regard to promises. By the natural consequences of this disposition, they fall from one scene of misery into another; and are at last exterminated. The same Philosopher, in his *Spirit of Laws*, copying and refining upon the current jargon, feigns a a law for this and other purposes, after defining a Law to be a *relation*. How much more instructive on this head is the fable of the Troglodytes, than the pseudo-metaphysical sophistry of the *Esprit des Loix!*

* See the collection of his Works.

according to ancient forms, some sort of vague promise of *good government* is made by Kings at the ceremony of their coronation: and let the acclamations, perhaps given, perhaps not given, by chance persons out of the surrounding multitude, be construed into a promise of *obedience* on the part of the *whole* multitude: that whole multitude itself a small drop collected together by chance out of the ocean of the state: and let the two promises thus made be deemed to have formed a perfect *compact*: — not that either of them is declared to be the *consideration* of the other.*

XLV. Make the most of this concession: one experiment there is, by which every reflecting man may satisfy himself, I think beyond a doubt that it is the consideration of *utility*, and no other, that, secretly, perhaps, but unavoidably, has governed his judgment upon all these matters. The experiment is easy and decisive. It is but to reverse, in supposition, in the first place, the import of the *particular* promise thus feigned; in the next place, the effect in point of *utility* of the observance of promises *in general*. Suppose the King to promise that he would govern his subjects *not* according to Law; *not* in the view to promote their happiness: — would this be binding upon *him?* Suppose the people to promise they would obey him *at all events*, let him govern as he will; let him govern to their destruction: — would this be binding upon *them?* Suppose the constant and universal effect of an observance of promises were to produce *mischief*, would it *then* be men's *duty* to observe them? would it *then* be *right* to make Laws, and apply punishment to *oblige* men to observe them?

XLVI. "No," (it may perhaps be replied); "but for this reason: among promises, some there are that, as every one allows, are void: now these you have been supposing, are unquestionably of the number. A promise that is in itself *void*, cannot, it is true, create any obligation: But allow the promise to be *valid*, and it is the promise itself that creates the obligation, and nothing else." The fallacy of this argument it is easy to perceive. For what is it, then, that the promise depends on for its *validity?* what is it that being *present* makes its *valid?* what is it that being *wanting* makes it *void?* To acknowledge that any *one* promise may be void, is to acknowledge that if any *other* is *binding*, it is not merely because it is a promise. That circumstance, then, whatever it be, on which the validity of a promise depends; that circumstance, I say, and not the promise itself, must, it is plain, be the cause of the obligation which a promise is apt in general to carry with it.

* *Vide supra*, par. 33, note [*i*].

XLVII. But farther. Allow, for argument's sake, what we have disproved: allow that the obligation of a promise is independent of every other: allow that a promise is binding *propriâ vi*: Binding, then, on whom? On him certainly who makes it. Admit this: For what reason is the same individual promise to be binding on those who *never* made it? The King, *fifty years ago*, promised my *Great-Grandfather* to govern him according to Law: my Great-Grandfather, *fifty years ago*, promised the King to obey him according to Law. The King, *just now*, promised my *neighbour* to govern him according to Law: my neighbour, *just now*, promised the King to obey him according to Law. Be it so: What are these promises, all or any of them, to *me?* To make answer to this question, some other principle, it is manifest, must be resorted to, than that of the *intrinsic* obligation of promises upon those who make them.

XLVIII. Now this *other* principle that still recurs upon us, what other can it be than the *principle of* UTILITY? [*l*] The

[*l*] To this denomination, has of late been added, or substituted, the *greatest-happiness* or *greatest-felicity* principle: this for shortness, instead of saying at length, *that principle* which states the greatest happiness of all those whose interest is in question, as being the right and proper, and only right and proper and universally desirable, *end* of human action: of human action in every situation; and, in partitular, in that of a functionary, or set of functionaries, exercising the powers of Government. The word *utility* does not so clearly point to the ideas of *pleasure* and *pain*, as the words *happiness* and *felicity* do: nor does it lead us to the consideration of the *number* of the interests affected; of the *number*, as being the circumstance which contributes, in the largest proportion, to the formation of the standard here in question — the *standard of right and wrong*, by which alone the propriety of human conduct, in every situation, can with propriety be tried.

This want of a sufficiently manifest connexion between the ideas of *happiness* and *pleasure* on the one hand, and the idea of *utility* on the other, I have every now and then found operating, and with but too much efficiency, as a bar to the acceptance, that might otherwise have been given, to this principle.

For further elucidation of the principle of *utility*, or say *greatest-happiness principle*, it may be some satisfaction to the reader, to see a note, inserted in a second edition, now printing, of a later work of the Author's, entitled, "*An Introduction to the Principles of Morals and Legislation.*" In Chapter I., subjoined to paragraph 13, is a note in these words: — "The principle of utility," I have heard it said, "is a dangerous principle: it is dangerous on certain occasions to consult it." This is as much as to say — what? that it is not consonant to utility, to consult utility; in short, that it is *not* consulting it, to consult it.

In the second edition, to this note is added the following paragraph: —

principle which furnishes us with that *reason*, which alone depends not upon any higher reason, but which is itself the sole and all-sufficient reason for every point of practice whatsoever.

Explanation, written 12th July 1822, relative to the above note.

Not long after the publication of the *Fragment on Government*, anno 1776, in which, in the character of an all-comprehensive and all-commanding principle, the principle of *utility* was brought to view, one person by whom observation to the above effect was made was *Alexander Wedderburne*, at that time *Attorney* or *Solicitor-General*, afterwards successively *Chief-Justice of the Common Pleas*, and *Chancellor of England*, under the successive titles of *Lord Loughborough* and *Earl of Rosslyn*. It was made—not indeed in my hearing, but in the hearing of a person by whom it was almost immediately communicated to me. So far from being self-contradictory, it was (I now see and confess) a shrewd and perfectly true one. By that distinguished functionary, the state of the Government was thoroughly understood; by the obscure individual, at that time, not so much as supposed to be so: his disquisitions had not been as yet applied, with any thing like a comprehensive view, to the field of Constitutional Law, nor therefore to those features of the English Government, by which the greatest happiness of the ruling *one*, with or without that of a favoured few, are now so plainly seen to be the only ends to which the course of it has at any time been directed. The *principle of utility* was an appellative, at that time employed—employed by me, as it has been by others, to designate that which, in a more perspicuous and instructive manner, may as above be designated by the name of the *greatest-happiness principle*. "This principle," said Wedderburne, "is a dangerous one." Saying so, he said that which, to a certain extent, is strictly true: a principle, which lays down, as the only *right* and justifiable end of Government, the greatest happiness of the greatest number—how can it be denied to be a dangerous one? dangerous to every Government, which has for its *actual* end or object, the greatest happiness of a certain *one*, with or without the addition of some comparatively small number of others, whom it is matter of pleasure or accommodation to him to admit, each of them, to a share in the concern, on the footing of so many junior partners. "*Dangerous*," it therefore really was to the interest—the sinister interest of all those functionaries, himself included, whose interest it was to maximize delay, vexation, and expense, in judicial and other modes of procedure, for the sake of the profit extractible out of the expense. In a Government which had for its end in view the greatest happiness of the greatest number, *Alexander Wedderburne* might have been *Attorney-General* and *then Chancellor;* but he would not have been Attorney-General with £15,000 a-year, nor Chancellor with a peerage, with a veto upon all justice, with £25,000 a year, and with 500 sinecures at his disposal, under the name of Ecclesiastical Benefices besides *et cæteras*."—*Note of the Author's, 12th July* 1822.

CHAPTER II.

FORMS OF GOVERNMENT.

I. The contents of the whole digression we are examining, were distributed, we may remember, at the outset of this essay, into five divisions. The first, relative to the manner in which Government in general was formed, has already been examined in the preceding chapter. The next, relative to the different *species* or *forms* it may assume, comes now to be considered.

II. The first object that strikes us in this division of our subject is the theological flourish it sets out with. In God may be said, though in a peculiar sense, to be our Author's strength. In theology he has found a not unfrequent source of ornament to divert us, of authority to overawe us, from sounding into the shallowness of his doctrines. [*a*]

III. That governors, of some sort or other, we must have, is what he has been showing in the manner we have seen in the last chapter. Now for *endowments* to qualify them for the exercise of their function. These endowments, then, as if it were to make them show the brighter, and to keep them as much as possible from being soiled by the rough hands of impertinent speculators, he has chosen should be of ethereal texture, and has fetched them from the clouds.

"All mankind,"* he says, "will agree that government should be reposed in such persons in whom those qualities are most likely to be found, the perfection of which are among the attributes of Him who is emphatically styled the Supreme Being: the three great requisites, I mean, of wisdom, of goodness, and of power."

But let us see the whole passage as it stands —

IV. "But as all the members of Society" (meaning *natural* Society) "are naturally EQUAL," (*i. e.* I suppose with respect to *political* power, of which none of them as yet have any), "it may be asked," continues he, "in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons in whom those qualities are most likely to be found; the perfection of which are among the attributes of Him who is emphatically styled the Supreme Being,

[*a*] This is what there would be occasion to show at large, were what he says of LAW in *general*, and of the LAWS of *Nature* and *Revelation* in particular, to be examined.

* 1 Comm. p. 48.

the three grand requisites, I mean, of wisdom, goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty; and these are the requisites that ought to be found in every well constituted frame of government."

V. Every thing in its place. Theology in a sermon, or a catechism. But in this place, the flourish we have seen might, for every purpose of instruction, have much better, it should seem, been spared. What purpose the idea of that tremendous and incomprehensible Being, thus unnecessarily introduced, can answer, I cannot see, unless it were to bewilder and entrance the reader; as it seems to have bewildered and entranced the writer. Beginning thus, is beginning at the wrong end: it is explaining *ignotum per ignotius*. It is not from the attributes of the Deity, that an idea is to be had of any qualities in men: on the contrary, it is from what we see of the qualities of men, that we obtain the feeble idea we can frame to ourselves, of the attributes of the Deity.

VI. We shall soon see whether it be light or darkness our Author has brought back from this excursion to the clouds. The qualifications he has pitched upon for those in whose hands Government is to be reposed, we see are *three:* wisdom, goodness, and power. Now of these three, one there is which, I doubt, will give him some trouble to know what to do with: I mean, that of *Power;* which, looking upon it as a jewel, it should seem, that would give a lustre to the royal diadem, he was for importing from the celestial regions. In heaven, indeed, we shall not dispute its being to be found; and that at all junctures alike. But the parallel, I doubt, already fails. In the earthly governors in question, or, to speak more properly, candidates for government, by the very supposition there cannot, at the juncture he supposes, be any such thing. *Power* is that very quality which, in consideration of these other qualities, which, it is supposed, are possessed by them already, they are now waiting to receive.

VII. By Power in this place, I, for my part, mean *political* power: the only sort of power our Author could mean; the only sort of power that is here in question. A little farther on we shall find him speaking of this endowment as being possessed, and that in the highest degree, by a King, a single person. *Natural* power, therefore — mere organical power — the faculty of giving the hardest blows, can never, it is plain, be that which he meant to number among the attributes of this godlike personage.

VIII. We see, then, the dilemma our Author's theology has brought him into, by putting him upon reckoning *power* among the qualifications of his candidates. Power is either *natural* or *political*. *Political* power is what they cannot have by the supposition: for that is the very thing that is to be created, and which, by the establishment of Government, men are going to confer on them. If any, then, it must be *natural* power; the natural strength that a man possesses of himself without the help of Government. But of this, then, if this be it, there is more, if we may believe our Author, in a single member of a society, than in that member and all the rest of the society put together. [*b*]

IX. This difficulty, if possible, one should be glad to see cleared up. The truth is, I take it, that in what our Author has said of power, he has been speaking, as it were, by anticipation; and that what he means by it, is not any power of either kind actually possessed by any man, or body of men, at the juncture he supposes, but only a *capacity*, if one may call it so, of *retaining* and *putting* into action political power, whensoever it shall have been conferred. Now, of actual power, the quantity that is possessed is, in every case, one and the same: for it is neither more nor less than the Supreme power. But as to the capacity above spoken of, there do seem, indeed, to be good grounds for supposing it to subsist in a higher degree in a *single* man than in a *body*.

X. These grounds it will not be expected that I should display at large: a slight sketch will be sufficient. — The efficacy of power is, in part at least, in proportion to the promptitude of obedience; the promptitude of obedience is, in part, in proportion to the promptitude of command: command is an expression of will; a will is sooner formed by one than many. And this, or something like it, I take to be the plain English of our Author's metaphor, where he tells us,* as we shall see a little farther on,† that "a monarchy is the most powerful [form of government] of any, all the sinews of government being knit together, and united in the hands of the prince."

XI. The next paragraph, short as it is, contains variety of matter. The first two sentences of it, are to let us know, that with regard to the manner in which the several *particular* governments that we know of have been formed, he thinks proper to pass it by. A third is to intimate, for the second time, that all Governments must be absolute in some hands or other: in the fourth and last, he favours us with a very comfortable piece

[*b*] *Vide infra*, par. 32. Monarchy, which is the government of *one*, "is the most powerful form of government," he says, "of any:" more so than Democracy, which he describes as being the Government *of all*.

* Comm. p. 50. † Par. 32.

of intelligence; the truth of which, but for his averment, few of us, perhaps, would have suspected. This is, that the qualifications mentioned by the last paragraph as *requisite* to be possessed by all Governors of states, are, or at least once upon a time were, *actually* possessed by them: (*i. e.*) according to the opinion of somebody; but of what somebody is not altogether clear: whether in the opinion of these Governors themselves, or of the persons governed by them.

XII. "How the several forms of Government we now see in the world at first actually began," says our Author, "is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority IS placed in those hands, wherein (according to the OPINION of the FOUNDERS of such respective states, either expressly given or collected from their *tacit* APPROBATION) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found."

XIII. Who those persons are, whom our Author means here by the word *founders;* whether those who became the Govern*ors* of the states in question, or those who became the govern*ed*, or both together, is what I would not take upon me positively to determine. For aught I know, he may have meant neither the one nor the other, but some third person. And, indeed, what I am vehemently inclined to suspect is, that, in our Author's large conception, the mighty and extensive domains of ATHENS and SPARTA, of which we read so much at school and at college, consisting each of several scores of miles square, represented, at the time this paragraph was writing, the whole universe: and the respective eras of *Solon* and *Lycurgus*, the whole period of the history of those states.

XIV. The words "founders,"—"opinion," —"approbation,"—in short, the whole complexion of the sentence, is such as brings to one's view a system of government utterly different from the generality of those we have before our eyes: a system in which one would think neither caprice, nor violence, nor accident, nor prejudice, nor passion, had any share: a system uniform, comprehensive, and simultaneous; planned with phlegmatic deliberation; established by full and general assent: such, in short, as, according to common imagination, were the systems laid down by the two sages above mentioned. If this be the case, the object he had in mind when he said *Founders*, might be neither Govern*ors* nor govern*ed*, but some *neutral* person: such as those sages, chosen as they were in a manner as umpires, might be considered with regard to the persons who, under the prior constitution, whatever it was, had stood respectively in those two relations.

XV. All this, however, is but conjecture: in the proposition itself, neither this nor any other restriction is expressed. It is delivered explicitly and emphatically in the character of an universal one. "In ALL OF THEM," he assures us, "this authority (the supreme authority) *is* placed in those hands, wherein, according to the *opinion* of the *founders* of such respective states," these "qualities of wisdom, goodness, and power, are the most likely to be found." In this character it cannot but throw a singular light on history. I can see no end, indeed, to the discoveries it leads to, all of them equally new and edifying. When the Spaniards, for example, became masters of the empire of Mexico, a vulgar politician might suppose it was because such of the Mexicans as remained unexterminated, could not help it. No such thing — It was because either the Spaniards were of "opinion," or the Mexicans themselves were of "opinion" (which of the two is not altogether clear) that, in Charles V. and his successors, more goodness (of which they had such abundant proofs) as well as wisdom, was likely to be found, than in all the Mexicans put together. The same persuasion obtained between Charlemagne and the German Saxons with respect to the goodness and wisdom of Charlemagne: — between William the Norman and the English Saxons: — between Mahomet II. and the subjects of John Paleologus: —between Odoacer and those of Augustulus: — between the Tartar Gingiskan and the Chinese of his time: — between the Tartars Chang-ti and Cam-ghi, and the Chinese of their times: — between the Protector Cromwell and the Scotch: — between William III. and the Irish Papists: — between Cæsar and the Gauls: — in short, between the Thirty Tyrants, so called, and the Athenians, whom our Author seems to have had in view: — to mention these examples only, out of as many hundred as might be required. All this, if we may trust our Author, he has the "*goodness*" to believe: and by such lessons is the penetration of students to be sharpened for piercing into the depths of politics.

XVI. So much for the introductory paragraph. — The main part of the subject is treated of in six others: the general contents of which are as follows:

XVII. In the first he tells us how many different forms of government there are according to the division of the ancients; which division he adopts. These are three: Monarchy, Aristocracy, and Democracy.

XVIII. The next is to tell us, that by the *sovereign* POWER he means that of "*making laws.*"

XIX. In a third he gives us the advantages and disadvantages of these three different forms of government.

XX. In a fourth he tells us that these are all the ancients would allow of.

XXI. A fifth is to tell us that the British form of Government is different from each of them; being a combination of all, and possessing the advantages of all.

XXII. In the sixth and last, he shows us that it could not possess these advantages, if, instead of being what it is, it were either of those others: and tells us what it is that may destroy it. These two last it will be sufficient here to mention: to examine them will be the task of our next chapter.

XXIII. Monarchy is that form of Government in which the power of making laws is lodged in the hands of a *single* member of the state in question. Aristocracy is that form of Government in which the power of making laws is lodged in the hands of *several* members. Democracy is that form of Government in which the power of making laws is lodged in the hands of "*all*" of them put together. These, according to our Author, are the definitions of the Ancients; and these, therefore, without difficulty, are the definitions of our Author.

XXIV. "The political writers of antiquity," says he, "will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly, consisting of all the members of a community, which is called a Democracy; the second, when it is lodged in a council composed of select members, and then it is styled an Aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a Monarchy. All other species of government, they say, are either corruptions of, or reducible to these three."

XXV. "By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases: and all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end."

XXVI. Having thus got three regular simple forms of Government (this anomalous complex one of our own out of the question) and just as many qualifications to divide among them; of each of which, by what he told us a while ago, each form of Government must have some share, it is easy to see how their allotments will be made out. Each form of Government will possess one of these qualities in perfection, taking its chance, if one may say so, for its share in the two others.

XXVII. Among these three different forms of Government, then, it should seem, according to our Author's account of them, there is not much to choose. Each of them has a *qualification*, an *endowment*, to itself. Each of them is completely characterized by this qualification. No intimation is given of any pre-eminence among these qualifications, one above another. Should there be any dispute concerning the preference to be given to any of these forms of Government, as proper a method as any of settling it, to judge from this view of them, is that of cross and pile. Hence we may infer, that all the Governments that ever were, or will be (except a very particular one that we shall come to presently, that is to say, our own), are upon a par: that of ATHENS with that of PERSIA; that of GENEVA with that of MOROCCO; since they are all of them, he tells us, "corruptions of, or reducible to," one of these. This is happy. A legislator cannot do amiss. He may save himself the expense of thinking. The choice of a King was once determined, we are told, by the neighing of a horse: the choice of a form of Government might be determined so as well.

XXVIII. As to our own form of Government, however, this, it is plain, being that which it seemed good to take for the theme of his panegyric, and being made out of the the other three, will possess the advantages of all of them put together; and that without any of the disadvantages; the disadvantages vanishing at the word of command, or even without it, as not being suitable to the purpose.

XXIX. At the end of the paragraph which gives us the above definitions, one observation there is that is a little puzzling: "Other species of Government," we are given to understand, there are besides these; but then those others, if not "reducible to," are but "corruptions of these." Now, what there is in any of these to be corrupted, is not so easy to understand. The essence of these several forms of Government, we must always remember, is placed by him, solely and entirely, in the article of *number*: in the ratio of the number of the Governors (for so for shortness we will style those in whose hands is lodged this "power of making laws") to that of the governed. If the number of the former be, to that of the latter, as *one* to *all*, then is the form of Government a Monarchy: if as *all* to *all*, then is it a Democracy: if as some number *between one and all*, to *all*, then is it an Aristocracy. Now, then, if we can conceive a fourth number,

which not being more than all, is neither one nor all, nor any thing between one and all, we can conceive a form of Government, which, upon due proof, may appear to be a corruption of some or one or other of these three. [c] If not, we must look for the corruption somewhere else: Suppose it were in our Author's *reason*. [d]

XXX. Not but that we may meet, indeed, with several other hard-worded names for forms of Government: but these names were only so many names for one or other of those three. We hear often of a *Tyranny:* but this is neither more nor less than the name a man gives to our Author's Monarchy, when out of humour with it. It is still the Government of number *one*. We hear now and then, too, of a sort of Government called an *Oligarchy:* but this is neither more nor less than the name a man gives to our Author's Aristocracy, in the same case. It is still the Government of some number or other, *between one and all*. In fine, we hear now and then of a sort of Government fit to break one's teeth, called an *Ochlocracy:* but this is neither more nor less than the name a man gives to a Democracy in the same case. It is still that sort of Government which, according to our Author, is the Government of *all*.

XXXI. Let us now see how he has disposed of his three qualifications among his three sorts or forms of Government. Upon Monarchy we shall find he has bestowed the perfection of power; on Aristocracy, of wisdom; on Democracy, of goodness: each of these forms having just enough, we may suppose, of the two remaining qualifications besides its own peculiar one, to make up the necessary complement of "qualities requisite for supremacy." Kings are (nay *were* before they were Kings, since it was this qualification determined their subjects to make them Kings*) as strong as so many Hercules's; but then, as to their wisdom or their goodness, there is not much to say. The members of an Aristocracy are so many Solomons: but then they are not such sturdy folks as your Kings; nor, if the truth is to be spoken, have they much more honesty than their neighbours. As to the members of a Democracy, they are the best sort of people in the world; but then they are but a puny sort of gentry as to strength, put them all together; and apt to be a little defective in point of understanding.

XXXII. "In a democracy," says he, "where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found than in the other frames of Government; being composed, or intended to be composed, of the most experienced citizens; but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any, all the sinews of government being knit together and united in the hand of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes."

XXXIII. "Thus these three species of government have all of them their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three; for though Cicero declares himself of opinion, *esse optimè constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari sit modicè confusa;* yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim; and one that, if effected, could never be lasting or secure."

XXXIV. In the midst of this fine-spun ratiocination, an accident has happened, of which our Author seems not to be aware. One of his *accidents*, as a logician would say, has lost its *subject:* one of the *qualifications* he has been telling us of, is, somehow or other, become vacant; the form of Government he designed it for, having unluckily slipped through his fingers in the handling. I mean Democracy; which he, and, according to him, the Ancients, make out to be the government of *all*. Now "*all*" is a great many; so many that, I much doubt, it will

[c] By the laws of GERMANY, such and such states are to furnish so many men to the general army of the empire: some of them so many men and one-half; others, so many and one-third: others again, if I mistake not, so many and one-fourth. One of these half, third part, or quarter men, suppose, possesses himself of the Government: here, then, we have a kind of corruption of a Monarchy. Is this what our Author had in view?

[d] A more suitable place to look for *corruption* in, if we may take his own word for it, there cannot be. "Every man's reason," he assures us,† "is corrupt;" and not only that, but "his understanding full of ignorance and error." With regard to others, it were as well not to be too positive; but with regard to a man's self, what he tells us from experience, it would be ill manners to dispute with him.

* 1 Comm. p. 48. † 1 Comm. p. 41.

be rather a difficult matter to find these high and mighty personages power enough — so much as to make a decent figure with. The members of this redoubtable Commonwealth will be still worse off, I doubt, in point of subjects, than *Trinculo* in the play, or than the potentates, whom some late navigators found lording it, with might and main, "κρατερῇφι βιηφι," over a Spanish settlement: there were three members of the Government; and they had one subject among them all.* [*e*] Let him examine it a little, and it will turn out, I take it, to be precisely that sort of Government, and no other, which one can conceive to obtain where there is no Government at all Our Author, we may remember, had shrewd doubts about the existence of a *state of nature*:† grant him his Democracy, and it exists in his Democracy. [*f*]

XXXV. The qualification of *goodness*, I think it was, that belonged to the Government of *all*, while there was such a Government. This having taken its flight, as we have seen, to the region of nonentities, the qualification that was designed for it remains upon his hands: he is at liberty, therefore, to make a compliment of it to Aristocracy or to Monarchy, which best suits him. Perhaps it were as well to give it to Monarchy; the title of that form of government to its own peculiar qualification, *power*, being, as we have seen, rather an equivocal one: or else, which, perhaps, is as good a way of settling matters as any, he may set them to cast lots.

* See HAWKESWORTH'S *Voyages*.

[*e*] The condition of these imaginary sovereigns puts one in mind of the story of I forget what King's Fool. The Fool had stuck himself up one day, with great gravity, in the King's throne; with a stick, by way of a sceptre, in one hand, and a ball in the other: being asked what he was doing? he answered, "*reigning*." Much the same sort of reign, I take it, would be that of the members of our Author's Democracy.

† *Vide supra*, ch. i. par. 6.

[*f*] What is curious is, that the same persons who tell you (having read as much) that Democracy is a form of Government under which the supreme power is vested in all the members of a state, will also tell you (having also read as much) that the Athenian Commonwealth was a Democracy. Now the truth is, that in the Athenian Commonwealth, upon the most moderate computation, it is not one-tenth part of the inhabitants of the Athenian state that ever at a time partook of the supreme power: women, children, and slaves, being taken into the account.* Civil Lawyers, indeed, will tell you, with a grave face, that a slave is *nobody*; as Common Lawyers will, that a bastard is the *son* of *nobody*. But, to an unprejudiced eye, the condition of a state is the condition of all individuals, without distinction, that compose it.

* See, among Mr. HUME'S *Essays*, that *on the Populousness of Ancient Nations*.

CHAPTER III.

THE BRITISH CONSTITUTION.

I. WITH a set of *data*, such as we have seen in the last chapter, we may judge whether our Author can meet with any difficulty in proving the British Constitution to be the best of all possible governments, or indeed any thing else that he has a mind. In his paragraph on this subject, there are several things that lay claim to our attention. But it is necessary we should have it under our eye.

II. "But happily for us in this island, the British Constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch that are to be found in the most absolute monarchy; and, as the Legislature of the kingdom is entrusted to three distinct powers entirely independent of each other; first, the King; second, the Lords Spiritual and Temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and third, the House of Commons, freely chosen by the people from among themselves, which makes it a kind of democracy: as this aggregate body, actuated by different springs, and attentive to different interests, composes the British Parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous."

III. "Here then is lodged the sovereignty of the British Constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of Government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniencies of either absolute monarchy, aristocracy, or democracy; and so want two of the principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the King and House of Lords, our Laws might be providentially made and well executed, but they might not always have the good of the people in view: if lodged in the King and Commons, we should want that circumspection and mediatory caution, which the wisdom of the Peers is to afford: if the supreme rights of legislature were lodged in the two Houses only, and

the King had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed from that which was originally set up by the general consent and fundamental act of the society; and such a change, however effected, is, according to Mr. Locke (who perhaps carries his theory too far) at once an entire dissolution of the bands of Government, and the people would be reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power."

IV. In considering the first of these two paragraphs, in the first place, a phenomenon we should little expect to see from any thing that goes before, is a certain *executive power*, that now, for the first time, bolts out upon us without warning or introduction.

The power, the only power our Author has been speaking of all along till now, is the *legislative*. 'Tis to this, and this alone, that he has given the name of "*sovereign power*." 'Tis this power, the different distributions of which he makes the characteristics of his three different forms of Government. 'Tis with these different distributions, distributions made of the legislative power, that, according to his account, are connected the several qualifications laid down by him, as "requisites for supremacy:" qualifications in the possession of which consist all the advantages which can belong to any form of Government. Coming now then to the British Constitution, it is in the superior degree in which these qualifications of the legislative body are possessed by it, that its peculiar excellence is to consist. It is by possessing the qualification of strength, that it possesses the advantage of a monarchy. But how is it, then, that, by his account, it possesses the qualification of strength? By any disposition made of the legislative power? By the legislative power's being lodged in the hands a single person, as in the case of a monarchy? No; but to a disposition made of a new power, which comes in, as it were, in a parenthesis—a new power which we now hear of for the first time—a power which has not, by any description given of it, been distinguished from the legislative—an *executive*.

V. What, then, is this same executive power? I doubt our Author would not find it a very easy matter to inform us. "Why not?" says an objector: "is it not that power which in this country the King has in addition to his share in the legislative?" Be it so: the difficulty for a moment is staved off. But that it is far enough from being solved, a few questions will soon show us This power, is it that only which the King really *has*, or is it all that he is said to have? Is it that only which he really has, and which he exercises? or is it that also, which although he be said to have it, he neither does exercise, nor may exercise? Does it include judiciary power or not? If it does, does it include the power of making as well *particular* decisions and orders, as *general, permanent, spontaneous* regulations of procedure, such as are some of those we see made by judges? Doth it include supreme military power, and that as well in ordinary as in a time of martial law? Doth it include the supreme *fiscal* power; [*a*] and, in general, that power which, extending as well over the public money as over every other article of public property, may be styled the *dispensatorial*? [*b*] Doth it include the power of granting patents for inventions, and charters of incorporation? Doth it include the right of making bye-laws in corporations? And is the right of making bye-laws in corporations the superior right to that of conferring the power to make them? or is it that there is an executive power that is superior to a legislative? This *executive*, again, doth it include the right of substituting the laws of war to the laws of peace? and, *vice versâ*, the laws of peace to the laws of war? Doth it include the right of restraining the trade of subjects by treaties with foreign powers? Doth it include the right

[*a*] By *fiscal* power I mean that which in this country is exercised by what is called the Board of Treasury.

[*b*] By *dispensatorial* power I mean as well that which is exercised by the Board of Treasury, as those others which are executed in the several offices styled with us the War Office, Admiralty Board, Navy Board, Board of Ordnance, and Board of Works: excepting from the business of all these offices, the power of appointing persons to fill other subordinate offices; a power which seems to be of a distinct nature from that of making disposition of any article of public property.

Power, political power, is either over *persons* or over *things*. The powers, then, that have been mentioned above, in as far as they concern *things*, are powers over such *things* as are the property of the public: powers which differ in this from those which constitute private ownership, in that the former are, in the main, not *beneficial* (that is, to the possessors themselves) and *indiscriminate;* but *fiduciary*, and *limited* in their exercise to such *acts* as are conducive to the *special* purposes of *public* benefit and security.

of delivering over, by virtue of the like treaties, large bodies of subjects to foreign laws? —He that would understand what power is executive and not legislative, and what legislative and not executive; he that would mark out and delineate the different species of constitutional powers; he that would describe either what *is*, or what *ought to be* the constitution of a country, and particularly of this country, — let him *think of these things*.

VI. In the next place, we are told in a parenthesis (it being a matter so plain as to be taken for granted) that "each of these branches of the Legislature is *independent*," —yes, "*entirely* independent," of the two others.—Is this then really the case? Those who consider the influence which the King and so many of the Lords have in the election of Members of the House of Commons; the power which the King has, at a minute's warning, of putting an end to the existence of any House of Commons; those who consider the influence which the King has over both Houses, by offices of dignity and profit given and taken away again at pleasure; those who consider that the King, on the other hand, depends for his daily bread on both Houses, but more particularly on the House of Commons; not to mention a variety of other circumstances that might be noticed in the same view,—will judge what degree of precision there was in our Author's meaning, when he so roundly asserted the affirmative.

VII. One parenthesis more: for this sentence teems with parenthesis within parenthesis. To this we are indebted for a very interesting piece of intelligence: nothing less than a full and true account which he has given us of the personal merits of the members of the House of Lords for the time being. This he is enabled to do, by means of a contrivance of his own, no less simple than it is ingenious: to wit, that of looking at their titles. It is by looking at men's titles that he perceives, not merely that they *ought* to possess certain merits, not that there is reason to *wish* they may possess them, but that they do *actually* possess them, and that it is by possessing those merits that they come to possess these titles. Seeing that some are Bishops, he knows that they are pious: seeing that some are Peers, he knows that they are wise, rich, valiant. [*c*]

VIII. The more we consider the application he makes of the commonplace notions concerning the three forms of Government to our own, the more we shall see the wide difference there is between reading and reflecting. Our own he finds to be a combination of these three. It has a Monarchical branch, an Aristocratical, and a Democratical. The Aristocratical is the House of Lords; the Democratical is the House of Commons. Much had our Author read at school, doubtless, and at college, of the wisdom and gravity of the Spartan senate: something, probably, in Montesquieu, and elsewhere, about the Venetian. He had read of the turbulence and extravagance of the Athenian mob. Full of these ideas, the House of Lords were to be our Spartans or Venetians; the House of Commons, our Athenians. With respect, then, to the point of wisdom, (for that of honesty we will pass by) the consequence is obvious. The House of Commons, however excellent in point of honesty, is an assembly of less *wisdom* than that of the House of Lords. This is what our Author makes no scruple of assuring us. A Duke's son gets a

[*c*] "The Lords spiritual and temporal, which," says our Author (p. 50), "*is* an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property,"—I have distributed, I think, these endowments, as our Author could not but intend they should be distributed. Birth, to such of the members of that assembly as have their seat in it by *descent;* and, as to those who may chance from time to time to sit there by *creation*, wisdom, valour, and property in *common* among the temporal Peers; and piety, singly but entirely, among my Lords the Bishops. As to the other three endowments, if there were any of them to which these right reverend persons could lay any decent claim, it would be wisdom: but since worldly wisdom is what it would be an ill compliment to attribute to them, and the wisdom which is from above is fairly included under piety, I conclude that, when secured in the exclusive possession of this grand virtue, they have all that was intended them. There is a remarkable period in our history, at which, measuring by our Author's scale, these three virtues seem to have been at the boiling point. It was in Queen Anne's reign, not long after the time of the hard frost. I mean in the year 1711. In that auspicious year, these three virtues issued forth, it seems, with such exuberance, as to furnish merit enough to stock no fewer than a dozen respectable persons, who, upon the strength of it, were all made Barons in a day. Unhappily, indeed, so little read was a right reverend and cotemporary historian* in our Author's method of "discerning of spirits," as to fancy it was neither more nor less than the necessity of making a majority that introduced so large a body of new members thus suddenly into the house. But I leave it to those who are read in the history of that time, to judge of the ground there can be for so romantic an imagination. As to piety, the peculiar endowment of the mitre, the stock there is of that virtue, should, to judge by the like standard, be, at all times, pretty much upon a level: at all times, without question, at a *maximum*. This is what we can make the less doubt of, since, with regard to ecclesiastical matters in general, our Author, as in another place he assures us, has had the happiness to find that "every thing is as it should be."†

* See Bishop Burnet's History of his own Times, vol. 2.

† Vol. 4, chap. iv. p. 49.

seat in the House of Commons: there needs no more to make him the very model of an Athenian cobbler.

IX. Let us find out, if we can, whence this notion of the want of wisdom in the members of a Democracy, and of the abundance of it in those of an Aristocracy, could have had its rise. We shall then see with what degree of propriety such a notion can be transferred to *our* Houses of Lords and Commons.

In the members of a Democracy, in particular, there is likely to be a want of wisdom —Why? The greater part being poor, are, when they begin to take upon them the management of affairs, uneducated: being uneducated, they are illiterate: being illiterate, they are ignorant. Ignorant, therefore, and *unwise*, if that be what is meant by ignorant, they *begin*. Depending for their daily bread on the profits of some petty traffic, or the labour of some manual occupation, they are nailed to the work-board, or the counter. In the business of Government, it is only by fits and starts that they have leisure so much as to *act:* they have no leisure to *reflect*. Ignorant, therefore, they *continue*.—But in what degree is this the case with the Members of our House of Commons?

X. On the other hand, the members of an Aristocracy, being few, are rich: either they are members of the Aristocracy, because they are rich; or they are rich, because they are members of the Aristocracy. Being rich, they are educated: being educated, they are learned: being learned, they are knowing. They are at leisure to *reflect*, as well as *act*. They may therefore naturally be expected to become more knowing, that is, more wise, as they persevere. In what degree is this the case with the Members of the House of Lords, more than with those of the House of Commons? The fact is, as every body sees, that either the Members of the House of Commons are as much at leisure as those of the House of Lords; or, if occupied, in such a way as tends to give them a more than ordinary insight into some particular department of Government. In whom shall we expect to find so much knowledge of Law as in a professed Lawyer? of Trade, as in a Merchant?

XI. But hold — Our Author, when he attributes to the members of an Aristocracy more wisdom than to those of a Democracy, has a reason of his own. Let us endeavour to understand it, and then apply it, as we have applied the others. In Aristocratical bodies, we are to understand there is more *experience:* at least it is intended by somebody or other there *should be:* which, it seems, answers the same purpose as if there *was*. "In Aristocracies," says our Author, "there is more wisdom to be found, than in the other frames of Government; being composed," continues he, "or intended to be composed, of the most experienced citizens."* On this ground then it is, that we are to take for granted, that the members of the House of Lords have more wisdom among them, than those of the House of Commons. It is this article of *experience* that, being a qualification possessed by the members of an Aristocratical body, as such, in a superior degree to that in which it can be possessed by a Democratical body, is to afford us a particular ground for attributing a greater share of wisdom to the Members of the Upper House, than to those of the Lower.

XII. How is it that a member of an Aristocracy, as such, is, of all things, to have attained more *experience* than the number of a Democracy, our Author has not told us; nor what it is this experience is to consist of. Is it experience of things *preparatory* to, but different from, the business of governing? This should rather go by the name of *knowledge*. Is it experience of the business itself of governing? Let us see. For the member of the one body, as of the other, there must be a time when he first enters upon this business. They both enter upon it, suppose on the same day. Now, then, is it on that same day that one is more experienced in it than the other? or is it on that day ten years?

XIII. Those, indeed, who recollect what we observed but now,† may answer without hesitation, — on the day ten years. The reason was there given. It is neither more nor less, than that want of leisure which the bulk of the numerous members of a Democracy must necessarily labour under, more than those of an Aristocracy. But of this, what intimation is there to be collected, from any thing that has been suggested by our Author?

XIV. So much with respect to Aristocracies in general. It happens also by accident, that that particular branch of our *own* government to which he has given the name of the Aristocratical — the House of Lords — has actually greater opportunities of acquiring the qualification of experience, than that other branch, the House of Commons, to which he has given the name of the Democratical. But to what is this owing? Not to any thing in the characteristic natures of those two bodies; not to the one's being Aristocratical, and the other Democratical, but to a circumstance, entirely foreign and accidental, which we shall see presently. But let us observe his reasoning. The House of Lords, he says, is an assembly that behoves to have more wisdom in it than the House of Commons. This is the proposition. Now for the proof. The first is an Aristocratical assembly; the second a Democratical. An

* P. 50. † *Vide supra*, par. 9.

Aristocratical assembly has more experience than a Democratical; and on that account more wisdom. Therefore the House of Lords, as was to be proved, has more wisdom than the House of Commons. Now, what the whole of the argument rests upon, we may observe, is this fact, that an Aristocratical assembly, as such, has more experience than a Democratical one; but this, with Aristocratical assemblies in general, we see, is not, for any reason that our Author has given us, the case. At the same time, with respect to our House of Lords in particular, in comparison with the House of Commons, it does happen to be the case, owing to this simple circumstance: the members of the House of Lords, when once they begin to sit, sit on for life: those of the House of Commons only from seven years to seven years, or it may happen, less.

XV. In speaking, however, in this place, of experience, I would rather be understood to mean opportunity of acquiring experience, than experience itself. For actual experience depends upon other concurrent causes.

XVI. It is, however, from superiority of experience alone, that our Author derives superiority of wisdom. He has, indeed, the proverb in his favour: "Experience," it has been said of old, "is the Mother of Wisdom:" be it so;—but then Interest is the Father. There is even an Interest that is the Father of Experience. Among the members of the House of Commons, though none so poor as to be illiterate, are many whose fortunes, according to the common phrase, are yet to make: the fortunes of those of the House of Lords (I speak in general) are made already. The members of the House of Commons may hope to be members of the House of Lords: the members of the House of Lords have no higher House of Lords to rise to. Is it natural for those to be most active who have the *least*, or those who have the *most* interest to be so? Are the experienced, those who are the least, or those who are the most active? Does experience come to men when asleep, or when awake? Is it the members of the House of Lords that are the most active, or of the House of Commons? To speak plain, is it in the House of Lords that there is most business done, or in the House of Commons? Was it *after* the *fish* was caught that the successor of St. Peter used the *net*, or was it *before*? [*i*] In a word, is there most wisdom ordinarily where there is least, or where there is most, to gain by being wise? [*k*]

XVII. A word or two more with respect to the characteristic qualifications, as our Author states them, of the higher assembly of our legislature. Experience is, in virtue of their being an aristocratical assembly, to afford them wisdom: thus far we were arrived before. But he now pushes the deduction a step farther.—Wisdom is to afford them "circumspection and mediatory caution:" qualifications which it seems as if we should see nothing of were it not for them. Let us now put a case. The business, indeed, that originates in the House of Lords, is, as things stand, so little, that our Author seems to forget that there is any. However, some there is. A bill, then, originates with the Lords, and is sent down to the Commons. As to "circumspection" I say nothing: *that*, let us hope, is not wanting to either House. But whose province is "mediatory caution" now?

XVIII. Thus much concerning these two branches of our Legislature, so long as they continue what, according to our Author's principles, they are at present: the House of Lords the Aristocratical branch; the House of Commons the Democratical. A little while, and we shall see them so; but again a little while, perhaps, and we shall not see them so. For by what characteristic does our Author distinguish an Aristocratical legislative body from a Democratical one? By that of *number:* by the number of the persons that compose them: by that, and that alone: for no other has he given. Now, therefore, to judge by that, the House of Lords, at present, indeed, *is* the Aristocratical branch: the House of Commons, in comparison at least with the other, the Democratical. Thus far is well. But should the list of nobility swell at the rate we have sometimes seen it, there is an assignable period, and that, perhaps, at no very enormous distance, at which the assembly of the Lords will be more numerous than that of the Commons. Which will *then* be the Aristocratical branch of our Legislature?

[*i*] Every body has heard the story of him who, from a fisherman, was made Archbishop, and then Pope. While Archbishop, it was his custom every day, after dinner, to have a fishing net spread upon his table, by way of a memento, as he used to say, of the meanness of his original. This farcical ostentation of humility was what, in those days, contributed not a little to the increase of his reputation. Soon after his exaltation to St. Peter's chair, one of his intimates was taking notice to him, one day, when dinner was over, of the table's not being decked as usual. "Peace," answered the Holy Father; "when the fish is caught, there is no occasion for the net."

[*k*] In the House of Commons itself, is it by the opulent and independent country gentlemen that the chief business of the House is transacted, or by aspiring, and perhaps needy Courtiers? The man who would persevere in the toil of Government, without any other reward than the favour of the people, is certainly the man for the people to make choice of. But such men are at best but rare. Were it not for those children of Corruption we have been speaking of, the business of the state, I doubt, would stagnate.

Upon our Author's principles, the House of Commons. Which the Democratical? The House of Lords.

XIX. The final cause we are to observe, and finishing exploit, the "*portus et sabbatum*," as Lord Bacon might perhaps have called it, [*l*] of this sublime and edifying dissertation, is this demonstration he has been giving us of the perfection of the British Form of Government. This demonstration (for by no less a title ought it to be called) is founded, we may have observed, altogether upon the properties of *numbers:* properties, newly discovered indeed, and of an extraordinary complexion, *moral* properties; but properties, however, so it seems, of numbers.* 'Tis in the nature, then, of numbers, we shall find these characteristic properties of the three Forms of Government, if any where. Now the properties of numbers are universally allowed to be the proper subject of that mode of demonstration which is called *mathematical.* The proof our Author has given has therefore already in it the *essence* of such a demonstration. To be complete at all points, it wants nothing but the *form.* This deficiency is no other than what an underrate workman might easily supply. A mere technical operation does the business. That humble task it shall be my endeavour to perform. The substantial honour I ascribe wholly to our Author, to whom only it is most due.

XX. PROPOSITION. *Theorem.* — The British Government is all-perfect.

DEMONSTRATION.

By definition,	1	The British Government == Monarchy + Aristocracy + Democracy.
Again, by definition,	2	Monarchy == the Government of 1.
Also,	3	Democracy == the Government of *all.*
Also,	4	Aristocracy == the Government of some number between 1 and *all.*
Put	5	*All* == 1,000,000.
Put also	6	The number of governors in an Aristocracy == 1,000.
Now then, by assumption,	7	1 has + strength — wisdom — honesty.
Also,	8	1,000 has + wisdom — strength — honesty.
Also,	9	1,000,000 has + honesty — strength — wisdom.
Rejecting — wisdom — honesty in [*m*] in [7]	10	1 has + strength.
Also rejecting — strength — honesty in [8]	11	1,000 has + wisdom.
Also rejecting — strength — wisdom in [9]	12	1,000,000 has + honesty.
Putting together the expressions [10], [11], and [12],	13	1 + 1,000, + 1,000,000 has strength + wisdom + honesty.
But by the definitions [1], [2], [3], [4], and the suppositions [5], [6],	14	The British Government == 1 + 1,000 + 1,000,000.
Therefore, by [13],	15	The British Government has + strength + wisdom + honesty.
Changing the expressions,	16	The British Government is all-powerful + all-wise + all-honest.
But by definition,	17	All-powerful + all-wise + all-honest == all-perfect.
Therefore, by [16] and [17],	18	The British Government is all-perfect, Q. E. D.

*** SCHOLIUM. After the same manner it may be proved to be *all-weak*, *all-foolish*, and *all-knavish.*

XXI. Thus much for the British Constitution; and for the grounds of that pre-eminence which it boasts, I trust, indeed, not without reason, above all others that are known: Such is the idea our Author gives us of those grounds.—"You are not satisfied with it, then?" says some one. — Not perfectly. — "What is then your own?" — In truth this is more than I have quite yet settled. I may have settled it with myself, and not think it worth the giving: but if ever I do think it worth the giving, it will hardly be in the form of a comment on a digression, stuffed into the belly of a definition. At any rate, it is not likely to be much wished for by those who have read what has been given us on this subject by an ingenious foreigner: since it is to a foreigner we were destined to owe the best idea that has yet been given of a subject so much our own. Our Author has copied: but Mr. De LOLME has thought.

The topic which our Author has thus brought upon the carpet (let any one judge with what necessity) is, in respect to some parts of it that we have seen, rather of an invidious nature. Since, however, it *has* been brought upon the carpet, I have treated it with that plainness with which an Englishman of all others is bound to treat it, because an Englishman may thus treat it and be safe. I have said what the subject seemed to demand, without any fear indeed, but without any wish, to give offence: resolving not to

[*l*] It is what he says of Theology with respect to the Sciences. — V. Augm. Scient. L. VIII. c. iii. p. 97.

* *Vide supra.*

[*m*] Which is done without any sort of ceremony; the quantities marked in this step with the negative sign, being as so many *fluents*, which are at a *maximum*, or a *minimum*, just as happens to be most convenient.

permit myself to consider how this or that man might chance to take it. I have spoken without sycophantical respect, indeed, yet I hope not without decency: certainly without any party spleen. I chose rather to leave it to our Author to compliment men in the lump, and to stand aghast with admiration at the virtues of men unknown.* Our Author will do as shall seem meet to him. For my part, if ever I stand forth and sing the song of eulogy to great men, it shall be not because they *occupy* their station, but because they *deserve* it.

CHAPTER IV.

RIGHT OF THE SUPREME POWER TO MAKE LAWS.

I. WE now come to the third topic touched upon in the digression; namely, the *right*, as our Author phrases it, which the Supreme Power has of making laws. And this topic occupies one pretty long paragraph. The title here given to it is the same which in the next succeeding paragraph he has found for it himself. This is fortunate: for, to have been obliged to find a title for it myself, is what would have been to the last degree distressing. To *entitle* a discourse, is to represent the drift of it. But, to represent the drift of this, is a task which, so long at least as I confine my consideration to the paragraph itself, bids defiance to my utmost efforts.

II. 'Tis to another passage or two, a passage or two that we have already seen starting up in distant parts of this digression, that I am indebted for such conjectures as I have been able to make up.

These conjectures, however, I could not have ventured so far to rely on, as on the strength of them to have furnished the paragraph with a title of my own framing. The danger of misrepresentation was too great; a kind of danger which a man cannot but lie eminently exposed to, who ventures to put a precise meaning upon a discourse which in itself has none. That I may just mention, however, in this place, the result of them; what he is really aiming at, I take it, is, to inculcate a persuasion that in every state there must subsist, in some hands or other, a power that is *absolute*. I mention it thus prematurely, that the reader may have some clue to guide him in his progress through the paragraph; which it is now time I should recite.

III. "Having," says our Author, "thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, to prescribe the rule of civil action. And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals united for their safety and convenience, and intended to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But in as much as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one, or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is, in different states, according to their different constitutions, understood to be law."

IV. The other passages which suggested to me the construction I have ventured to put upon this, shall be mentioned by and by. First, let us try what is to be made of it by itself.

V. The obscurity, in which the first sentence of this paragraph is enveloped, is such, that I know not how to go about bringing it to light, without borrowing a word or two of logicians. Laying aside the preamble, the body of it, viz. "*as* the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws," may be considered as constituting that sort of syllogism which logicians call an *enthymeme*. An *enthymeme* consists of two *propositions;* a *consequent* and *antecedent*. "The power of making laws," says our Author, "constitutes the supreme authority." This is his antecedent. From hence it is he concludes, that "wherever the supreme authority in any state resides, it is the right of that authority to make laws." This, then, is his *consequent*.

Now so it is, that this *antecedent*, and this *consequent*, for any difference at least that I can possibly perceive in them, would turn out, were they but correctly worded, to mean precisely the same thing: for, after saying that "the power of making laws constitutes the supreme authority," to tell us that, for that reason, "the supreme authority" is (or has) the power (or the right) of making laws, is giving us, I take it, much the same sort of information, as it would be to us to be told

* *Vide supra*, par. 7.

that a thing is so, *because* it is so: a sort of truth which there seems to be no very great occasion to send us upon "discovering, in the end and institution of civil states." That by the "sovereign power," he meant "the power of making laws;" this, or something like it, is no more, indeed, than what he had told us over and over, and over again, with singular energy and anxiety, in his 46th page, in his 49th, and in I know not how many pages besides: always taking care, for precision's sake, to give a little variety to the expression: the words "*power*" and "*authority*" sometimes seemingly put for the same idea; sometimes seemingly opposed to each other; both of them sometimes denoting the *fictitious* being, the *abstract quality;* sometimes the *real* being or beings, the *person* or *persons* supposed to *possess* that *quality*. — Let us disentangle the sense from these ambiguities; let us learn to speak distinctly of the *persons*, and of the *quality* we attribute to them; and then let us make another effort to find a meaning for this perplexing passage.

VI. By the "supreme authority," then, (we may suppose our Author to say) "I mean the same thing as when I say the power of making laws." This is the proposition we took notice of above, under the name of the *antecedent*. This antecedent, then, we may observe, is a definition: a definition, to wit, of the phrase "supreme authority." Now, to define a phrase, is to translate it into another phrase, supposed to be better understood, and expressive of the same ideas. The supposition here then is, that the reader was already, of himself, tolerably well acquainted with the import of the phrase "power of making laws;" that he was not at all, or was however less acquainted with the import of the phrase "supreme authority." Upon this supposition, then, it is, that in order to his being made clearly to understand the latter, he is informed of its being synonymous to the former. Let us now introduce the mention of the *person:* let us add the word "*person*" to the definition; it will be the same definition still in substance, only a little more fully and precisely worded. *For a person to possess* the supreme authority, is *for a person to possess* the power of making laws. This, then, is what in substance has been already laid down in the *antecedent*.

VII. Now let us consider the *consequent;* which, when detached from the context, may be spoken of as making a sentence of itself. "Wherever," says he, "the supreme authority in any state presides, it is the *right* of that authority to make Laws."—By "*wherever*," I take it for granted, he means, "*in whatever persons:*" by "*authority*," in the former part of the sentence,—*power;* by the same word, "*authority*," in the latter part of the sentence,—*persons*. Corrected, therefore, the sentence will stand thus: *In whatever persons in any state the supreme power resides, it is the right of those persons to make Laws.*

VIII. The only word now remaining undisposed of is the word "*right*." And what to think of this, I must confess I know not: whether our Author had a meaning in it, or whether he had none. It is inserted, we may observe, in the latter part only of the sentence: it appears not in the former. Concerning this omission, two conjectures here present themselves: it may have happened by accident; or it may have been made by design. If by accident, then the case is, that the idea annexed to the word "*right*" is no other than what was meant to be included in the former part of the sentence, in which it is *not* expressed, as well as in the latter, in which it *is*. In this case it may, without any change in the signification, be expressed in both. Let it then be expressed, and the sentence, take it all together, will stand thus: *In whatever persons* the right of exercising *supreme power in any state resides, it is* the right *of those persons to make Laws.* If this conjecture be the true one, and I am apt to think it is, we see once more, and, I trust, beyond all doubt, that the *consequent* in this *enthymeme* is but a repetition of the *antecedent*. We may judge, then, whether it is from any such consideration as that of "the end and institution of civil states," or any other consideration, that we are likely to gain any further conviction of the truth of this *conclusion*, than it presents us of itself. We may also form some judgment beforehand, what use or meaning there is likely to be in the assemblage of words that is to follow.

IX. What is possible, notwithstanding, however improbable, is, that the omission we have been speaking of was *designed*. In this case, what we are to understand is, that the word "*right*" *was* meant to introduce a new idea into this latter part of the sentence, over and above any that was meant to be suggested by the former. "*Right*," then, according to this construction, in the one place, is to be considered as put in contradistinction to *fact*, in the other. The sense is, then, that *whatever persons* do actually *exercise supreme power* (or what, according to the *antecedent* of the *enthymeme*, is the same thing, *the power of making laws*), *those persons* have the right to *exercise it*. But, in this case, neither does what is given as a *consequence* in any respect follow from the *antecedent*, nor can *any thing be* made of it, but what is altogether foreign to the rest of the discourse: so much, indeed, that it seems more consonant to probability, as well as more favourable to our Author, to conclude that he had no meaning at all, than that he had this.

X. Let us now try what we can make of the remainder of the paragraph. Being ushered in by the word "*for*," it seems to lay claim to the appellation of an argument. This argument, setting out, as we have seen, without an object, seems however to have found something like one at last, as if it had picked it up by the way. This object, if I mistake it not, is to persuade men, that the *supreme power* (that is, the *person* or *persons* in use to exercise the supreme power in a state) ought, in all points, without exception, to be obeyed. What men intend, he says, to do when they are in a state, is to act, as if they were but "one man." But one man has but one will belonging to him. What they intend, therefore, or what they *ought* to intend (a slight difference, which our Author seems not to be well aware of) is, to act as if they had but one will. To act as if they had but one will, the way is for them to "join" all their wills "together." To do this, the most obvious way would be to join them "*naturally*:" but, as *wills* will not splice and dovetail like deal boards, the only feasible way is to join them "*politically*." Now the only way for men to join their wills together *politically*, is for them all to consent to submit their wills to the will of one. This one will, to which all others are to be submitted, is the will of those persons who are in use to exercise the supreme power; whose wills, again, when there happens to be many of them, have, by a process of which our Author has said nothing, been reduced (as we must suppose) into *one* already. So far our Author's argument. The above is the substance of it fairly given; not altogether with so much ornament, indeed, as he has given it, but, I trust, with somewhat more precision. The whole concludes, we may observe, with our Author's favourite identical proposition, or something like it, now for the twentieth time repeated.

XI. Taking it altogether, it is, without question, a very ingenious argument: nor can any thing in the world answer the purpose better, except just in the case where it happens to be wanted. Not but that a veteran antagonist, trained up in the regular and accustomed discipline of legal fencing—such an one, indeed, *might* contrive, perhaps, with due management, to give our Author the honour of the field. But should some undisciplined blunderer, like the Commissary's landlady, thrust in *quart*, when he should have thrust in *tierce*, I doubt much whether he might not get within our Author's *guard*. — I "intend?"— I "consent?"—I "submit" myself?—'Who are you, I wonder, that should know what I do better than I do myself? As to "*submitting my will*" to the wills of the people who made this law you are speaking of,—what I know is, that I never "intended" any such thing: I abominate them, I tell you, and all they ever did, and have always *said* so: and as to my "consent," so far have I been from giving it to their law, that from the first to the last, I have protested against it with all my might.' So much for our refractory disputant.—What I should say to him I know: but what our Author could find to say in answer to him, is more than I can imagine. [*a*]

XII. Let us now return and pick up those other passages which we supposed to have a respect to the same design that seems to be in view in this. First comes the short introductory paragraph that ushers in the whole digression: a paragraph which, however short, and however imperfect with respect to the purpose of giving a general view of the contents of those which follow it, was, in despite of method, to expatiate upon this subject. Upon this subject, indeed, he does expatiate with a force of argument and energy of expression which nothing can withstand. "This," it begins, "will necessarily lead us into a short inquiry concerning the nature of society and civil government."* This is all the intimation it gives of the contents of those paragraphs we have examined. Upon *this* before us it touches in energetic terms; but more energetic than precise. "And the *natural*" (it continues) "and *inherent* right that belongs to the sovereignty of a state," (*natural* right, observe, that belongs to the sovereignty of a *political* society) "wherever that sovereignty be lodged, of making and enforcing laws."

XIII. This is not all. The most emphatical passage is yet behind. It is a passage in that short paragraph† which we found to contain such a variety of matter. He is there speaking of the several forms of government now in being. "However they began," says he, "or by what right soever they subsist, there *is* and *must be* in all of them a *supreme*, *irresistible*, *absolute*, *uncontrouled* authority, in which the *jura summi imperii*, or the rights of sovereignty, reside."

[*a*] One thing in the paragraph we are considering is observable; it is the concluding sentence, in which he brings together the ideas of *law* and *will*. Here, then, in the tail of a digression, he comes nearer in fact, though without being aware of it, to the giving a just and precise idea of a law, than in any part of the definition itself from whence he is digressing. If, instead of saying that a law is a *will*, he had called it the *expression* of a *will*, and that sort of expression of a will which goes by the name of a *command*, his definition would, so far as this goes, have been clear as well as right. As it is, it is neither the one nor the other. But of this more, if at all, in another place. The definition of law is a matter of too much nicety and importance to be dispatched in a note.

* 1 Comm. p. 47.

† 1 Comm. p. 48; *supra*, ch. ii. par. 11.

XIV. The vehemence, the δεινοτης, of this passage is remarkable. He ransacks the language: he piles up, one upon another, four of the most tremendous epithets he can find; he heaps Ossa upon Pelion: and, as if the English tongue did not furnish expressions strong or imposing enough, he tops the whole with a piece of formidable Latinity. From all this agitation, it is plain, I think, there is a something which he has very much at heart; which he wishes, but fears, perhaps, to bring out undisguised; which in several places, notwithstanding, burst out involuntarily, as it were, before he is well ready for it; and which a certain discretion, getting at last the upper hand of propensity, forces, as we have seen, to dribble away in a string of obscure sophisms. Thus oddly enough it happens, that that passage of them all, which, if I mistake not, is the only one that was meant to be dedicated expressly to the subject, is the least explicit on it. [*b*]

XV. A courage much stauncher than our Author's might have wavered here. A task of no less intricacy was here to be travelled through, than that of adjusting the claims of those two jealous antagonists, Liberty and Government. A more invidious ground is scarcely to be found any where within the field of politics. Enemies encompass the traveller on every side. He can scarce stir but he must expect to be assaulted with the war-hoop of political heresy from one quarter or another. Difficult enough is the situation of him, who, in these defiles, feels himself impelled one way by fear, and another by affection.

XVI. To return to the paragraph which it was the more immediate business of this chapter to examine: — Were the path of obscurity less familiar to our Author, one should be tempted to imagine he had struck into it on the particular occasion before us, in the view of extricating himself from this dilemma. A discourse thus prudently indeterminate might express enough to keep fair with the rulers of the earth, without setting itself in direct array against the prejudices of the people. Viewed by different persons, it might present different aspects: to men in power it might recommend itself, and that from the first, under the character of a practical lesson of obedience for the use of the people; while among the people themselves it might pass muster, for a time at least, in quality of a string of abstract scientific propositions of jurisprudence. It is not till some occasion for making application of it should occur, that its true use and efficacy would be brought to light. The people, no matter on what occasion, begin to murmur, and concert measures of resistance. Now, then, is the time for the latent virtues of this passage to be called forth. The book is to be opened to them, and in this passage they are to be shown, what of themselves, perhaps, they would never have observed — a set of arguments curiously strung together and wrapped up, in proof of the universal expedience, or rather *necessity*, of submission; a necessity which is to arise, not out of the reflection that *the probable mischiefs of resistance are greater than the probable mischiefs of obedience;* not out of any such debateable consideration, but out of a something that is to be much more cogent and effectual; to wit, a certain *metaphysico-legal* impotence, which is to beget in them the sentiment, and answer all the purposes of a natural one. Armed, and full of indignation, our malcontents are making their way to the royal palace. In vain. A certain *estoppel* being made to bolt out upon them, in the manner we have seen, by the force of our Author's legal engineering, their arms are to fall, as it were by enchantment, from their hands. To disagree, to clamour, to oppose, to take back, in short, their wills again, is now, they are told, too late: it is what *can*not be done: their wills have been put in *hotchpot* along with the rest: they *have* "united," — they *have* "consented," — they *have* "*sub*mitted." — Our Author having thus *put his hook into their nose*, they are to go back as they came, and all is peace. An ingenious contrivance this enough: but popular passion is not to be fooled, I doubt, so easily. Now and then, it is true, one error may be driven out for a time, by an opposite error; one piece of nonsense by another piece of nonsense; but for barring the door effectually and for ever against all error and all nonsense, there is nothing like the simple truth.

XVII. After all these pains taken to inculcate unreserved submission, would any one have expected to see our Author himself among the most eager to excite men to disobedience? and that, perhaps, upon the most frivolous pretences? in short, upon any pretence whatsoever? Such, however, upon looking back a little, we shall find him. I say, among the most eager; for other men, at least the most enlightened advocates for liberty, are content with leaving it to subjects to resist, for their own sakes, on the footing of *permission:* this will not content our Author, but he must be forcing it upon them as a point of *duty.*

XVIII. 'Tis in a passage antecedent to the digression we are examining, but in the same section, that, speaking of the pretended law of Nature, and of the law of Revelation, "No human laws," he says, "should be *suffered* to contradict these."* The expres-

[*b*] Another passage or two there is, which might seem to glance the same way: but these I pass over as less material, after those which we have seen.

* 1 Comm. p. 42.

sion is remarkable. It is not, that no human laws should contradict them; but, that no human laws should be SUFFERED to contradict them. He then proceeds to give us an example. This example, one might think, would be such as should have the effect of softening the dangerous tendency of the rule: — on the contrary, it is such as cannot but enhance it; [c] and in the application of it to the rule, the substance of the latter is again repeated in still more explicit and energetic terms. "Nay," says he, speaking of the act he instances, "if any human law should allow or enjoin us to commit it, we are BOUND TO TRANSGRESS that human law, or else we must offend both the natural and the divine."

XIX. The propriety of this dangerous maxim, so far as the Divine Law is concerned, is what I must refer to a future occasion for more particular consideration. [d] As to the LAW *of Nature*, if (as I trust it will appear) it be nothing but a phrase; [e] if there be no other medium for proving any act to be an offence against it, than the mischievous tendency of such act; if there be no other medium for proving a law of the *state* to be contrary to it, than the *inexpediency* of such law, unless the bare unfounded disapprobation of any one who thinks of it be called a proof; if a test for distinguishing such laws as would be *contrary* to the LAW *of Nature* from such as, *without* being contrary to it, are simply *inexpedient*, be that which neither our Author, nor any man else, so much as pretended ever to give; if, in a word, there be scarce any law whatever but what those who have not liked it have found, on some account or another, to be repugnant to some text of scripture; I see no remedy but that the natural tendency of such doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like. What sort of government it is that can consist with such a disposition, I must leave to our Author to inform us.

XX. It is the principle of *utility*, accurately apprehended and steadily applied, that affords the only clew to guide a man through these streights. It is for that, if any, and for that alone, to furnish a decision which neither party shall dare in *theory* to disavow. It is something to reconcile men even in theory. They are, at least, *something* nearer to an effectual union, than when at variance as well in respect to theory as of practice.

XXI. In speaking of the supposed contract between King and people,* I have already had occasion to give the description, and, as it appears to me, the only *general* description that *can* be given, of that juncture at which, and not before, resistance to government becomes *commendable;* or, in other words, reconcilable to just notions, whether of *legal* or not, at least of *moral*, and, if there be any difference, *religious* duty.† What was there said was spoken, at the time, with reference to that particular branch of government which was then in question; the branch that in this country is administered by the King. But if it was just, as applied to *that* branch of government, and in *this* country, it could only be for the same reason that it is so when applied to the *whole* of government, and that in *any* country whatsoever. It is *then*, we may say, and not till then, allowable to, if not incumbent on, every man, as well on the score of *duty* as of *interest*, to enter into measures of resistance; when, according to the best calculation he is able to make, *the probable mischiefs of resistance* (speaking with respect to the community in general) *appear less to him than the probable mischiefs of submission.* This, then, is to him, that is, to each man in particular, the *juncture for resistance.*

XXII. A natural question here is — by what *sign* shall this juncture be known? By what *common* signal, alike conspicuous and perceptible to all? A question which is readily enough started, but to which, I hope, it will be almost as readily perceived that it is impossible to find an answer. *Common* sign for such a purpose, I, for my part, know of none: he must be more than a prophet, I think, that can show us one. For that which shall serve as a particular sign to each particular person, I have already given one

[c] It is that of murder. In the word here chosen, there lurks a fallacy which makes the proposition the more dangerous, as it is the more plausible. It is too important to be altogether passed over: at the same time that a slight hint of it, in this place, is all that can be given. Murder is *killing* under certain *circumstances*. — Is the human law, then, to be allowed to define, in *dernier resort*, what shall be those *circumstances*, or is it not? If *yes*, the case of "a human law allowing or enjoining us to commit it," is a case that is not so much as supposable: if *no*, adieu to all human laws: to the fire with our Statutes at large, our Reports, our Institutes, and all that we have hitherto been used to call our law books; our law books, the only law books we can be safe in trusting to, are Puffendorf and the Bible.

[d] According to our Author, indeed, it should be to no purpose to make any separate mention of the two laws; since the Divine Law, he tells us, is but "a part of" that of Nature.* Of consequence, with respect to that part, at least, which is common to both, to be contrary to the one, is, of course, to be contrary to the other.

[e] This is what there would be occasion to show more at large in examining some former parts of this section.

* 1 Comm. p. 42.

* Ch. i. † See ch. v. par. 7, note [b.]

— his own internal persuasion of a balance of *utility* on the side of resistance.

XXIII. Unless such a sign, then, which I think impossible, can be shown, the *field*, if one may say so, of the supreme governor's authority, though not *infinite*, must unavoidably, I think, *unless where limited by express convention*, [*f*] be allowed to be *indefinite*. Nor can I see any narrower or other bounds to it, under this constitution, or under any other yet *freer* constitution, if there be one, than under the most *despotic*. *Before* the juncture I have been describing were arrived, resistance, even in a country like this, would come too soon: were the juncture arrived *already*, the time for resistance would be come already, under such a government even as any one should call *despotic*.

XXIV. In regard to a government that is *free*, and one that is *despotic*, wherein is it, then, that the difference consists? Is it that those persons in whose hands that power is lodged which is acknowledged to be supreme, have less power in the one than in the other, when it is from custom that they derive it? By no means. It is not that the power of one, any more than of the other, has any certain bounds to it. The distinction turns upon circumstances of a very different complexion: — on the *manner* in which the whole mass of power, which, taken together, is supreme, is, in a free state, *distributed* among the several ranks of persons that are sharers in it: — on the *source* from whence their titles to it are successively derived: — on the frequent and easy *changes* of condition between governors and governed; whereby the interests of the one class are more or less indistinguishably blended with those of the other: — on the *responsibility* of the governors; or the right which a subject has of having the reasons publicly assigned and canvassed of every act of power that is exerted over him: — on the *liberty of the press;* or the security with which every man, be he of the one class or the other, may make known his complaints and remonstrances to the whole community: — on the *liberty of public association;* or the security with which malcontents may communicate their sentiments, concert their plans, and practise every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them.

XXV. True, then, it may be, that, owing to this last circumstance in particular, in a state thus circumstanced, the road to a revolution, if a revolution be necessary, is to appearance shorter; certainly more smooth and easy. More likelihood, certainly, there is of its being such a revolution as shall be the work of a number; and in which, therefore, the interests of a number are likely to be consulted. Grant, then, that by reason of these facilitating circumstances, the juncture itself may arrive sooner, and upon less provocation, under what is called a *free* government, than under what is called an *absolute* one: grant this; — yet till it *be* arrived, resistance is as much too soon under one of them as under the other.

XXVI. Let us avow then, in short, steadily but calmly, what our Author hazards with anxiety and agitation, that the authority of the supreme body cannot, *unless where limited by express convention*, be said to have any assignable, any certain bounds. — That to say there is any act they *cannot* do, — to speak of any thing of their's as being *illegal*, — as being *void;* — to speak of their exceeding their *authority* (whatever be the phrase) — their *power*, — their *right*, — is, however common, an abuse of language.

XXVII. The legislature *cannot* do it? The legislature *cannot* make a law to this effect? Why cannot? What is there that should hinder them? Why not *this*, as well as so many other laws murmured at, perhaps as inexpedient, yet submitted to without any question of the *right?* With men of the same party, with men whose affections are already listed against the law in question, any thing will go down: any rubbish is good that will add fuel to the flame. But with regard to an impartial by-stander, it is plain that it is not denying the right of the legislature, their *authority*, their *power*, or whatever be the word — it is not denying that they *can* do what is in question — it is not that, I say, or any discourse verging that way, that can tend to give *him* the smallest satisfaction.

XXVIII. Grant even the proposition in general: — What are we the nearer? Grant that there *are* certain bounds to the *authority* of the legislature: — Of what use is it to say so, when these bounds are what nobody has ever attempted to mark out to any useful purpose; that is, in any such manner whereby it might be known beforehand what description a law must be of to fall *within*, and what to fall *beyond* them? Grant that there *are* things which the legislator *cannot* do; — grant that there *are* laws which exceed the *power* of the legislature to establish: what rule does this sort of discourse furnish us for determining whether any one that is in question is, or is not, of the number? As far as I can discover, none. Either the discourse goes on in the confusion it began; — either all rests in vague assertions, and no intelligible argument at all is offered; or if any, such arguments as are drawn from the principle of

[*f*] This respects the case where one state has, upon *terms*, submitted itself to the government of another: or where the governing bodies of a number of states agree to take directions, in certain specified cases, from some *body* or other that is distinct from all of them; consisting of members, for instance, appointed out of each.

utility: arguments which, in whatever variety of words expressed, come at last to neither more nor less than this: that the tendency of the law is, to a greater or a less degree, pernicious. If this then be the result of the argument, why not come home to it at once? Why turn aside into a wilderness of sophistry, when the path of plain reason is straight before us?

XXIX. What practical inferences those who maintain this language mean should be deduced from it, is not altogether clear; nor, perhaps, does every one mean the same. Some who speak of a law as being *void* (for to this expression, not to travel through the whole list, I shall confine myself) would persuade us to look upon the authors of it as having thereby *forfeited*, as the phrase is, their *whole* power: as well that of giving force to the particular law in question, as to any other. These are they who, had they arrived at the same practical conclusion through the principle of utility, would have spoken of the law as being to such a degree pernicious, as that, were the bulk of the community to see it in its true light, *the probable mischief of resisting it would be less than the probable mischief of submitting to it*. These point, in the first instance, at *hostile* opposition.

XXX. Those who say nothing about forfeiture are commonly less violent in their views. These are they who, were they to ground themselves on the principle of utility, and to use our language, would have spoken of the law as being mischievous indeed, but without speaking of it as being mischievous to the degree that has been just mentioned. The mode of opposition which they point to is one which passes under the appellation of a *legal* one.

XXXI. Admit, then, the law to be void in their sense, and mark the consequences. The idea annexed to the epithet *void* is obtained from those instances in which we see it applied to a private instrument. The consequence of a *private* instrument's being void is, that all persons concerned are to act as if no such instrument had existed. The consequence, accordingly, of a *law's* being void must be, that people shall act as if there were no such law about the matter: and therefore, that if any person, in virtue of the mandate of the law, should do anything in coercion of another person, which without such law he would be punishable for doing, he would still be punishable; to wit, by appointment of the judicial power. Let the law, for instance, be a law imposing a tax: a man who should go about to levy the tax by force would be punishable as a trespasser: should he chance to be killed in the attempt, the person killing him would *not* be punishable as for murder: should he kill, he himself *would*, perhaps, be punishable as for murder. To whose office does it appertain to do those acts in virtue of which such punishment would be inflicted? To that of the Judges. Applied to practice, then, the effect of this language is, by an appeal made to the Judges, to confer on those magistrates a controuling power over the acts of the legislature.

XXXII. By this management, a *particular* purpose might, perhaps, by chance be answered: and let this be supposed a good one. Still what benefit would, from the *general* tendency of such a doctrine, and such a practice in conformity to it, accrue to the body of the people, is more than I can conceive. A Parliament, let it be supposed, is too much under the influence of the Crown; pays too little regard to the sentiments and the interests of the people. Be it so. The people, at any rate, if not so great a share as they might and ought to have, have had, at least, *some* share in choosing it. Give to the Judges a power of annulling its acts; and you transfer a portion of the supreme power from an assembly which the people have had *some* share, at least, in choosing, to a set of men in the choice of whom they have not the least imaginable share: to a set of men appointed solely by the Crown: appointed *solely*, and avowedly, and *constantly*, by that very magistrate whose partial and occasional influence is the very grievance you seek to remedy.

XXXIII. In the heat of debate, some, perhaps, would be for saying of this management, that it was transferring at once the supreme authority from the legislative power to the judicial. But this would be going too far on the other side. There is a wide difference between a *positive* and a *negative* part in legislation. There is a wide difference, again, between a negative upon *reasons* given, and a negative without any. The power of *repeating* a law, even for reasons given, is a great power: too great, indeed, for Judges; but still very distinguishable from, and much inferior to, that of *making* one. [*g*]

XXXIV. Let us now go back a little.

[*g*] Notwithstanding what has been said, it would be in vain to dissemble but that, upon occasion, an appeal of this sort may very well answer, and has, indeed, in general, a tendency to answer, in some sort, the purposes of those who espouse, or profess to espouse, the interests of the people. A public and authorized debate on the propriety of the law is by this means brought on. The artillery of the tongue is played off against the law, under cover of the law itself. An opportunity is gained of impressing sentiments unfavourable to it, upon a numerous and attentive audience. As to any other effects from such an appeal, let us believe, that in the instances in which we have seen it made, it is the certainty of miscarriage that has been the encouragement to the attempt.

In denying the existence of any assignable bounds to the supreme power, I added,* "unless where limited by express convention:" for this exception I could not but subjoin. Our Author, indeed, in that passage in which, short as it is, he is the most explicit, leaves, we may observe, no room for it. "However they began," says he (speaking of the several forms of government) — "however they began, and by what right soever they subsist, there is and must be in ALL of them an authority that is absolute....." To say this, however, of *all* governments without exception; — to say that *no* assemblage of men can subsist in a state of government, without being subject to some *one* body whose authority stands unlimited so much as by convention; — to say, in short, that not even by convention can any limitation be made to the power of that body in a state which in other respects is supreme, would be saying, I take it, rather too much: it would be saying that there is no such thing as government in the German Empire; nor in the Dutch Provinces; nor in the Swiss Cantons: nor was of old in the Achæan league.

XXXV. In this mode of limitation I see not what there is that need surprise us. By what is it that any degree of *power* (meaning *political power*) is established? It is neither more nor less, as we have already had occasion to observe,† than a habit of, and disposition to obedience: *habit*, speaking with respect to *past* acts; *disposition*, with respect to *future*. This disposition it is as easy, or I am much mistaken, to conceive as being absent with regard to one sort of acts, as present with regard to another. For a body, then, which is in other respects supreme, to be conceived as being with respect to a certain sort of acts limited, all that is necessary is, that this sort of acts be in its description distinguishable from every other.

XXXVI. By means of a convention, then, we are furnished with that common signal which, in other cases, we despaired of finding.‡ A certain act is in the instrument of convention specified, with respect to which the government is therein precluded from issuing a law to a certain effect: whether to the effect of commanding the act, of permitting it, or of forbidding it. A law is issued to that effect notwithstanding. The issuing, then, of such a law (the sense of it, and likewise the sense of that part of the convention which provides against it being supposed clear) is a fact notorious and visible to all: in the issuing, then, of such a law, we have a fact which is *capable* of being taken for that common signal we have been speaking of. These bounds the supreme body in question has marked out to its authority: of such a demarcation, then, what is the effect? Either none at all, or this: that the disposition to obedience confines itself within these bounds. Beyond them the disposition is stopped from extending: beyond them the subject is no more prepared to obey the governing body of his own state, than that of any other. What difficulty, I say, there should be in conceiving a state of things to subsist in which the supreme authority is thus limited, — what greater difficulty in conceiving it with this limitation, than without any, I cannot see. The two states are, I must confess, to me alike conceivable: whether alike expedient, — alike conducive to the happiness of the people, is another question.

XXXVII. God forbid, that from any thing here said it should be concluded that in any society any convention is or can be made, which shall have the effect of setting up an insuperable bar to that which the parties affected shall deem a reformation: — God forbid that any disease in the constitution of a state should be without its remedy. Such might by some be thought to be the case, where that supreme body which in such a convention was one of the contracting parties, having incorporated itself with that which was the other, no longer subsists to give any new modification to the engagement. Many ways might however be found to make the requisite alteration, without any departure from the spirit of the engagement. Although that body itself which contracted the engagement be no more, a *larger body*, from whence the first is understood to have derived its title, may still subsist. Let this larger body be consulted. Various are the ways that might be conceived of doing this, and that without any disparagement to the dignity of the subsisting legislature: of doing it, I mean, to such effect, as that, should the sense of such *larger body* be favourable to the alteration, it may be made by a law, which, in this case, neither ought to be, nor probably would be, regarded by the body of the people as a breach of the convention. [*h*]

* *Vide supra*, par. 26.
† *Vide supra*, ch. i. par. 13, note [*b*.]
‡ *Vide supra*, par. 22.

[*h*] In Great Britain, for instance, suppose it were deemed necessary to make an alteration in the act of Union. If in an article stipulated in favour of England, there need be no difficulty, so that there were a majority for the alteration among the English members, without reckoning the Scotch. The only difficulty would be with respect to an article stipulated in favour of Scotland; on account, to wit, of the small number of the Scotch members, in comparison with the English. In such a case, it would be highly expedient, to say no more, for the sake of preserving the public faith, and to avoid irritating the body of the nation, to take some method for making the establishment of the new law depend upon their sentiments. One such method might be as follows: — Let the new law in question be enacted in the common form; but let its

XXXVIII. To return for a moment to the language used by those who speak of the supreme power as being limited in its own nature. One thing I would wish to have remembered. What is here said of the impropriety, and evil influence of that kind of discourse, is not intended to convey the smallest censure on those who use it, as if intentionally accessary to the ill effects it has a tendency to produce. It is rather a misfortune in the language, than a fault of any person in particular. The original of it is lost in the darkness of antiquity. We inherited it from our fathers, and maugre all its inconveniences, are likely, I doubt, to transmit it to our children.

XXXIX. I cannot look upon this as a mere dispute of words: I cannot help persuading myself, that the disputes between contending parties — between the defenders of a law and the opposers of it, would stand a much better chance of being adjusted than at present, were they but explicitly and constantly referred at once to the principle of UTILITY. The footing on which this principle rests every dispute, is that of matter of fact; that is, future fact — the probability of certain future contingencies. Were the debate, then, conducted under the auspices of this principle, one of two things would happen: either men would come to an agreement concerning that probability, or they would see at length, after due discussion of the real grounds of the dispute, that no agreement was to be hoped for. They would, at any rate, see clearly and explicitly the point on which the *dis*agreement turned. The discontented party would then take their resolution to resist or to submit, upon just grounds, according as it should apppear to them worth their while — according to what should appear to them the importance of the matter in dispute — according to what should appear to them the probability or improbability of success — *according*, in short, *as the mischiefs of submission should appear to bear a less, or a greater ratio to the mischiefs of resistance.* But the door to reconcilement would be much more open, when they saw that it might be, not a mere affair of passion, but a difference of judgment, and that, for any thing they could know to the contrary, a sincere one, that was the ground of quarrel.

XL. All else is but womanish scolding and childish altercation, which is sure to irritate, and which never can persuade. — *I* say, the legislature "can*not* do this — *I* say, that it *can*. *I* say, that to do this, *exceeds* the bounds of its *authority* — *I* say, it does *not*." It is evident, that a pair of disputants setting out in this manner, may go on irritating and perplexing one another for everlasting, without the smallest chance of ever coming to an agreement. It is no more than announcing, and that in an obscure and at the same time a peremptory and captious manner, their opposite persuasions, or rather affections, on a question of which neither of them sets himself to discuss the grounds. The question of utility, all this while, most probably is never so much as at all brought upon the carpet: if it be, the language in which it is discussed is sure to be warped and clouded to make it match with the obscure and entangled pattern we have seen.

XLI. On the other hand, had the debate been originally and avowedly instituted on the footing of utility, the parties might at length have come to an agreement; or at least to a visible and explicit issue.—"*I* say, that the mischiefs of the measure in question are to *such* an amount — *I* say, *not* so, but to a *less*. — *I* say, the benefits of it are only to *such* an amount — *I* say, *not* so, but to a *greater*."—This, we see, is a ground of controversy very different from the former. The question is now manifestly a question of conjecture concerning so many future contingent matters of fact: to solve it, both parties then are naturally directed to support their respective persuasions by the only evidence the nature of the case admits of; — the evidence of such *past* matters of fact as appear to be analogous to those contingent *future* ones. Now these *past* facts are almost always numerous: so numerous, that till brought into view for the purpose of the debate, a great proportion of them are what may very fairly have escaped the observation of one of the parties: and it is owing, perhaps, to this and nothing else, that that party is of the persuasion which sets it at variance with the other. Here, then, we have a plain and open road, perhaps, to present reconcilement: at the worst, to an intelligible and explicit issue — that is, to such a ground of difference as may, when thoroughly trodden and explored, be found to lead on to reconcilement at the last. Men, let them but once clearly under-

commencement be deferred to a distant period, suppose a year or two: let it then, at the end of that period, be in force, unless petitioned against by persons of such a description, and in such number, as might be supposed fairly to represent the sentiments of the people in general; persons, for instance, of the description of those who at the time of the Union, constituted the body of electors. To put the validity of the law out of dispute, it would be necessary the fact upon which it was made ultimately to depend, should be in its nature too notorious to be controverted. To determine, therefore, whether the conditions upon which the invalidation of it was made to depend, had been complied with, is what must be left to the simple declaration of some person or persons; for instance, the King. I offer this only as a general idea, and as one amongst many that perhaps might be offered in the same view. It will not be expected that I should here answer objections, or enter into details.

stand one another, will not be long ere they agree. It is the perplexity of ambiguous and sophistical discourse that, while it distracts and eludes the apprehension, stimulates and inflames the passions,

But it is now high time we should return to our Author, from whose text we have been insensibly led astray, by the nicety and intricacy of the question it seemed to offer to our view.

CHAPTER V.

DUTY OF THE SUPREME POWER TO MAKE LAWS.

I. WE now come to the last topic touched upon in this digression: a certain "*duty*," which, according to our Author's account, the supreme power lies under:—the *duty of making laws*.

II. "Thus far," says he, "as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. *For since* the respective members are bound to conform themselves to the will of the state, it is expedient that they *receive directions* from the state declaratory of that its will. *But since* it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, therefore the state establishes general rules for the perpetual information and direction of all persons, in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity."

III. Still as obscure, still as ambiguous as ever. The "*supreme power*," we may remember, according to the definition so lately given of it by our Author, and so often spoken of, is neither more nor less than the *power to make laws*. Of this power we are now told that it is its "*duty*" to make laws. Hence we learn—what?—that it is its "*duty*" to do what it does; to be, in short, what it is. This, then, is what the paragraph now before us, with its apparatus of "*fors*" and "*buts*," and "*sinces*," is designed to prove to us. Of this stamp is that meaning, at least, of the initial sentence, which is apparent upon the face of it.

IV. Complete the sense of the phrase, "*to make laws*;" add to it, in this place, what it wants in order to be an adequate expression of the import which the preceding paragraph seemed to annex to it; you have now, for what is mentioned as the object of the "*duty*," another sense indeed, but a sense still more untenable than the foregoing. "Thus far," says our Author (recapitulating what he had been saying before) "as to the *right* of the supreme power to make laws."—By this "*right*," we saw, in the preceding chapter, was meant, a right to make laws *in all cases whatsoever*. "But further," he now adds, "it is its *duty* likewise." Its *duty*, then, to do—what? to do the same thing that it was before asserted to be its *right* to do—to make laws in all cases whatsoever: or (to use another word, and that our Author's own, and that applied to the same purpose) that it is its duty to be "*absolute*."* A sort of duty this, which will probably be thought rather a singular one.

V. Meantime the observation which, if I conjecture right, he really had in view to make, is one which seems very just indeed, and of no mean importance, but which is very obscurely expressed, and not very obviously connected with the purport of what goes before. The duty he here means is a duty which respects, I take it, not so much the actual *making* of laws, as the taking of proper measures to *spread abroad* the knowledge of whatever laws happen to *have been* made: a duty which (to adopt some of our Author's own words) is conversant, not so much about *issuing* "directions," as about providing that such as *are* issued shall be "*received*."

VI. Meantime, to speak of the *duties* of a supreme power;—of a *legislature*, meaning a *supreme* legislature;—of a set of men acknowledged to be absolute;—is what, I must own, I am not very fond of. Not that I would wish the subordinate part of the community to be a whit less watchful over their governors, or more disposed to unlimited submission in point of *conduct*, than if I were to talk with ever so much peremptoriness of the "*duties*" of these latter, and of the *rights* which the former have against them: [*a*] what I am afraid of is, running into solecism and confusion in *discourse*.

* Comm. p. 49.

[*a*] With this note let no man trouble himself, who is not used, or does not intend to use himself, to what are called *metaphysical* speculations; in whose estimation the benefit of understanding clearly what he is speaking of, is not worth the labour.

1. That may be said to be my *duty* to do (understand political duty) which you (or some other person or persons) have a *right* to have me made to do. I have, then, a DUTY *towards* you: you have a RIGHT as *against* me.

2. What you have a right to have me made to do (understand a political right) is that which I am liable, according to law, upon a requisition made on your behalf, to be *punished* for not doing.

VII. I understand, I think, pretty well, what is meant by the word *duty* (political duty) when applied to myself; and I could not persuade myself, I think, to apply it in the same sense in a regular didactic discourse to those whom I am speaking of as my supreme governors. That it is my *duty* to do, which I am liable to be *punished*, according to law, if I do not do: this is the original, ordinary, and proper sense of the word *duty*. [*b*] Have

3. I say *punished:* for without the notion of punishment (that is, of *pain* annexed to an act, and accruing on a certain *account*, and from a certain *source*) no notion can we have of either *right* or *duty*.

4. Now the idea belonging to the word *pain* is a simple one. To *define*, or rather (to speak more generally) to *expound* a word, is to resolve, or to make a progress towards resolving, the idea belonging to it into simple ones.

5. For expounding the words *duty*, *right*, *power*, *title*, and those other terms of the same stamp that abound so much in ethics and jurisprudence, either I am much deceived, or the only method by which any instruction can be conveyed, is that which is here exemplified. An exposition framed after this method I would term *paraphrasis*.

6. A word may be said to be expounded by *paraphrasis*, when not that *word* alone is translated into other *words*, but some whole *sentence*, of which it forms a part, is translated into another *sentence;* the words of which latter are expressive of such ideas as are *simple*, or are more immediately resolvable into simple ones than those of the former. Such are those expressive of *substances* and *simple modes*, in respect of such *abstract* terms as are expressive of what LOCKE has called *mixed modes*. This, in short, is the only method in which any abstract terms can, at the long run, be expounded to any instructive purpose; that is, in terms calculated to raise *images* either of *substances* perceived, or of *emotions;*—sources, one or other of which every idea must be drawn from, to be a clear one.

7. The common method of defining—the method *per genus et differentiam*, as logicians call it, will, in many cases, not at all answer the purpose. Among abstract terms we soon come to such as have no *superior genus*. A definition, *per genus et differentiam*, when applied to these, it is manifest, can make no advance: it must either stop short, or turn back, as it were, upon itself, in a *circulate* or a *repetend*.

8. "Fortitude is a virtue:"—Very well:—but what is a virtue? "A virtue is a disposition:"—Good again:—but what is a *disposition?* "A *disposition* is a - - -;" and there we stop. The fact is, a *disposition* has no *superior genus:* a *disposition* is not a - - -, anything:—this is not the way to give us any notion of what is meant by it. "A *power*," again, "is a right:" and what is a *right?* It is a *power*. An *estate* is an *interest*, says our Author somewhere, where he begins defining an estate:—as well might he have said an *interest* was an *estate*. As well, in short, were it to define in this manner, a conjunction or a preposition. As well were it to say of the preposition *through*, or of the conjunction *because;* a *through* is a - - -, or a *because* is a - - -, and so go on defining them.

9. Of this stamp, by the bye, are some of his most fundamental definitions; of consequence they must leave the reader where they found him. But of this, perhaps, more fully and methodically on some future occasion. In the mean time, I have thrown out these loose hints for the consideration of the curious.

[*b*] 1. One may conceive three sorts of duties; *political*, *moral*, and *religious;* correspondent to the three sorts of *sanctions* by which they are enforced; or the same point of conduct may be a man's duty on these three several accounts. After speaking of the one of these to put the change upon the reader, and without warning begin speaking of another, or not to let it be seen from the first which of them one is speaking of, cannot but be productive of confusion.

2. Political duty is created by punishment; or at least by the will of persons who have punishment in their hands; persons stated and *certain*,—political superiors.

3. Religious duty is also created by punishment: by punishment expected at the hands of a person *certain*,—the Supreme Being.

4. Moral duty is created by a kind of motive, which, from the *un*certainty of the *persons* to apply it, and of the *species* and *degree* in which it will be applied, has hardly yet got the name of punishment: by various mortifications resulting from the ill-will of persons *un*certain and variable,—the community in general; that is, such individuals of that community as he, whose duty is in question, shall happen to be connected with.

5. When in any of these three senses a man asserts a point of conduct to be a duty, what he asserts is the existence, actual or probable, of an *external* event; viz. of a punishment issuing from one or other of these sources in consequence of a contravention of the duty: an event *extrinsic* to, and distinct from, as well the conduct of the party spoken of, as the sentiment of him who speaks:—if he persists in asserting it to be a duty, but without meaning it should be understood that it is on any one of these three accounts that he looks upon it as such; all he then asserts is his own internal *sentiment:* all he means then is, that he feels himself *pleased* or *displeased* at the thoughts of the point of conduct in question, but without being able to tell *why*. In this case, he should e'en say so: and not seek to give an undue influence to his own single suffrage, by delivering it in terms that purport to declare the voice either of God, or of the law, or of the people.

6. Now which of all these senses of the word our Author had in mind; in which of them all he meant to assert that it was the duty of supreme governors to make laws, I know not. *Political* duty is what they cannot be subject to:* and to say that a duty even of the *moral* or *religous* kind to this effect is incumbent on them, seems rather a precipitate assertion.

In truth, what he meant was neither more nor less, I suppose, than that he should be glad to see them do what he is speaking of; to wit, "*make* laws;" that is, as he explains himself, spread abroad the knowledge of them.—Would he so? So indeed should I; and if asked why, what answer our Author would give I know not; but I, for my part, have no difficulty. I answer,—because I am persuaded that it is for the benefit of the community that they (its governors) should do so. This would be enough to warrant

* See the note following.

these supreme governors any such duty? No: for if they are at all liable to punishment according to law, whether it be for *not* doing any thing, or for *doing*, then are they not, what they are supposed to be, supreme governors: [*c*] those are the supreme governors, by whose appointment the former are liable to be punished.

VIII. The word duty, then, if applied to persons spoken of as supreme governors, is evidently applied to them in a sense which is figurative and improper: nor, therefore, are the same conclusions to be drawn from any propositions in which it is used in this sense, as might be drawn from them if it were used in the other sense, which is its proper one.

IX. This explanation, then, being premised;—understanding myself to be using the word *duty* in its improper sense, the proposition that it is the duty of the legislature to spread abroad, as much as possible, the knowledge of their will among the people, is a proposition I am disposed most unreservedly to accede to. If this be our Author's meaning, I join myself to him heart and voice.

X. What particular institutions our Author wished to see established in this view—what *particular* duties he would have found for the legislature under this *general* head of duty, is not very apparent: though it is what should have appeared more precisely than it does, ere his meaning could be apprehended to any purpose. What increases still the difficulty of apprehending it, is a practice which we have already had more than once occasion to detect him in,*—a kind of versatility, than which nothing can be more vexatious to a reader who makes a point of entering into the sentiments of his Author. He sets out with the word "*duty*" in his mouth; and, in the character of a *Censor*, with all due gravity begins talking to us of what *ought* to be. 'Tis in the midst of this lecture that our *Proteus* slips aside; puts on the *historian;* gives an insensible turn to the discourse; and without any warning of the change, finishes with telling us what *is*. Between these two points, indeed, the *is*, and the *ought to be*, so opposite as they frequently are in the eyes of other men, that spirit of obsequious *quietism* that seems constitutional in our Author, will scarce ever let him recognise a difference. 'Tis in the second sentence of the paragraph that he observes that "it is *expedient* that they" (the people) "receive directions from the state" (meaning the governing body) "declaratory of that its will." 'Tis in the very next sentence that we learn from him, that what it is thus "*expedient*" that the state *should* do, it *does* do. "But since it is impossible in so great a multitude, to give particular injunctions to every particular man relative to each particular action, therefore," says he, "the state establishes" (does *actually* establish) "general rules" (*the* state generally, *any* state, that is to say, that one can mention, all states in short whatever, *do* establish) "general rules for the perpetual information and direction of *all* persons in *all* points, whether of positive or of negative duty." Thus far our Author; so that, for aught appears, whatever he could *wish* to see done in this view, *is* done. Neither this state of our own, nor any other, does he wish to see do any thing more in the matter than he sees done already; nay, nor than what is sure to be done at all events: so that happily the duty he is here so forward to lay on his superiors will not sit on them very heavy. Thus far is he from having any determinate instructive meaning in that part of the paragraph in which, to appearance, and by accident, he comes nearest to it.

XI. Not that the passage, however, is absolutely so remote from meaning, but that the inventive complaisance of a commentator of

rant me in my own opinion for saying that they *ought* to do it. For all this, I should not, at any rate, say that is was their *duty* in a *political* sense. No more should I venture to say it was in a *moral* or *religious* sense, till I were satisfied whether they themselves *thought* the measures useful and feasible, and whether they were generally *supposed* to think so.

Were I satisfied that they *themselves* thought so, God then, I might say, knows they do. God, we are to suppose, will punish them if they neglect pursuing it. It is then their religious duty. Were I satisfied that the *people* supposed they thought so: the people, I might say, in case of such neglect,—the people, by various manifestations of its ill-will, will also punish them. It is then their *moral* duty.

In any of these senses, it must be observed, there can be no more propriety in averring it to be the duty of the supreme power to pursue the measure in question, than in averring it to be their duty to pursue any other supposable measure equally beneficial to the community. To usher in the proposal of a measure in this peremptory and assuming guise, may be pardonable in a loose rhetorical harangue, but can never be justifiable in an exact didactic composition. Modes of *private moral* conduct there are indeed many, the tendency whereof is so well known and so generally acknowledged, that the observance of them may be well styled a duty. But to apply the same term to the particular details of *legislative* conduct, especially newly proposed ones, is going, I think, too far, and tends only to confusion.

[*c*] I mean for what they do, or omit to do, when *acting in a body:* in that body in which, when acting, they are *supreme*. Because for any thing any of them do separately, or acting in bodies that are subordinate, they may any of them be punished without any disparagement to their supremacy. Not only any *may* be, but many *are:* it is what we see examples of every day.

* *Vide supra*, ch. ii. par. 11, ch. iii. par. 7, ch. iv. par. 10.

the admiring breed might find it pregnant with a good deal of useful matter. The design of disseminating the knowledge of the laws is glanced at by it, at least with a show of approbation. Were our Author's writings, then, as sacred as they are mysterious; and were they in the number of those which stamp the seal of authority on whatever doctrines can be fastened on them; what we have read might serve as a text, from which the obligation of adopting as many measures as a man should deem subservient to that design, might, without any unexampled violence, be deduced. In this oracular passage I might find inculcated, if not *totidem syllabis*, at least *totidem literis*, as many points of legislative duty as should seem subservient to the purposes of *digestion* and *promulgation*. Thus fortified, I might press upon the legislature, and that on the score of "*duty*," to carry into execution, and that without delay, many a busy project, as yet either unthought of or unheeded. I might call them with a tone of authority to their work: I bid them go make provision forthwith for the bringing to light such scattered materials as can be found of the judicial decisions of time past, — sole and neglected materials of common law; — for the registering and publishing of all future ones as they arise; — for transforming, by a digest, the body of the common law thus completed, into statute-law; — for breaking down the whole together into *codes* or parcels, as many as there are classes of persons distinguishably concerned in it; — for introducing to the notice and possession of every person his respective code: — works which public necessity cries aloud for, at which professional interest shudders, and at which legislative indolence* stands aghast.

XII. All these leading points, I say, of legislative economy, with as many points of detail subservient to each as a meditation not unassiduous has suggested, I might enforce, were it necessary, by our Author's oracular authority. For nothing less than what has been mentioned, I trust, is necessary, in order that every man may be made to know, in the degree in which he *might* and *ought* to be made to know, what (in our Author's words) "to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity." In taking my leave of our Author, I finish gladly with this pleasing peroration: a scrutinizing judgment, perhaps, would not be altogether satisfied with it; but the ear is soothed by it, and the heart is warmed.

XIII. I now put an end to the tedious and intricate war of words that has subsisted, in a more particular manner during the course of these two last chapters: a logomachy, wearisome enough, perhaps, and insipid to the reader, but beyond description laborious and irksome to the writer. What remedy? Had there been sense, I should have attached myself to the sense: finding nothing but words, to the words I was to attach myself, or to nothing. Had the doctrine been but *false*, the task of exposing it would have been comparatively an easy one: but it was what is worse, *unmeaning;* and thence it came to require all these pains which I have been here bestowing on it: to what profit, let the reader judge.

"Well then," cries an objector, "the task you have set yourself is at an end; and the subject of it, after all, according to your own representation, teaches nothing; — according to your own showing, it is not worth attending to. Why then bestow on it so much attention?"

In this view: To do something to instruct, but more to undeceive, the timid and admiring student: — to excite him to place more confidence in his own strength, and less in the infallibility of great names: — to help him to emancipate his judgment from the shackles of authority: — to let him see that the not understanding a discourse may as well be the writer's fault as the reader's: — to teach him to distinguish between shewy language and sound sense: — to warn him not to pay himself with words: — to show him that what may tickle the ear, or dazzle the imagination, will not always inform the judgment: — to show him what it is our Author can do, and has done; and what it is he has not done, and cannot do: — to dispose him rather to fast on ignorance than feed himself with error: — to let him see, that with regard to an expositor of the law, our Author is not *he that should come*, but that we may be still *looking for another*. — "Who then," says my objector, "shall be that other? Yourself?" — No, verily. My mission is at end, when I have *prepared the way before him*.

FINIS.

* Had I seen in those days what every body has seen since, instead of *indolence* I should have put *corruption*. — Note of the Author, 1822.

PRINCIPLES

OF

THE CIVIL CODE.

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PRINCIPLES

OF

THE CIVIL CODE.

INTRODUCTION.

Of all the branches of legislation, the Civil Code is that which presents the fewest attractions to those who do not study the law as a profession. This assertion is not strong enough, since this branch has hitherto almost inspired a species of disgust. Curiosity has for a long time been ardently directed to the consideration of political economy, penal law, and the principles of government. Celebrated works have rendered these studies respectable; and upon pain of acknowledging a humiliating inferiority to those around us, it is necessary that these should be understood, and an opinion be formed respecting them.

But the Civil Law has never yet passed the obscure bounds of the Bar. Its commentators sleep in the dust of the libraries, by the side of their opponents. The public are ignorant even of the names of the sects that divide them, and regard with a silent respect the numerous folios, the enormous compilations, ornamented with the pompous titles of *Body of Laws* and *Universal Jurisprudence*, &c.

The general dislike to this study is the result of the manner in which it has been treated. All these works occupy the same place in the science of law, which was once occupied by the works of the schoolmen in the natural sciences, before the establishment of experimental philosophy. Those who attribute their dryness and their obscurity to the nature of their subject, show them too great an indulgence.

Indeed, to what does this part of the laws refer? It treats of every thing which is most interesting to men:—of their security, of their property, of their reciprocal and daily transactions, of their domestic condition in the relations of father, husband, child. It is here we behold the rise of *Rights* and *Obligations*, for all the objects of law may be reduced to these two terms, and there is then no mystery.

The civil code is at bottom only the penal code under another aspect: it is not possible to understand the one, without understanding the other. The establishment of *Rights* is the granting of permissions, and the issuing of prohibitions: in a word, it is the creation of offences. To commit an offence is, on the one hand, to violate an obligation—on the other hand, a right. To commit a private offence is to violate an obligation due to an individual—a right which he has over us. To commit a public offence is to violate an obligation due to the public—a right which the public have over us. Civil law is therefore only penal law considered under another aspect. If I consider the law at the moment it confers a right or imposes an obligation, I consider it in a civil point of view. If I consider the law in its sanctions, in its effects, with respect to a violated right or broken obligation, I consider it in a penal point of view.

What, then, is meant by *Principles of Civil Law?* We intend to express the motives of the laws—the knowledge of the true reasons which ought to guide the legislator in the distribution of the rights he confers, or the obligations he imposes upon individuals.

In the whole library of writings upon the civil law, we search in vain for one which has had for its object the exhibition of the reasons upon which it is founded: philosophy has never entered there. The Theory of Civil Law by Linguet, which promises much, is far from deserving its title: it is the production of an unregulated imagination, governed by a bad heart. An oriental despotism is the model to which he would reduce all the European governments, that he might correct all their notions of liberty and humanity, which seem like mournful spectres to torment him.

The disputes of jurisprudence have produced, even in its schools, a set of doubters, who have doubted whether they had any principles. According to them, every thing is arbitrary — the law is good, because it is law: because a decision, whatever it may be, produces the great benefit of peace. There is in this opinion a little truth, and a great deal of error. It will be seen in the following work, that the principle of utility extends over this portion of the laws, as well as over all the others, but that its application is difficult — that it requires an intimate knowledge of human nature.

The first ray of light which broke in upon Mr. Bentham in his legal studies was, that *the law of Nature — the original Compact — the moral Sense — the notions of Right and Wrong*, which had been employed for the explanation of the laws, were only at bottom *those innate ideas* whose falsehood had been so ably demonstrated by Mr. Locke. He saw that they revolved in a vicious circle. Familiarized with the method of Bacon and of Newton, he resolved to introduce it into legislation: he has made it an experimental science: he has discarded all dogmatic words; he has rejected all terms that do not express some sensation of pleasure or of pain. For example, he will not admit that property is an inherent right—a natural right; because these terms explain nothing, prove nothing. The terms Justice and Injustice have in his eyes the same inconvenience of prejudging, instead of illuminating, the questions to which they refer. When he proposes to establish a law, he does not pretend to have discovered a corresponding law in the *law of nature*, and by a common trick present that as already done, which still remains to be done. When he explains obligations, he does not envelope them in mysterious reasons; he admits nothing on supposition. He clearly shows that every obligation ought to be founded either upon some previous service received by the person on whom it is imposed, or on some superior need on the part of the person in whose favour it is imposed, or upon some mutual agreement which derives all its force from its utility. Thus always guided by experience and observation, he only considers the effects which the laws produce upon the faculties of man as a sensible being, and he always assigns *pains to be avoided* as the only arguments of real value.

The Civilians never leave off reasoning upon fictions, and giving these fictions the same effect as realities. For example, they admit of contracts, which never existed; of *quasi contracts*, which never had the appearance of existing. In certain cases, they admit a *civil death:* in other cases, they deny *natural death.* Such a dead man is not dead, such another living man is not living; such an one who is absent ought to be considered as present, such an one who is present ought to be considered as absent: a province is not where it is; a country does not belong to those to whom it belongs; men are sometimes only things, and as such cannot possess rights; things are sometimes beings which possess rights, and are bound by obligations. They recognise imprescriptible rights which have always been prescribed against, and unalienable rights which have always been alienated; and *that which is not,* is always more distinctly visible to their eyes than *that which is.* Take away their fictions, or rather their lies, they know not where they are: accustomed to these crutches, they cannot walk without them. Mr. Bentham has rejected all these puerile arguments: he has not one gratuitous supposition, not one arbitrary definition — not a reason which is not the expression of a fact, not a fact which is not drawn from an effect of the law, either good or bad.

It is by this method of always reasoning consistently with his principles, that he has made the Civil Law a new science: new and even paradoxical to those who have been educated in the opinions of the ancient schools; but simple, natural, and even familiar, to those who have not been misled by false systems. Hence a translation of this book would have in all languages the same meaning and the same force, because it appeals to the experience of all men, instead of technical reasons — of reasons founded upon abstract terms, upon arbitrary definitions, which possess only a local value, and consist only of words, which disappear when no synonyms are found by which to translate them. It is thus the savage Africans, who make use of shells for money, discover their poverty immediately that they pass their own frontiers, and wish to exchange their conventional riches with strangers.

In Mr. Bentham's MSS. there are frequent references to the laws of England. As his observations would often have appeared to want a foundation, if I had not mentioned the particular laws against which they were directed, I have endeavoured, for the purpose of clearness, to develope that which was only an allusion to the original. I may have made some mistakes: these ought not to be imputed to the Author. These laws are in general so difficult to understand, that it is dangerous for an Englishman, who is not a lawyer, to hazard an opinion respecting them, and much more so, therefore, for one who is not an Englishman.

DUMONT

PART I. — OBJECTS OF THE CIVIL LAW.*

CHAPTER I.

OF RIGHTS AND OBLIGATIONS.

EVERY thing which the legislator is called upon to distribute among the members of the community, may be reduced to two classes:

1*st*, Rights.

2*d*, Obligations.

Rights are in themselves advantages; benefits for him who enjoys them: obligations, on the other hand, are duties; burthensome charges for him who has to fulfil them.

Rights and obligations, though distinct and opposite in their nature, are simultaneous in their origin, and inseparable in their existence. According to the nature of things, the law cannot grant a benefit to any, without, at the same time, imposing a burthen on some one else; or, in other words, a right cannot be created in favour of any one, without imposing a corresponding obligation on another. In what manner is a right of property in land conferred on me? By imposing upon every body except myself the obligation not to touch its produce. How is the right of commanding conferred on me? By imposing upon a district, or a number of persons, the obligation to obey me.

The legislator ought to confer rights with pleasure, since they are in themselves a benefit; he ought to impose obligations with repugnance, since they are in themselves an evil. In accordance with the principle of utility, he ought never to impose a burthen but that he may confer a benefit of a greater value.

In the same proportion as it creates obligations, the law curtails liberty: it converts into offences, acts which would otherwise be permitted and unpunishable. The law creates an offence, either by a positive commandment or by a prohibition.

These curtailments of liberty are inevitable. It is impossible to create rights, to impose obligations, to protect the person, life, reputation, property, subsistence, or liberty itself, but at the expense of liberty.

But every restraint imposed upon liberty is liable to be followed by a natural feeling of pain, more or less great, independent of an infinite variety of inconveniences and sufferings which may result from the particular mode of this restraint. It follows, therefore, that no restraint should be imposed, no power conferred, no coercive law sanctioned, without a specific and satisfactory reason. There is always one reason against every coercive law, and one reason which, were there no other, would be sufficient by itself: it is, that such a law is restrictive of liberty. Whoever proposes a coercive law, ought to be ready to prove, not only that there is a specific reason in favour of this law, but also that this reason is more weighty than the general reason against every law.

The proposition, although almost self-evident, that every law† is contrary to liberty, is not generally recognised: on the contrary, the zealots of liberty, more ardent than enlightened, have made a conscience of combating it. And how have they done it? They have perverted the language, and will not employ this word in its common acceptation. They speak a language that belongs to no one: they say, *Liberty consists in the power of doing every thing which does not hurt another.* But is this the ordinary meaning of this word? The liberty of doing evil, is it not liberty? If it is not liberty, what is it then? and what word should we make use of in speaking of it? Do we not say that liberty should be taken away from fools, and wicked persons, because they abuse it?

According to this definition, then, I do not know if I have the liberty of doing or not doing any action, until I have examined all its consequences? If it appear to me hurtful to a single individual, whether the law permit, or even command it, I have not liberty to do it! An officer of justice would not have liberty to punish a thief, unless he was sure such punishment would not hurt such thief! Such are the absurdities implied in this definition.

What says unsophisticated reason? Let us seek from thence for true propositions.

The sole object of government ought to be the greatest happiness of the greatest possible number of the community.

The happiness of an individual is greater, in proportion as his sufferings are lighter and fewer in number, and as his enjoyments are greater and larger in number.

The care of providing for his enjoyments ought to be left almost entirely to each individual; the principal function of government being to protect him from sufferings.

It fulfils this office by creating rights which it confers upon individuals: rights of personal security; rights of protection for honour; rights of property; rights of receiving assist-

* The following work is edited from the Traités de Legislation, as published by Dumont, and the original MSS. of Bentham.

† It is necessary to except those laws by which restrictive laws are repealed: those laws which permit what other laws have forbidden.

ance in case of need. To these rights, correspond offences of all classes. The law cannot create rights without creating the corresponding obligations. It cannot create rights and obligations without creating offences.* It can neither command nor prohibit, without restraining the liberty of individuals.†

The citizen, therefore, cannot acquire any right without the sacrifice of a part of his liberty. Even under a bad government, there is no proportion between the sacrifice and the acquisition. Governments approach to perfection, in proportion as the acquisition is greater, and the sacrifice less.

CHAPTER II.

DISTINCT OBJECTS OF THE CIVIL LAW.

IN this distribution of rights and obligations, the legislator, we have already said, should have for his object the happiness of the body politic. In inquiring more particularly in what this happiness consists, we find four subordinate objects—

Subsistence.
Abundance.
Equality.
Security.

The more perfect the enjoyment of all these particulars, the greater the sum of social happiness, and especially of that happiness which depends upon the laws.

It may be shown, that all the functions of the law may be referred to these four heads: to provide for subsistence; to secure abundance; to befriend equality; to maintain security.

This division does not possess all the clearness and precision which could be desired. The boundaries which separate these objects are not always easily determined; they approach at different points, and are confounded one with the other. But it is enough to justify this division, that it is the most complete, and that we shall be called in many circumstances to consider each of the objects it contains, separately and distinct from each of the others.

Subsistence, for example, is included in abundance; it is, however, properly mentioned separately, because the laws ought to do for subsistence many things which they ought not to permit to be done for abundance.

Security admits of as many distinctions as there are kinds of actions which may be opposed to it. It relates to the person, to the honour, to property, to condition.

Actions hurtful to security, when prohibited by the laws, receive the character of crimes.

Among these objects of the law, security is the only one which necessarily embraces the future: subsistence, abundance, equality, may be regarded for a moment only; but security implies extension in point of time, with respect to all the benefits to which it is applied. Security is therefore the principal object.

I have placed equality among the objects of the law. In an arrangement intended to give to every man the greatest possible amount of happiness, no reason can be assigned why the law should seek to give one man more than another. There are, however, good reasons why it should not do it. The advantage acquired by the one, can only exist in consequence of an equivalent disadvantage being borne by another. The advantage would only be enjoyed by the favoured party: the disadvantage would be felt by all those who were not thus favoured.

Equality may be fostered, both by protecting it where it exists, and by seeking to produce it where it does not exist. But here lies the danger: a single error may overturn the whole social order. ‡

It may appear surprising, that liberty is not placed among the principal objects of the law. But in order that we may have clear notions, it is necessary to consider it as a branch of security: personal liberty is security against a certain species of injury which affects the person; whilst, as to political liberty, it is another branch of security — security against the injustice of the members of the Government. What relates to this object, belongs not to the civil, but to the constitutional code.

CHAPTER III.

RELATION BETWEEN THESE OBJECTS.

THESE four objects of the law appear very distinct to the mind, but they are much less so in practice. The same law may serve for several of them, because they are often united. What is done, for example, for the sake of security, may be done also for the sake of subsistence and abundance.

But there are circumstances in which it is not possible to reconcile these objects: hence a measure suggested by one of them will be

* To create an offence, is to convert an act into an offence — to give, by a prohibition, the quality of an offence to an act.

† When the law confers a right, it is by giving the quality of offences to the different actions by which the enjoyment of this right may be interrupted or opposed.

‡ Equality may be considered with regard to all the advantages derived from the laws: Political Equality, or Equality in point of Political Rights — Civil Equality, or Equality in point of Civil Rights. But when the word is employed alone, it is usually understood as referring to the distribution of property.

condemned by another. Equality, for example, would require a certain distribution of property, which is incompatible with security.

When this contradiction exists between these objects, it is necessary to find some means of deciding which ought to have the pre-eminence; otherwise, instead of guiding us in our researches, their consideration will serve only to augment our confusion.

At the first glance it is perceived, that subsistence and security rise together to the same height: abundance and equality are manifestly of an inferior order. Indeed, without security, equality itself could not endure a single day. Without subsistence, abundance cannot exist. The two first ends are like life itself: the two last are the ornaments of life.

In legislation, the most important object is security. If no direct laws are made respecting subsistence, this object will be neglected by no one. But if there are no laws respecting security, it will be useless to have made laws respecting subsistence: command production — command cultivation; you will have done nothing: but secure to the cultivator the fruits of his labour, and you most probably have done enough.

Security, we have observed, has many branches: it is necessary that one branch of security should give way to another. For example, liberty, which is one branch of security, ought to yield to general security, since it is not possible to make any laws but at the expense of liberty.

It is not possible, then, to obtain the greatest good, but by the sacrifice of some subordinate good. In distinguishing among these objects, which, on each occasion, deserves the pre-eminence, consists the difficulty of the legislative art. Each one claims pre-eminence in turn, and it sometimes requires a complex calculation to determine to which the preference is due.

Equality ought not to be favoured, except in cases in which it does not injure security; where it does not disturb the expectations to which the laws have given birth; where it does not derange the actually established distribution.

If all property were to be equally divided, the certain and immediate consequence would be, that there would soon be nothing more to divide. Every thing would be speedily destroyed. Those who had hoped to be favoured by the division, would not suffer less than those at whose expense it would be made. If the condition of the industrious were not better than the condition of the idle, there would be no reason for being industrious.

If the principle were established, that all men should possess *equal rights*, by a necessary train of consequences, all legislation would be rendered impossible. The laws never cease establishing inequalities, since they cannot bestow rights upon any, without imposing obligations upon others.

Declare that all men, that is, all the human race, have equal rights: there is an end of all subordination. The son has equal rights with his father; he has the same right to direct and to punish him; he has as much right in his father's house, as his father himself. The maniac has the same right to shut up others, as they have to shut up him. The idiot has the same right to govern his family, as his family have to govern him. All this is included in the equality of rights: it means all this, or it means nothing at all. It is true, those who have maintained this doctrine of the equality of rights, have neither been fools nor idiots. They had no intention of establishing this absolute equality: they had in their minds some restrictions, some modifications, some explanations. But if they knew not how to speak in a sensible and intelligible manner, was it possible that the blind and ignorant multitude should better understand what they did not understand themselves? And if they proclaimed independence, was it not too certain that they would be listened to?

CHAPTER IV.

OF LAWS RELATIVE TO SUBSISTENCE.

WHAT can the law do relative to subsistence? Nothing directly. All that the law can do is to create *motives;* that is to say, to establish rewards and punishments, by the influence of which, men shall be induced to furnish subsistence to themselves. But nature has created these motives, and given them sufficient energy. Before the idea of law was formed, *want* and *enjoyment* had done, in this respect, every thing which could have been done by the best concerted laws. Want, armed with every pain, and even death itself, had commanded labour, had sharpened courage, had inspired foresight, had developed all the faculties of man. Enjoyment, the companion of every satisfied want, had formed an inexhaustible fund of rewards for those who had overcome the obstacles and accomplished the designs of nature.

The force of the physical sanction being sufficient, the employment of the political sanction would be superfluous.

Besides, the motives furnished by the laws are always more or less precarious in their operation: this is a consequence of the imperfection of the laws themselves, or of the difficulty of establishing the necessary facts, before bestowing reward or punishment. The hope of impunity glides to the bottom of the heart, in all the intermediate degrees through

which it is necessary to pass, before arriving at the accomplishment of the law. But those natural effects, which we may consider as the rewards and punishments of nature, do not admit of this uncertainty: there is no evasion, no delay, no favour: experience announces the event; experience confirms it — each succeeding day repeats the lesson of the past, and the uniformity of this course leaves no place for doubt. What can be added, by direct legislation, to the constant and irresistible power of these natural motives?

But the law may indirectly provide for subsistence, by protecting individuals whilst they labour, and by securing to them the fruits of their industry when they have laboured: *security* for the labourer — *security* for the fruits of labour. In these cases, the benefit of the law is inestimable.

CHAPTER V.

OF LAWS RELATIVE TO ABUNDANCE.

SHALL laws be made, directing individuals not to be contented with subsistence alone, but to seek abundance? No: this would be a superfluous employment of artificial means, when the natural means are sufficient. The attractions of pleasure, the succession of wants, the active desire of adding to our happiness, will, under the safeguard of security, incessantly produce new efforts after new acquisitions. Wants and enjoyments, these universal agents in society, after having raised the first ears of corn, will by degrees erect the granaries of abundance, always increasing and always full. Desires extend themselves with the means of gratification; the horizon is enlarged in proportion as we advance; and each new want, equally accompanied by its pleasure and its pain, becomes a new principle of action. Opulence, which is only a comparative term, does not arrest this movement when once it is begun: on the contrary, the greater the means, the greater the field of operations, the greater the reward, and, consequently, the greater the force of the motive which actuates the mind. But in what does the wealth of society consist, if not in the total of the wealth of the individuals composing it? And what more is required than the force of these natural motives for carrying the increase of wealth to the highest possible degree?

We have seen that abundance is produced by degrees, by the continued operation of the same causes which had provided for subsistence: there is no opposition between these two objects. On the other hand, the greater the abundance, the more secure is subsistence. Those who have condemned abundance, under the name of luxury, have never understood this connexion.

Famines, wars, accidents of every kind, so often attack the resources of subsistence, that a society which has no superfluity would often be exposed to want necessaries. This is seen among savage nations: it is what has often been witnessed among all nations in the time of their ancient poverty; it is what has happened in our own days, in countries but little favoured by nature, such as Sweden, and in those countries in which the government has opposed the operations of commerce instead of protecting them; — whilst those countries in which luxury abounds, and where the governments are enlightened, are beyond the reach of famine. Such is the happy situation of England, where commerce is free. The gewgaw, useless in itself, obtains a value in exchange for necessaries: the manufactories of luxury are offices of insurance against want: the materials used in a brewery or a manufactory of starch, may be converted into a source of subsistence. How often has the keeping of dogs and horses been decried, as destroying the food of men! The profound politicians who would put down these expenses, do not rise one degree above those apostles of disinterestedness, who, for the purpose of producing abundance of corn, set fire to the granaries.

CHAPTER VI.

PROPOSITIONS OF PATHOLOGY UPON WHICH THE ADVANTAGE OF EQUALITY IS FOUNDED.

PATHOLOGY is a term used in medicine. It has not hitherto been employed in morals, but it is equally necessary there. When thus applied, moral *pathology* would consist in the knowledge of the feelings, affections, and passions, and their effects upon happiness. Legislation, which has hitherto been founded principally upon the quicksands of instinct and prejudice, ought at length to be placed upon the immoveable base of feelings and experience: a moral thermometer is required, which should exhibit every degree of happiness and suffering. The possession of such an instrument is a point of unattainable perfection; but it is right to contemplate it. A scrupulous examination of more or less, in point of pleasure or pain, may at first be esteemed a minute enterprise. It will be said that we must deal with generalities in human affairs, and be contented with a vague approximation. This is, however, the language of indifference or incapacity. The feelings of men are sufficiently regular to become the object of a science or an art; and till this is done, we can only grope our way by making irregular and ill-directed efforts. Medicine is founded upon the axioms of physical pathology: morals are the medicine of the soul: legislation is the practical branch; it ought,

therefore, to be founded upon the axioms of mental pathology.

In order to judge of the effect of a portion of wealth upon happiness, it must be considered in three different states:

1*st*, When it has always been possessed.
2*d*, When it is about to be gained.
3*d*, When it is about to be lost.

General observation. — When the effect of a portion of wealth upon happiness is spoken of, it is always without reference to the sensibility of the particular individual, and the exterior circumstances in which he may be placed. Difference of character is inscrutable; and there are no two individuals whose circumstances are alike. If these two considerations were not laid on one side, it would be impossible to form a single general proposition: but though each of these propositions may be found false or inexact in each particular case, it will neither militate against their speculative correctness, nor their practical utility. It is sufficient, — 1*st*, If they approach more nearly to the truth than any others which can be substituted for them; and, 2*dly*, If they may be employed by the legislator, as the foundation of his labours, with less inconvenience than any others.

I. We proceed to the examination of the first case we have to examine — the effect of a portion of wealth when it has always been possessed.

1. *Each portion of wealth is connected with a corresponding portion of happiness.*

2. *Of two individuals, possessed of unequal fortunes, he who possesses the greatest wealth will possess the greatest happiness.*

3. *The excess of happiness on the part of the most wealthy will not be so great as the excess of his wealth.*

4. *For the same reason, the greater the disproportion between the two masses of wealth, the less the probability that there exists an equally great disproportion between the masses of happiness.*

5. *The more nearly the actual proportion approaches to equality, the greater will be the total mass of happiness.*

What is here said of wealth, ought not to be limited to pecuniary wealth: the term is used with a more extended signification, and includes every thing which serves for subsistence and abundance. It is for abbreviation's sake that *a portion of wealth* is spoken of, instead of *a portion of the matter of wealth.*

We have said, each portion of wealth is connected with a corresponding portion of happiness: strictly speaking, it should have been, has a certain chance of being so connected. The efficacy of any cause of happiness is always precarious; in other words, a cause of happiness may not produce its ordinary effect; nor the same effect upon every individual. It is here that it is necessary to apply what has been said with respect to particular sensibility and character, and the variety of circumstances in which they may be found.

The second proposition is derived from the first: of two individuals, he who possesses the most wealth will possess the greatest happiness, or chance of happiness. This is a truth proved by the experience of all the world. I charge the man who would doubt it to give what he possesses of superfluity to the first person who asks it of him. This superfluity, according to his system, is worth no more than the sand on which he treads: it is a burden, and nothing else. The manna of the desert became corrupt, when more was collected than could be consumed. If, in the same manner, wealth, after it had reached a certain amount, did not give an increased chance of happiness, no one would wish for more than this amount, and the desire of accumulation would have an ascertained boundary.

The third proposition will be less contested. Place on one side one thousand labourers, having enough to live upon, and a trifle to spare: place on the other side a king, or, that he may not be troubled with the cares of royalty, a well apportioned prince, he himself as rich as all these labourers together. It is probable that his happiness will be greater than the medium happiness of each of them, but not equal to the sum-total of all their little masses of happiness; or, what amounts to the same thing, his happiness will not be one thousand times greater than the medium happiness of a single one among them. If the mass of his happiness should be found ten times, or even five times greater, this would still be much. The man who is born in the lap of wealth, is not so sensible of the value of fortune, as he who is the artisan of his own fortune. It is the pleasure of acquiring, and not the satisfaction of possessing, which is productive of the greatest enjoyment. The first is a lively sensation, sharpened by desire and previous privations: the other is a feeble sentiment, formed by habit, unenlivened by contrast, and borrowing nothing from imagination.

II. We proceed to the examination of the second case — the effect of a portion of wealth when it first comes into the hands of a new possessor. Observe, it will be proper to consider this gain as unexpected, and to suppose that this increase of wealth is received suddenly, and, as it were, by chance.

1. *By repeated divisions, a portion of wealth may be reduced to so small an amount as not to produce any happiness for any one of its co-partakers.* This would happen if the portion of each were less than the value of the smallest known coin; but it is not necessary

to carry the division to this extreme point, in order that the proposition may be true.

2. *Among co-partakers of equal fortunes, the more completely, in the distribution of a portion of wealth, this equality is allowed to remain, the greater will be the total mass of happiness.*

3. *Among co-partakers of unequal fortunes, the more the distribution of a portion of wealth contributes to their equality, the greater will be the total mass of happiness.*

III. We proceed to the examination of the third case — the effect of a portion of wealth when it leaves the hands of its possessor. It will be again necessary to consider this loss as unexpected; to suppose that it is unlooked for. A loss is almost always unexpected, because a man naturally hopes to keep what he possesses. This expectation is founded upon the ordinary course of things; for if we look at the whole mass of men, they not only keep what they have acquired, but still further increase its amount. The proof is in the difference between the primitive poverty of every country and its actual wealth.

1. *The loss of a portion of wealth will produce a loss of happiness to each individual, more or less great, according to the proportion between the portion he loses and the portion he retains.*

Take away the fourth part of his fortune, and you take away the fourth part of his happiness; and so of the rest.*

But there are cases in which this proportion does not continue. If, in taking three-fourths of my fortune, you trench upon my physical wants, and in taking only the half you leave these wants untouched, the loss of happiness will not be simply the half, but the double, the quadruple, the ten-fold of what it is in the other case: one knows not where to stop.

2. (This point being settled.) *The greater the number of persons with equal fortunes, among whom a given loss is divided, the less considerable the loss which results from it to the total mass of happiness.*

3. *A certain point being reached, a further division would render each share impalpable. The loss occasioned to the mass of happiness becomes null.*

4. *Among unequal fortunes, the loss of happiness produced by a loss of wealth, will be so much the less when the distribution of the loss is made in such manner as to cause them to approach most nearly to equality:* (when considered without reference to the inconveniences attached to the violation of security.)

Governments, profiting by the progress of knowledge, have favoured, in many respects, the principles of equality in the distribution of losses. It is thus that they have encouraged the establishment of assurance offices. In these useful contracts, individuals assess their shares beforehand, in order to be prepared for all possible losses. The principle of assurance, founded upon the calculation of probabilities, is only the art of distributing losses among a great number of associates, so as to render them extremely light, and almost null.

The same intention has directed princes, when they have made compensation, at the expense of the state, to such of their subjects as have suffered from public calamities or the devastations of war. Nothing could have been more wise, or better intended in this respect, than the administration of Frederick the Great: this is one of the most admirable points of view under which we can contemplate the social art.

Some few attempts have been made to indemnify individuals for the losses caused by crimes on the part of malefactors. The examples of this kind are, however, still rare. It is an object which deserves the attention of legislators, since by this means the evil of offences directed against property may be reduced almost to nothing. But such a system would require to be regulated with great care, that it might not become hurtful. It ought not to favour indolence or imprudence which neglects precautions against crimes, because secure of obtaining an indemnification. The utility of the remedy would depend, therefore, upon the manner in which it was administered. But it is a culpable indifference which rejects a salutary measure, in order to spare itself the trouble of separating it from its inconveniences.

The principles laid down above will equally serve for regulating the distribution of a loss among many persons charged with a common responsibility. If their respective contributions follow the quantity of their respective fortunes, their relative condition will be the same as before; but if it be desirable to seize this occasion to make them approach more nearly to equality, a different proportion must be adopted. To assess them all equally, without regard to the difference of their fortunes, would be a third plan, which would accord neither with equality nor security.

In order to make this subject more clear, I shall present a compound case, in which there are two individuals, one of whom seeks a profit at the expense of the other. We shall then determine the effect of a portion of wealth, which, in order to pass into the hands of one individual in the shape of gain,

* It is to this head that the evil of gambling may be referred. Though the chances, as they respect money, may be equal, the chances, as they respect happiness, are always unfavourable. I possess £1000; the stake is £500: if I lose, my fortune is diminished one half; if I gain, it is is only increased one third. Suppose the stake to be £1000: if I gain, my happiness is not doubled with my fortune; if I lose, my happiness is destroyed — I am reduced to poverty.

must come out of the hands of another individual in the shape of loss.

1 *Prop.* Among competitors of equal fortunes, if what is gained by one be lost by another, the distribution which will leave the greatest sum of happiness, is that which would favour the defendant to the exclusion of the plaintiff.

For, 1*st*, The sum lost, bearing a greater proportion to the reduced fortune than to the increased fortune, the diminution of happiness for the one will be greater than the increase of happiness to the other. In a word, equality would be violated by an opposite distribution. (See note upon Gaming: the case is exactly the same.)

2*d*, The loser experiences the pain of disappointed expectation: the other is simply in the condition of not having gained. But the negative evil of not having gained, is not equal to the positive evil of having lost. (If this were not the case, every man would experience this evil with regard to every thing which he did not obtain, and the causes of evil being infinite, every one ought to find himself infinitely miserable).

3*d*, Mankind in general appear to be more sensible of grief than pleasure from an equal cause. For example a loss which would diminish the fortune of an individual by one quarter, would take more from his happiness than would probably be added by a gain which should double it.*

2 *Prop.* Among unequal fortunes, if the loser is the poorest, the evil of the loss will be increased by this unequality.

3 *Prop.* If the loser is the richest, the evil caused by the attack upon security, will be in part compensated by the portion of good arising from the progress made towards equality.

By the assistance of these axioms, which have to a certain point the character and certainty of mathematical propositions, it will be possible at length to produce a regular and constant rule for indemnities and satisfactions. Legislators have often shown a disposition to follow the counsels of equality under the name of *equity*, to which greater latitude has been conceded than to *justice*: but this idea of equity, vague and ill developed, has rather seemed a matter of instinct than of calculation. It is only by much patience and order that a multitude of incoherent and confused sentiments can be reduced into rigorous propositions.

* It does not follow that the sum of evil is greater than that of good. Not only is evil more rare, but it is accidental: it does not arise, like good, from constant and necessary causes. Up to a certain point, also, it is in our power to repulse evil from, and attract good to, ourselves. There is also in human nature a feeling of confidence in happiness, which prevails over the fear of its loss: this is evidenced by the success of lotteries.

CHAPTER VII.

OF SECURITY.

We have now arrived at the principal object of the Laws: the care of security. This inestimable good is the distinctive mark of civilization: it is entirely the work of the laws. Without law there is no security; consequently no abundance, nor even certain subsistence. And the only equality which can exist in such a condition, is the equality of misery.

In order rightly to estimate this great benefit of the Laws, it is only necessary to consider the condition of savages. They struggle without ceasing against famine, which sometimes cuts off in a few days whole nations: rivalry with respect to the means of subsistence, produces among them the most cruel wars; and, like the most ferocious beasts, men pursue men, that they may feed on one another. The dread of this horrible calamity destroys amongst them the gentlest sentiments of nature: pity connects itself with insensibility in putting the old persons to death, because they can no longer follow their prey.

Examine also what passes at those periods, during which civilized societies almost return into the savage state: I refer to a time of war, when the laws which give security are in part suspended. Every instant of its duration is fruitful in calamity: at every step which it imprints upon the globe, at every movement which it makes, the existing mass of riches, the foundation of abundance and subsistence, is decreased and disappears: the lowly cottage, and the lofty palace are alike subject to its ravages; and often the anger or caprice of a moment consigns to destruction the slow productions of an age of labour.

Law alone has accomplished what all the natural feelings were not able to do: Law alone, has been able to create a fixed and durable possession which deserves the name of Property. The law alone could accustom men to submit to the yoke of foresight, at first painful to be borne, but afterwards agreeable and mild: it alone could encourage them in labour — superfluous at present, and which they are not to enjoy till the future. Economy has as many enemies as there are spendthrifts, or men who would enjoy, without taking the trouble to produce. Labour is too painful for idleness; it is too slow for impatience: Cunning and Injustice underhandedly conspire to appropriate its fruits; Insolence and Audacity plot to seize them by open force. Hence Security, always tottering, always threatened, never at rest, lives in the midst of snares. It requires in the legislator, vigilance continually sustained, and power always in action, to defend it against his constantly reviving crowd of adversaries.

The Law does not say to a man, "*Work and I will reward you;*" but it says to him, "*Work*, and by stopping the hand that would take them from you, *I will ensure to you the fruits of your labour*, its natural *and sufficient reward, which, without me, you could not preserve.*" If industry creates, it is the law which preserves: if, at the first moment, we owe every thing to labour, at the second, and every succeeding moment, we owe every thing to the law.

In order to form a clear idea of the whole extent which ought to be given to the principle of security, it is necessary to consider, that man is not like the brutes, limited to the present time, either in enjoyment or suffering, but that he is susceptible of pleasure and pain by anticipation, and that it is not enough to guard him against an actual loss, but also to guarantee to him, as much as possible, his possessions against future losses. The idea of his security must be prolonged to him throughout the whole vista that his imagination can measure.

This disposition to look forward, which has so marked an influence upon the condition of man, may be called expectation — expectation of the future. It is by means of this we are enabled to form a general plan of conduct; it is by means of this, that the successive moments which compose the duration of life are not like insulated and independent points, but become parts of a continuous whole. Expectation is a chain which unites our present and our future existence, and passes beyond ourselves to the generations which follow us. The sensibility of the individual is prolonged through all the links of this chain.

The principle of security comprehends the maintenance of all these hopes; it directs that events, inasmuch as they are dependent upon the laws, should be conformed to the expectations to which the laws have given birth.

Every injury which happens to this sentiment produces a distinct, a peculiar evil, which may be called pain of disappointed expectation.

The views of jurists must have been extremely confused, since they have paid no particular attention to a sentiment so fundamental in human life: the word expectation is scarcely to be found in their vocabulary; an argument can scarcely be found in their works, founded upon this principle. They have followed it, without doubt, in many instances, but it has been from instinct, and not from reason.

If they had known its extreme importance, they would not have omitted to name it; to point it out, instead of leaving it in the crowd.

CHAPTER VIII.

OF PROPERTY.

THAT we may more completely estimate the advantage of the law, let us endeavour to form a clear idea of property. We shall see that there is no natural property — that property is entirely the creature of law.

Property is only a foundation of expectation — the expectation of deriving certain advantages from the thing said to be possessed, in consequence of the relations in which one already stands to it.

There is no form, or colour, or visible trace, by which it is possible to express the relation which constitutes property. It belongs not to physics, but to metaphysics: it is altogether a creature of the mind.

To have the object in one's hand — to keep it, to manufacture it, to sell it, to change its nature, to employ it — all these physical circumstances do not give the idea of property. A piece of cloth which is actually in the Indies may belong to me, whilst the dress which I have on may not be mine. The food which is incorporated with my own substance may belong to another, to whom I must account for its use.

The idea of property consists in an established expectation — in the persuasion of power to derive certain advantages from the object, according to the nature of the case.

But this expectation, this persuasion, can only be the work of the law. I can reckon upon the enjoyment of that which I regard as my own, only according to the promise of the law, which guarantees it to me. It is the law alone which allows me to forget my natural weakness: it is from the law alone that I can enclose a field and give myself to its cultivation, in the distant hope of the harvest.

But it may be said, What has served as a base to the law for the commencement of the operation, when it adopted the objects which it promised to protect under the name of property? In the primitive state, had not men a natural expectation of enjoying certain things — an expectation derived from sources anterior to the law?

Yes: they have had from the beginning, there have always been circumstances in which a man could secure by his own means the enjoyment of certain things: but the catalogue of these cases is very limited. The savage, who has hidden his prey, may hope to keep it for himself so long as his cave is not discovered; so long as he is awake to defend it; whilst he is stronger than his rivals: but this is all. How miserable and precarious is this method of possession! — Suppose, then, the slightest agreement among these savages reciprocally to respect each other's booty: this is the introduction of a

principle, to which you can only give the name of law. A feeble and momentary expectation only results from time to time, from purely physical circumstances; a strong and permanent expectation results from law alone: that which was only a thread in a state of nature, becomes a cable, so to speak, in a state of society.

Property and law are born and must die together. Before the laws, there was no property: take away the laws, all property ceases.

With respect to property, security consists in no shock or derangement being given to the expectation which has been founded on the laws, of enjoying a certain portion of good. The legislator owes the greatest respect to these expectations to which he has given birth: when he does not interfere with them, he does all that is essential to the happiness of society; when he injures them, he always produces a proportionate sum of evil.

CHAPTER IX.

ANSWER TO AN OBJECTION.

But perhaps the laws relating to property may be good for those who possess it, but oppressive to those who have none;—the poor are perchance more miserable than they would be without them.

The laws, in creating property, have created wealth; but with respect to poverty, it is not the work of the laws—it is the primitive condition of the human race. The man who lives only from day to day, is precisely the man in a state of nature. The savage, the poor in society, I acknowledge, obtain nothing but by painful labour; but in a state of nature, what could he obtain but at the price of his toil? Has not hunting its fatigues, fishing its dangers, war its uncertainties? And if man appear to love this adventurous life—if he have an instinct greedy of these kinds of perils—if the savage rejoice in the delights of an idleness so dearly purchased—ought it to be concluded that he is more happy than our day labourers? No: the labour of these is more uniform, but the reward is more certain: the lot of the woman is more gentle, infancy and old age have more resources; the species multiplies in a proportion a thousand times greater, and this alone would suffice to show on which side is the superiority of happiness. Hence the laws, in creating property, have been benefactors to those who remain in their original poverty. They participate more or less in the pleasures, advantages, and resources of civilized society: their industry and labour place them among the candidates for fortune: they enjoy the pleasures of acquisition: hope mingles with their labours. The security which the law gives them, is this of little importance? Those who look from above at the inferior ranks, see all objects less than they really are; but at the base of the pyramid, it is the summit which disappears in its turn. So far from making these comparisons, they dream not of them; they are not tormented with impossibilities: so, that all things considered, the protection of the laws contributes as much to the happiness of the cottage, as to the security of the palace. It is surprising that so judicious a writer as Beccaria should have inserted, in a work dictated by the soundest philosophy, a doubt subversive of the social order. *The right of property*, says he, *is a terrible right, and may not perhaps be necessary.* Upon this right, tyrannical and sanguinary laws have been founded. It has been most frightfully abused; but the right itself presents only ideas of pleasure, of abundance, and of security. It is this right which has overcome the natural aversion to labour—which has bestowed on man the empire of the earth—which has led nations to give up their wandering habits—which has created a love of country and of posterity. To enjoy quickly—to enjoy without punishment,—this is the universal desire of man; this is the desire which is terrible, since it arms all those who possess nothing, against those who possess any thing. But the law, which restrains this desire, is the most splendid triumph of humanity over itself.

CHAPTER X.

ANALYSIS OF THE EVILS RESULTING FROM ATTACKS UPON PROPERTY.

We have already seen, that subsistence depends upon the laws, which secure to the labourers the products of their labour; but it would be proper more exactly to analyze the evils which result from violations of property. They may be reduced to four heads:—

1. *Evil of Non-possession.*—If the acquisition of a portion of riches be a good, the non-possession of it must be an evil; though a negative evil, and nothing more. Hence, although men in the condition of primitive poverty may not have felt the special privation of wealth which was unknown to them, it is clear that they at least had not all the happiness which results from it, and of which we are in the enjoyment.

The loss of a portion of good, should it even remain always unknown, would yet be a loss. If by calumny you prevent my friend from conferring a benefit upon me which I did not expect, do you not do me an injury? In what consists this injury? In the negative evil which results to me, of not possessing what I otherwise should have possessed but for your calumny.

2. *Pain of Loss.* — Every thing which I actually possess, or which I ought to possess, I consider in my imagination as about to belong to me for ever: I make it the foundation of my expectation — of the expectation of those who depend upon me, and the support of my plan of life. Each part of my property may possess, in my estimation, besides its intrinsic value, a value in affection — as the inheritance of my ancestors, the reward of my labours, or the future benefit of my heirs. Every thing may recall to me that portion of myself which I have spent there — my cares, my industry, my economy — which put aside present pleasures, in order to extend them over the future; so that our property may become, as it were, part of ourselves, and cannot be taken from us without wounding us to the quick.

3. *Fear of Loss.* — To regret for what is lost, uneasiness respecting what is possessed joins itself, and even for what it is possible to acquire; for most of the objects which are necessary for subsistence and abundance, being perishable matters, future acquisitions form a necessary supplement to present possessions.

When insecurity reaches a certain point, the fear of loss hinders the enjoyment of what is possessed. The care of preserving condemns us to a thousand sad and painful precautions, always liable to fail. Treasures fly away, or are buried: enjoyment becomes sombre, stealthy, and solitary: it fears, by the exhibition of itself, to direct cupidity to its prey.

4. *Destruction of Industry.* — If I despair of enjoying the fruits of my labour, I shall only think of living from day to day: I shall not undertake labours which will only benefit my enemies. But besides this, in order to the existence of labour, the will alone is not sufficient: instruments are wanting: whilst these are being provided, subsistence is necessary. A single loss may render me unable to act, without depriving me of the disposition to labour—without having paralyzed my will. Hence the three first of these evils affect the passive faculties of the individual, whilst the fourth extends to his active faculties, and strikes them with numbness.

It is perceived in this analysis, that the two first of these evils do not extend beyond the individual injured; but the two latter expand themselves, and occupy an indefinite space in society. An attack made upon the property of one individual spreads alarm among the other proprietors: this feeling is communicated from one to another, and the contagion may at last spread over the whole body of the state.

For the development of industry, the union of *power* and *will* is required. Will depends upon encouragement — power upon means.— These means are called, in the language of political economy, productive capital.— With regard to a single individual, his capital may be destroyed, without his industrious disposition being destroyed, or even weakened. With regard to a nation, the destruction of its productive capital is impossible: but long before this fatal term arrives, the mischief would have reached the will; and the spirit of industry would fall under a terrible *marasmus*, in the midst of the natural resources presented by a rich and fertile soil. The will, however, is excited by so many stimulants, that it resists a multitude of discouragements and losses: a passing calamity, how great soever it may be, does not destroy the spirit of industry. This has been seen springing up again after destructive wars, which have impoverished nations, like a robust oak, which in a few years repairs the injuries inflicted by the tempest, and covers itself with new branches. Nothing less is requisite for freezing up industry, than the operation of a permanent domestic cause, such as a tyrannical government, a bad legislation, an intolerant religion which repels men from each other, or a minute superstition which terrifies them.

The first act of violence will produce a certain degree of apprehension — there are already some timid minds discouraged: a second outrage, quickly succeeding, will spread a more considerable alarm. The most prudent will begin to contract their enterprises, and by degrees to abandon an uncertain career. In proportion as these attacks are repeated, and the system of oppression assumes an habitual character, the dispersion augments: those who have fled are not replaced; those who remain fall into a state of langour. It is thus that, after a time, the field of industry being beaten down by storms, becomes at last a desert.

Asia Minor, Greece, Egypt, the coasts of Africa, so rich in agriculture, commerce, and population, whilst the Roman Empire flourished — what have they become under the absurd despotism of the Turk? The palaces are changed into cabins, and the cities into small towns: this government, hateful to all persons of reflection, has never understood that a state can never become rich but by an inviolable respect for property. It has possessed only two secrets for governing — to drain and to brutify its subjects. Hence the finest countries in the world, wasted, barren, or almost abandoned, can scarcely be recognised in the hands of their barbarous conquerors. For these evils need not be attributed to remote causes: civil wars, invasions, the scourges of nature—these might have dissipated the wealth, put the arts to flight, and swallowed up the cities; but the ports which have been filled up, would have been reopened, the communications re-established, the manu-

factures revived, the towns rebuilt, and all these ravages repaired in time, if the men had continued to be men. But they are not so in these unhappy countries: despair, the slow but fatal effect of long-continued insecurity, has destroyed all the active powers of their souls.

If we trace the history of this contagion, we shall see that its first attacks fall upon the richest part of society. Wealth was the first object of depredation. Superfluity vanished by little and little: absolute necessity must still be provided for, notwithstanding obstacles: man must live; but when he limits his efforts to mere existence, the state languishes, and the torch of industry furnishes but a few dying sparks. Besides, abundance is never so distinct from subsistence, that the one can be injured without a dangerous attack upon the other: whilst some lose only what is superfluous, others lose what is necessary. From the infinitely complicated system of economical relations, the wealth of one part of the citizens is uniformly the source from which a more numerous party derives its subsistence.

But another, and more smiling picture, may be traced, and not less instructive, of the progress of security, and prosperity, its inseparable companion. North America presents the most striking contrast of these two states: savage nature is there placed by the side of civilization. The interior of this immense region presents only a frightful solitude: impenetrable forests or barren tracts, standing waters, noxious exhalations, venomous reptiles,—such is the land left to itself. The barbarous hordes who traverse these deserts, without fixed habitation, always occupied in the pursuit of their prey, and always filled with implacable rivalry, only meet to attack and to destroy each other; so that the wild beasts are not so dangerous to man, as man himself. But upon the borders of these solitudes, what a different prospect presents itself! One could almost believe that one saw, at one view, the two empires of good and evil. The forests have given place to cultivated fields; the morass is dried up; the land has become solid—is covered with meadows, pastures, domestic animals, smiling and healthy habitations; cities have risen upon regular plans; wide roads are traced between them: every thing shows that men are seeking the means of drawing near to one another; they no longer dread, or seek to murder each other. The seaports are filled with vessels receiving all the productions of the earth, and serving to exchange its riches. A countless multitude, living in peace and abundance upon the fruits of their labours, has succeeded to the nations of hunters who were always struggling between war and famine. What has produced these wonders? what has renovated the surface of the earth? what has given to man this dominion over embellished, fruitful, and perfectionated nature? The benevolent genius is *Security*. It is security which has wrought out this great metamorphosis. How rapid have been its operations! It is scarcely two centuries since William Penn reached these savage wilds with a colony of true conquerors; for they were men of peace, who sullied not their establishment by force, and who made themselves respected only by acts of benevolence and justice.

CHAPTER XI.

SECURITY AND EQUALITY — THEIR OPPOSITION.

In consulting the grand principle of security, what ought the legislator to direct with regard to the mass of property which exists?

He ought to maintain the distribution which is actually established. This, under the name of justice, is with reason regarded as his first duty: it is a general and simple rule applicable to all states, adapted to all plans, even those which are most opposed to each other. There is nothing more diversified than the condition of property in America, England, Hungary, Russia: in the first country the cultivator is proprietor; in the second he is a farmer; in the third he is attached to the soil; in the fourth he is a slave. Still the supreme principle of security directs the preservation of all these distributions, how different soever their natures, and though they do not produce the same amount of happiness. For how shall a different distribution be made, without taking from some one what he possesses? how shall one party be stripped, without attacking the security of all? When your new distribution shall be disarranged, which it will be the day after its establishment, how will you be able to avoid making a second? Why should you not correct this also? and, in the meantime, what becomes of security? of happiness? of industry?

When security and equality are in opposition, there should be no hesitation: equality should give way. The first is the foundation of life—of subsistence—of abundance—of happiness; every thing depends on it. Equality only produces a certain portion of happiness: besides, though it may be created, it will always be imperfect; if it could exist for a day, the revolutions of the next day would disturb it. The establishment of equality is a chimera: the only thing which can be done is to diminish inequality.

If violent causes, such as a revolution in government, a schism, a conquest, produce the overthrow of property, it is a great calamity; but it is only transitory—it may be softened and even repaired by time. Industry is a vigorous plant, which resists numerous

loppings, and in which the fruitful sap rises immediately upon the return of spring. But if property were overthrown with the direct intention of establishing equality of fortune, the evil would be irreparable: no more security—no more industry—no more abundance; society would relapse into the savage state from which it has arisen.

"Devant eux des cités, derrière, eux des déserts."

Such is the history of fanaticism. If equality ought to reign to-day, for the same reason it ought to reign always. It can only be preserved by the same violences by which it was established. It would require an army of inquisitors and executioners, deaf both to favouritism and complaint—insensible to the seductions of pleasure—inaccessible to personal interest—endowed with every virtue, and engaged in a service which would destroy them all. The level must be in perpetual motion, in order to smooth down whatever would rise above the legal line. Watchfulness must be uninterrupted, to restore the lack of those who have dissipated their portion, and to strip those who by means of labour have augmented, or by care have preserved, theirs. In such a state of things, prodigality would be wisdom, and none but the mad would be industrious. This pretended remedy, so gentle in appearance, would thus be found a deadly poison. It is a burning cautery, which would consume every thing till it reached the last principles of life. The sword of the enemy, in its wildest fury, is a thousand times less to be dreaded. It only causes partial evils, which time effaces and which industry repairs.

Some small societies, in the first effervescence of religious enthusiasm, have instituted, as a fundamental principle, the community of goods. Has happiness been increased thereby? The gentle motive of reward has been supplied by the doleful motive of punishment. Labour, so easy and so light when animated by hope, has been represented as a penance necessary in order to escape from eternal punishments. Hence, so long as the religious motive preserves its force, every one labours, but every one groans. Does this motive grow weaker? The society divides itself into two classes: the one, degraded fanatics, contract all the vices of an unhappy superstition; the other, idle cheats, cause themselves to be supported in their idleness by the dupes by whom they surround themselves; whilst the cry for equality is only a pretext to cover the robbery which idleness perpetrates upon industry.

The prospects of benevolence and concord, which have seduced so many ardent minds, are, under this system, only the chimeras of the imagination. Whence should arise, in the division of labour, the determining motive to choose the most painful? who would undertake disagreeable and dirty tasks? who would be content with his lot, and not esteem the burthen of his neighbour lighter than his own? How many frauds would be attempted, in order to throw that burthen upon another, from which a man would wish to exempt himself? and in the division of property, how impossible to satisfy every one, to preserve the appearance of equality, to prevent jealousies, quarrels, rivalries, preferences? Who shall put an end to the numberless disputes always arising? What an apparatus of penal laws would be required, to replace the gentle liberty of choice, and the natural reward of the cares which each one takes for himself? The one half of society would not suffice to govern the other. Hence this iniquitous and absurd system could only be maintained by political or religious slavery, such as that of the Helots among the Lacedemonians, and the Indians of Paraguay in the establishments of the Jesuits. Sublime inventions of legislators, who, for the establishment of equality, made two equal lots of evil and of good, and put all the evil on one side, and all the good upon the other.

CHAPTER XII.

SECURITY AND EQUALITY—MEANS OF RECONCILIATION.

MUST there, therefore, be constant opposition, an eternal war between the two rivals, *Security* and *Equality*? Up to a certain point they are incompatible, but with a little patience and skill they may be brought by degrees to coincide.

Time is the only mediator between these contrary interests. Would you follow the counsels of equality without contravening those of security, wait for the natural period which puts an end to hopes and fears — the period of death.

When property is vacated by the death of the proprietors, the law may intervene in the distribution to be made, either by limiting in certain respects the power of disposing of it by will, with the design of preventing too great an accumulation of property in the hands of a single person, or by making the right of succession subservient to the purposes of equality, in case the deceased should not leave a husband, or wife, or relations, in the direct line, and should not have made use of his power of disposing of it by will. It passes then to new possessors, whose expectations are not formed, and equality may produce good to all, without deceiving the expectations of any. The principle only is indicated here: it will be more largely developed in the second Book.

When it regards the correction of a species of civil inequality such as slavery, the same

attention ought to be paid to the rights of property; the operation should be gradual, and the subordinate object should be pursued without sacrificing the principal object. The men whom you would render free by these gradations, will be much more fitted for its enjoyment, than if you had led them to trample justice under foot, in order to introduce them to this new social condition.

We may observe, that in a nation which prospers by agriculture, manufactures, and commerce, there is a continual progress towards equality. If the laws do not oppose it — if they do not maintain monopolies — if they do not restrain trade and its exchanges — if they do not permit entails — large properties will be seen, without effort, without revolutions, without shock, to subdivide themselves by little and little, and a much greater number of individuals will participate in the advantage of moderate fortunes. This will be the natural result of the different habits formed by opulence and poverty. The first, prodigal and vain, seeks only to enjoy without creating: the second, accustomed to obscurity and to privations, finds its pleasures in its labours and its economy. From this arises the change which is going on in Europe, from the progress of arts and commerce, notwithstanding the obstacles of the laws. The ages of feudality are not long since passed by, in which the world was divided into two classes — a few great proprietors who were every thing, and a multitude of slaves who were nothing. These lofty pyramids have disappeared or have been lowered, and their debris has been spread abroad: industrious men have formed new establishments, of which the infinite number proves the comparative happiness of modern civilization. Hence we may conclude, that *security*, by preserving its rank as the supreme principle, indirectly conducts to the establishment of *equality*; whilst this latter, if taken as the basis of the social arrangement, would destroy security in establishing itself.

CHAPTER XIII.

SACRIFICES OF SECURITY TO SECURITY.

THIS title at first appears enigmatical, but the enigma is soon solved.

An important distinction is to be made between the ideal perfection of security, and that perfection which is practicable. The first requires that nothing should be taken from any one; the second is attained if no more is taken than is necessary for the preservation of the rest.

This sacrifice is not an attack upon security; it is only a defalcation from it. An attack is an unforeseen shock; an evil which could not be calculated upon; an irregularity which has no fixed principle: it seems to put all the rest in danger; it produces a general alarm. But this defalcation is a fixed deduction — regular, necessary, expected — which produces an evil of the first order, but no danger, no alarm, no discouragement to industry: the same sum of money, according to the manner in which it is levied upon the people, will possess the one or the other of these characters, and will produce, in consequence, either the deadening effects of insecurity, or the vivifying effects of security.

The necessity of these defalcations is evident. To work, and to guard the workmen, are two different, and, for a time, incompatible operations. It is therefore necessary, that those who create wealth by their labour should give up a portion of it to supply the wants of the guardians of the state: wealth can only be defended at its own expense.

Society, attacked by internal or external enemies, can only maintain itself at the expense of the security, not only of these enemies themselves, but even of those in whose protection it is engaged.

If there are any individuals who perceive not this necessary connexion, it is because, in this respect, as in so many others, the wants of to-day eclipse those of to-morrow. All government is only a tissue of sacrifices. The best government is that in which the value of these sacrifices is reduced to the smallest amount. The practical perfection of security is a quantity which unceasingly tends to approach to the ideal perfection, without ever being able to reach it.

I shall proceed to give a catalogue of those cases in which the sacrifice of some portion of security, in respect of property, is necessary for the preservation of the greater mass: —

1. General wants of the state for its defence against external enemies.
2. General wants of the state for defence against delinquents or internal enemies.
3. General wants of the state for the prevention of physical calamities.
4. Fines at the expense of offenders, on account of punishment, on account of indemnities in favour of the parties injured.
5. Incroachment upon the property of individuals, for the development of the powers to be exercised against the above evils, by justice, by the police, by the army.
6. Limitations of the rights of property, or of the use which each proprietor may make of his own goods, in order to prevent his injuring himself or others.*

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* A general right of property in any thing, is possessed, when it may be used every way, with the exception of certain uses which are forbidden by special reasons. These reasons may be referred to three heads: —

1. Private detriment — when a certain use of the thing would be injurious to a certain other

CHAPTER XIV.

CASES SUBJECT TO DISPUTE.

OUGHT provision for the poor, for public worship, and the cultivation of the arts and sciences, to be ranked among the wants of the state for which provision ought to be made by forced contributions?

§ 1. *Of Indigence.*

In the highest state of social prosperity, the great mass of the citizens will most probably possess few other resources than their daily labour, and consequently will always be near to indigence—always liable to fall into its gulf, from accident, from the revolutions of commerce, from natural calamities, and especially from disease: infancy will always be unable, from its own powers, to provide the means of subsistence; the decays of old age will often destroy these powers. The two extremities of life resemble each other in their helplessness and weakness. If natural instinct, humanity and shame, in concurrence with the laws, generally secure to infants and old persons the care and protection of their family, yet these succours are precarious, and those who give them may stand in need of similar succours themselves. A numerous family, supported in abundance by the labour of a man and his wife, may at any moment lose the half of its resources by the death of one of them, and lose the whole by the death of both.

Decay is still more badly provided for than childhood. The love which descends, has more power than that which ascends: gratitude is less powerful than instinct: hope attaches itself to the feeble beings who are commencing life, but has nothing more to say to those who are closing it. But even when the aged receive every possible comfort, the idea of exchanging the part of a benefactor, for that of the recipient of alms, pours somewhat of bitterness into favours received, especially when, from decay, the morbid sensibility of the mind has rendered painful, changes which would otherwise be indifferent.

This aspect of society is most painful. We picture to ourselves a long train of evils gathering round poverty, and followed up by death, under its most terrible forms, as their ultimate effect. We perceive that it is the centre towards which inaction alone makes the lot of every mortal to gravitate. Man can only rise by continued efforts, without which he will fall into this abyss; whilst these efforts are not always sufficient, and we see the most diligent, the most virtuous, sometimes sliding into it by a fatal declivity, or falling into it from inevitable reverses.

To put an end to these evils, there are only two methods independent of the laws—*economy*, and *voluntary contributions*.

If these two resources were constantly sufficient, it would be proper to guard against the interference of the laws, for the assistance of the poor. The law which offers to poverty an assistance independent of industry, is, so to speak, a law against industry itself; or at least, against frugality. The motive to labour and economy is the pressure of present, and the fear of future, want: the law which takes away this pressure, and this fear, must be an encouragement to idleness and dissipation. This is the reproach which is reasonably brought against the greater number of establishments created for the poor.

But these two means are insufficient, as will appear upon a slight examination.

With respect to economy, if the greatest efforts of industry are insufficient for the daily support of a numerous class, still less will they be sufficient to allow of saving for the future. Others may be able, by their daily labour, to supply their daily returning wants; but these have no superfluity to lay by in store, that it may be used when required at a distant time. There only remains a third class, who can provide for every thing, by economizing during the period of labour, for the supply of the period in which they can no longer work. It is only with respect to this last class, that poverty can be esteemed a kind of crime, "Economy," it is said "is a duty. If they have neglected it, so much the worse for them. Misery and death may perhaps await them, but they can accuse only themselves: besides, their catastrophe will not be an evil wholly wasted; it will serve as a lesson to prodigals. It is a law established by nature—a law which is not, like those of men, subject to uncertainty and injustice. Punishment only falls upon the guilty, and is proportioned exactly to their fault." This severe language would

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individual, either in his fortune or otherwise. *Sic utere tuo ut alium non lædas. Sic utere tuo ut alienum non lædas.*

2. Public detriment:—such as may result to the community in general. *Sic utere tuo ut rem publicam non lædas.*

3. Detriment to the individual himself. *Sic utere tuo ut semet ipsum non lædas.*

This sword is mine in full property; but plenary as this property is as to a thousand uses, I may not use it in wounding my neighbour, nor cutting his clothes; I may not wave it as a signal of insurrection against the government. If I am a minor or a maniac, it may be taken from me, for fear that I should injure myself.

An absolute and unlimited right over any object of property would be the right to commit nearly every crime. If I had such a right over the stick I am about to cut, I might employ it as a mace to knock down the passengers, or I might convert it into a sceptre as an emblem of royalty, or into an idol to offend the national religion.

be justifiable, if the object of the law were vengeance: but this vengeance itself is condemned by the principle of utility, as an impure motive, founded upon antipathy. Again, what will be the fruit of these evils, this neglect, this indigence, which you regard in your anger as the just punishment of prodigality? Are you sure that the victims thus sacrificed will prevent, by their example, the faults which have led to their suffering?

Such an opinion shows little knowledge of the human heart. The distress, the death of certain prodigals — of those unhappy persons who have not been able to refuse themselves the infinitely little enjoyments of their condition, who have not learnt the painful art of striving by reflection against all the temptations of the moment — their distress I say, even their death itself, would have little influence, as instruction upon the laborious class of society. Is it possible that this sad spectacle, in which shame conceals the greater part of the details, should possess, like the punishment of malefactors, a publicity which should strike the attention, and permit no one to be ignorant of its cause? Would those to whom this lesson was most necessary, know how to give to such an event the proper interpretation? — would they always recognise the connexion between imprudence as the cause, and suffering as the effect? Might they not attribute this catastrophe to unforeseen accidents, which it was impossible to prevent? Instead of saying, Behold a man who has been the author of his own losses, and whose indigence ought to excite me to labour and economy without relaxation, — might it not often be said, with an appearance of reason, There is an unfortunate person, who has taken a thousand useless cares, and whose experience proves the vanity of human prudence. This would doubtless be bad reasoning: but ought an error in logic, a simple defect in reflection, among a class of men more called to the exercise of their hands than their heads, to be punished thus rigorously?

Besides, what should be thought of a punishment, retarded as to its execution even to the last extremity of life, which ought to begin by overcoming at the other extremity (that is to say, in youth) the ascendancy of the most imperious motives? How must this pretended lesson be weakened by the distance! — how small the analogy between an old and a young man! — how little does the example of the one operate upon the other! In the youth, the idea of immediate good and evil occupies nearly all the sphere of reflection, excluding the ideas of distant good and evil. If you would act upon him, place the motive near him; show him, for example, in perspective, a marriage, or any other pleasure: but a punishment placed at the extreme distance, beyond his intellectual horizon, is a punishment in pure waste. It is sought to guide those who think little; and in order to draw instruction from such a misfortune, it is requisite that they should think much: of what use, then, I ask, is a political instrument distined for the least prudent class, if it is of a nature to be efficacious only upon the wise?

Recapitulation.—The resource of economy is insufficient: — 1*st*, It is evidently so for those who do not earn a subsistence; 2*dly*, For those who earn only what is strictly necessary; whilst, as to the 3*d* class, which embraces all those who are not included in the two former, economy would not be insufficient of itself, but it may become so from the imperfection natural to human prudence.

Let us proceed to the other resource — *voluntary contributions*. This has many imperfections: —

1. Its uncertainty. It will experience daily vicissitudes, according to the fortune and the liberality of the individuals upon whom it depends. Is it insufficient? These conjunctures are marked by misery and death. Is it superabundant? It offers a reward to idleness and profusion.

2. The inequality of the burden. This supplement to the wants of the poor is formed entirely at the expense of the most humane, of the most virtuous individuals in the society, often without proportion to their means; whilst the avaricious calumniate the poor, in order to colour their refusal with a varnish of system and reason. Such an arrangement is, then, a favour granted to egotism, and a punishment against humanity, the first of virtues.

I say a punishment; for though these contributions bear the name of voluntary, what is the motive from which they emanate? If it be not founded on a religious or political fear, it is a tender, but painful sympathy, which presides over these acts of generosity. It is not the hope of a pleasure, which is purchased at this price; it is the torment of pity, from which we would be set free by this sacrifice: hence it has been observed in Scotland, where indigence is limited to this sad resource, that the poor find the greatest assistance among the class the least removed from poverty.

3. The inconveniences of the distribution. If these contributions are left to chance, as in the giving of alms upon the highway — if they are left to be paid on each occasion without intervention, by the individual giving to the individual asking — the uncertainty of the supply is aggravated by another uncertainty: How, in the multitude of cases, shall the degree of merit be appreciated? May not the penny of the poor widow only increase the ephemeral treasure of an abandoned woman? Will many generous hearts be found, who, with Sidney, will put back the vivifying cup

from their parched lips, saying, "I can wait — Think first of that unfortunate soldier, who has more need than I?" Can it be forgotten, that in the distribution of these fortuitous gratuities, it is not modest virtue, it is not honest poverty, often silent and bashful, which obtains the largest share? To be successful upon this obscure theatre, management and intrigue are as necessary as in the more brilliant theatre of fashion. Those who are importunate — who flatter, who lie — who mingle, according to the occasion, boldness and baseness, and change their impostures,— will obtain success, which indigent virtue, devoid of artifice, and preserving its honour in the midst of its misery, will never attain.

"Les vrais talens se taisent et s'enfuient
Découragés des affronts qu'ils essuient
Les faux talens sont hardis effrontés
Souples, adroits, et jamais rebutés."

What Voltaire here says of talents may be applied to mendicity. In the indiscriminate distribution of voluntary contributions, the share of honest and virtuous poverty will be seldom equal to that of the impudent and bold beggar.

Shall these contributions be placed in a common fund, to be afterwards distributed by chosen individuals? This method would be much to be preferred, since it permits a regular examination of wants and persons, and tends to proportion assistance to them; but it has also a tendency to diminish liberality. This benefit, which must be received at the hand of strangers, the application of which I cannot follow, from which I do not derive either the pleasure or the immediate merit, has something abstract in it, which chills the feelings: what I give myself, I give at the moment when I am moved, when the cry of poverty has entered into my heart, when there was no one but me to assist it. What I contribute to a general collection may not have a destination conformable to my wishes. This penny, which is much for me and my family to contribute, will only be as a drop in the ocean of contribution on the one hand, and in the ocean of wants on the other hand: it becomes the rich to succour the poor. In this manner many will reason, and it is on this account that collections succeed better when they are made for a determinate class of individuals than for an indefinite multitude, as the whole mass of the poor. It is, however, for this mass that it is necessary to secure permanent assistance.

From these considerations it appears, that it may be laid down as a general principle of legislation, that a regular contribution should be established for the wants of indigence; it being well understood that those only ought to be regarded as indigent, who are in want of necessaries. But from this definition it follows, that the title of the indigent, as indigent, is stronger than the title of the proprietor of a superfluity, as proprietor; since the pain of death, which would finally fall upon the neglected indigent, will always be a greater evil than the pain of disappointed expectation, which falls upon the rich when a limited portion of his superfluity is taken from him.*

With regard to the amount of a legal contribution, it ought not to exceed simple necessaries: to exceed this would be to punish industry for the benefit of idleness. Establishments which furnish more than necessaries, are only good when supported at the expense of individuals, because they can use discretion in the distribution of their assistance, and apply it to specific classes.

The details of the manner of assessing this contribution and distributing its produce, belong to political economy; in the same manner as inquiries respecting the methods of encouraging the spirit of economy and foresight among the inferior classes of society. We have, upon this interesting subject, instructive memoirs, but no treatise which embraces the whole question.† It would be necessary to commence with the theory of poverty; that is to say, by the classification of the indigent, and the causes which produce indigence, and to proceed to the adoption of precautions and remedies.

§ 2. *Of the Expense of Public Worship.*

If the ministers of religion are considered as charged with the maintenance of one of the sanctions of morality (the religious sanction), the expense of their support ought to be referred to the same head as the expenses of police and justice — to that of internal security. They are a body of inspectors and teachers of morals, who form, so to speak, the advanced guard of the law; who possess no power over crime, but who combat with the vices out of which crimes spring; and who render the exercise of authority more rare, by maintaining good conduct and subordination. If they were charged with all the functions which might suitably be assigned to them, such as the education of the inferior classes, the promulgation of the laws, the promulgation of different public acts, the utility of their services would be more manifest.

* If this deduction were established upon a fixed footing, each proprietor, knowing beforehand what he would have to give, the pain of disappointment would disappear, and make way for another pain, a little different in its nature, and less in its degree.

† In 1797, Mr. Bentham addressed a letter on pauper management to Mr. Arthur Young, editor of the Annals of Agriculture, which was inserted in that work, and afterwards translated and published in Paris, an. X. under the title of "Esquisse d'un ouvrage en faveur des Pauvres."

The greater the number of real services they render to the state, the less will they be subject to the diseases of dogmas and controversies, which are engendered by a desire of distinction, and the impossibility of being useful. Their activity and ambition being directed to useful objects, would prevent their becoming mischievous.

In this respect, even those who do not acknowledge the foundations of the religious sanction cannot complain, when called upon to contribute to its support, since they participate in its advantages.

But if there be in a country a great diversity of religious professions, and the legislator is not bound by a previous establishment, or by particular considerations, it will be more conformable to liberty and equality, to apply to the support of each church the contribution of each religious community. The zeal of proselytism on the part of the clergy may, it is true, in this case, be apprehended; but it will also be probable, that from their reciprocal efforts a useful emulation will result, and that by balancing their influence, a species of equilibrium will be established in this ocean of opinions, otherwise so subject to dangerous tempests.

An unfortunate case* may be imagined: that of a people to whom the legislator has denied the public exercise of their religion, and at the same time imposed upon them the obligation of supporting a religion which they consider as opposed to their own. This would be double violation of security. In such a people we must expect to find a sentiment formed, of habitual hatred against its government, a desire of change, a ferocious courage, a profound secrecy. The people, deprived of all the advantages of a public religion, of known guides, of acknowledged priests, would be given up to ignorant and fanatical chiefs; and as the support of this worship would be a school of conspiracy, the use of an oath, instead of being the security of the state would become a source of terror; instead of binding the citizens to the government, it would unite them against it, so that this people would become as formidable from its virtues as its vices.

§ 3. *Of the Cultivation of the Arts and Sciences.*

I do not here speak of what may be done for what may be designated the *useful arts and sciences:* no one doubts but that objects of public utility ought to be supported by public contributions.

But with regard to the cultivation of the fine arts, of the embellishment of a country, of buildings of luxury, of objects of ornament and pleasure — in a word, for these works of supererogation, ought forced contributions to be levied? Can the imposition of taxes, which have no other than this brilliant but superfluous destination, be justified?

I would not plead here, for that which is agreeable, in opposition to what is useful,† nor justify the starving of the people, to give feasts to a court, or pensions to buffoons. But one or two reflections may be presented, by way of apology: —

1. The amount expended, and which can be expended, upon these objects, is commonly but little, compared with the mass of necessary contributions. If any one should advise that his portion of this superfluous expense should be returned to each person, would it not be an impalpable object?

2. This supererogatory part of the taxes, being confounded with the mass of those which are necessary, its collection is imperceptible: it does not excite any distinct sensation, which can give rise to any distinct complaint; and the evil of the first order, being limited to so trifling an amount, is not sufficient to produce an evil of the second order.

3. This luxury of pleasure may have a palpable utility, by attracting a concourse of foreigners, who will spend their money in the country, and thus other nations will by degrees, be made tributary to that which sways the sceptre of fashion. A country fertile in amusements, may be considered as a great theatre, which is supported in part at the expense of a crowd of spectators attracted from all parts.

It may even happen that this pre-eminence in the objects of pleasure, of literature, and of taste, may tend to conciliate to a nation the benevolence of other nations. Athens, which has been called the Eye of Greece, was more than once saved by this sentiment of respect, which its superiority of civilization inspired. A crown of glory, which surrounded this land of the fine arts, served for a long time to conceal its weakness; and every thing which was not barbarous was interested in the preservation of this city, the centre of politeness and mental enjoyment.

After all, it must be acknowledged that this seductive object may be abandoned, without risk, to the single resource of voluntary contributions. At least, nothing essential ought to have been neglected, before expenses of mere ornament are undertaken. Come-

* This was once not an imaginary case: it was the case of Ireland.

† I do not mean that there is a real opposition between the useful and the agreeable: every thing which gives pleasure is useful; but in ordinary language, that is exclusively called *useful* which possesses a distant utility; that *agrecable*, which has an immediate utility, or is limited to present pleasure. Very many things, whose utility is contested, have therefore a more certain utility than those to which this denomination is appropriated.

dians, painters, architects may be employed, when the public credit is satisfied, when individuals have been indemnified for the losses occasioned by wars, by crimes, and physical calamities, when the support of the indigent has been provided for: until then, a preference accorded to these brilliant accessories, over these objects of necessity, cannot be justified.

It is even extremely contrary to the interest of the sovereign, inasmuch as reproaches are always exaggerated, because thought is not required in making them, but only passion and temper. The extent to which these topics have been employed in our days, in certain writings, for the purpose of exciting the people against the government of kings, is well known. But though every thing conspires, in this respect, to throw princes into the illusion, have they fallen into the same excesses, with regard to the luxury of amusements, as many republics? Athens, at the period of its greatest dangers, disregarding equally the eloquence of Demosthenes and the threats of Philip, recognised a want more pressing than its defence — an object more essential than the maintenance of its liberty: the greatest neglect of duty consisted in diverting, even for the good of the state, the funds destined for the use of a theatre. And at Rome, the passion for shows was carried almost to madness. It became necessary to waste the treasures of the world, and to strip the subject nations, in order to captivate the suffrages of the majesty of the people. Terror was spread through a whole country, because a proconsul had to give a fête at Rome; one hour of the glories of the circus threw a hundred thousand of the inhabitants of the provinces into despair,

CHAPTER XV.

EXAMPLES OF ATTACKS UPON SECURITY.

IT will not be useless to give some examples of what I call *attacks upon security*. It will be a means of more clearly exhibiting the principle, and of showing that what is called unjust in morals, cannot be innocent in politics. Nothing has been more common than to authorize under one name that which would be odious under the other.

I cannot refrain from noticing here the ill effects of one branch of classical education. Youth are accustomed from their earliest days to see, in the history of the Roman people, public acts of injustice, atrocious in themselves, always coloured under specious names, always accompanied by a pompous eulogium respecting Roman virtues. The abolition of debts occupies a conspicuous place in the early transactions of the Republic. A return of the people to mount Aventine obliged the Senate to pass the sponge over all the rights of creditors. The historian excites all our interest in favour of the fraudulent debtors who discharged their debts by a bankruptcy, and does not fail to render those odious who were thus despoiled by an act of violence. What end was answered by this iniquity? The usury, which had served as a pretext for this theft, was only augmented on the morrow by this catastrophe; for the exorbitant rate of interest was only the price paid for the risks attached to the uncertainty of engagements. The foundation of their colonies has been boasted of as the work of a profound policy: it consisted always in stripping the legitimate proprietors, in a conquered country, in order to create establishments of favour or reward. This exercise of power, so cruel in its immediate effects, was disastrous also in its consequences. The Romans, accustomed to violate all the rights of property, knew not where to stop in this course. From hence arose that perpetual demand for a new division of the lands, which was the perpetual firebrand of the seditious, which contributed, under the Triumvirs, to a dreadful system of general confiscations.

The history of the Grecian Republics is full of facts of the same kind, always presented in a plausible manner, and calculated to mislead superficial minds. How has reasoning been abused, respecting the division of the lands carried into effect by Lycurgus, to serve as a foundation of his warrior institution, in which, through the most striking inequality, all the rights were on one side and all the servitude on the other.*

The *attacks upon security*, which have found so many officious defenders when made by the Greeks and Romans, have not experienced the same indulgence when they have been made by the monarchs of the East. The despotism of a single person has nothing seducing, because it too evidently refers to himself alone, and because there are a million chances of suffering to one of enjoying. But the despotism exercised by the multitude deceives feeble minds by a false image of public good: they place themselves, in imagination, among the great number who command, instead of supposing themselves among the small number who give up and who suffer. Leaving, therefore, the sultans and viziers in peace, we may reckon that their injustices will not be coloured by the flatteries of histo-

* It appears, that of all the establishments of Lycurgus, this division of lands was that which experienced the least resistance. This singular phenomenon can only be explained by supposing, that during a long anarchy, property had almost lost its value. Even the rich might gain by this operation, because ten acres *secure* are worth more than a thousand *insecure*.

rians: their reputation serves as an antidote to their example.

For the same reason, we need not insist upon such attacks as national bankruptcies; but we may remark, in passing, a singular effect of fidelity to engagements, with respect to the authority even of the sovereign. In England, since the revolution, the engagements of the state have always been sacred. Hence the individuals who have treated with the government have never required any other pledge than their mortgage upon the revenue, and the collection of the revenue has remained in the hands of the king. In France, under the monarchy, the violations of the public faith were so frequent, that those who made advances to the government were for a long time in the habit of themselves collecting the taxes, and paying themselves with their own hands. But their intervention was costly to the people, whom they had no interest in sparing, and still more to the king, whom they robbed of the affection of his people. When the announcement of a deficiency alarmed all the creditors of the state, this class, so interested in England in the maintenance of the government, in France, showed itself desirous of a revolution. Each one believed he saw his security in taking from the sovereign the administration of the finances, and placing it in the hands of a national council. In what manner the event corresponded with their hopes, is well known. But it is not the less interesting to observe, that the downfal of this monarchy, which appeared immoveable, was owing, in the first instance, to mistrust, founded upon many violations of public faith.

But amid so many *attacks upon security*, made through ignorance, from inadvertency, or from false reasons, we shall content ourselves with pointing out a few: —

1. We may consider under this point of view, *all mis-seated taxes*; for example, disproportioned taxes, which spare the rich to the prejudice of the poor. The weight of this evil is further aggravated by a feeling of injustice, when one is obliged to pay more than would be required, if all others interested paid in the same proportion.

Statute labour is the height of inequality, when it falls upon those who have only their hands for their patrimony.

Taxes levied upon uncertain funds, upon persons who may not have wherewith to pay. The evil then takes another direction: the individual being unable to pay the tax on account of his indigence, finds himself subject to graver evils. Instead of the inconveniences of the tax, the sufferings of privation are experienced: for this reason, a capitation tax is bad; because a man has a head, it does not follow that he has any thing else.

Taxes which restrain trade; monopolies; close corporations. The true method of estimating these taxes is not by considering what they yield, but what they prevent the acquisition of.

Taxes upon the necessaries of life, which may be followed by physical privations, diseases, and even death itself; and no one perceive the cause. These sufferings, caused by an error in government, become confounded with natural evils which cannot be prevented.

Taxes upon the sale of lands alienated during life. It is want, in general, which leads to these sales; and the exchequer, by intervening at this period of distress, levies an extraordinary fine upon an unfortunate individual.

Taxes upon public sales; upon goods sold by auction. Here the distress is clearly proved: it is extreme, and the fiscal injustice is manifest.

Taxes upon law proceedings. These include all kinds of *attacks upon security*, since they amount to a refusal of the protection of the law, to all those who cannot pay for them. They consequently offer a hope of impunity to crime: the criminal has only to choose, for the object of his injustice, individuals who cannot afford to furnish the advances for a judicial suit, or to run its risks.

2. *The forced raising of the value of money*, another attack upon security. This is a bankruptcy, since it is not paying all that is due; a fraudulent bankruptcy, since there is a semblance of payment; and an unskilful fraud, since it deceives no one. It is also proportionably an abolition of debts; for the theft that the prince practises upon his creditors, he authorizes every debtor to practise upon his own, without producing any advantage to the public treasury. Is this course of injustice accomplished? The operation, after having weakened confidence, ruined the honest citizens, enriched the rogues, deranged commerce, disturbed the system of taxes, and caused a thousand evils to individuals, does not leave the least advantage to the government which is dishonoured by it. Expense and receipt are all altered in the same proportions.

3. *Forced reduction of the rate of interest.* Viewed as a question of political economy, the reduction of the rate of interest by a law is an injury to the public wealth, because it acts as a prohibition of particular premiums for the importation of foreign capital: it acts as a prohibition, in many cases, of new branches of commerce, and even of old ones, if the legal rate of interest be not sufficient to balance the risks of the capitalists.

But viewed in relation to the more immediate question of security, it is to take from the lenders, to give to the borrowers. When the rate of interest is reduced a fifth, the effect as to the lenders is the same as if they

were every year stripped by robbers of the fifth part of their fortune.

If the legislator find it good to take from a particular class of citizens a fifth of their revenue, why should he stop there? — why not take another fifth — and yet another? If this first reduction answer its end, the last reduction will answer it in the same proportion; and if the measure be good in the one case, why should it be bad in the other? When he stops, he ought to have a reason for stopping; but the reason which would hinder him from taking the second step, ought to be sufficient to prevent his taking the first.

This operation resembles an act by which the rent of land should be diminished, under pretence that the proprietors are useless consumers, and the farmers productive labourers.

If you shake the principle of security as to one class of citizens, you shake it as to all: the bundle of concord is its emblem.

4. *General confiscations.* I refer to this head those vexations exercised upon a sect, upon a party, upon a class of men, under the vague pretence of some political offence, in such manner that the imposition of the confiscation is pretended to be employed as a punishment, when in truth the crime is only a pretence for the imposition of the confiscation. History presents many examples of such robberies. The Jews have often been the object of them: they were too rich not to be always culpable. The financiers, the farmers of the revenue, for the same reason, were subjected to what were called *burning chambers.* When the succession to the throne was unsettled, every body, at the death of the sovereign, might become culpable, and the spoils of the vanquished formed a treasury of reward in the hands of the successor. In a republic torn by factions, one half of the nation became rebels in the eyes of the other half. When the system of confications was admitted, the parties, as was the case at Rome, alternately devoured each other.

The crimes of the powerful, and especially the crimes of the popular party in democracies, have always found apologists. "The greater part of these large fortunes," it has been said, "have been founded in injustice and that was only restored to the public which had been stolen from the public." To reason in this manner, is to open an unlimited career to tyranny: it is to allow it to presume the crime, instead of proving it. By means of this logic, it is impossible to be rich and to be innocent. Ought so grave a punishment as confiscation to be inflicted by wholesale, without examination, without detail, without proof? A procedure which would be deemed atrocious if it were employed against a single person — does it become lawful when employed against an entire class of citizens? Can the evil which is done be disregarded, because there is a multitude of sufferers, whose cries are confounded together in their common shipwreck? To despoil the great proprietors, upon pretence that some one of their ancestors acquired their wealth by unjust methods, is to bombard a city because it is suspected that it encloses some thieves.

5. *Dissolution of monastic orders and convents.* The decree for their abolition was signed by reason itself; but its execution ought not to have been abandoned to prejudice and avarice. It would have been enough to prohibit these societies from receiving new members. They would thus have been gradually abolished: individuals would not have suffered any privation. The successive savings might have been applied to useful objects; and philosophy would have applauded an operation excellent in principle, and gentle in execution. But this slow proceeding is not that followed by avarice. It seems that the sovereigns, in dissolving these societies, have sought to punish the individuals for wrongs which they had received from the societies. Instead of considering them as orphans and invalids, who deserved all the compassion of the legislator, they looked upon them as enemies who were treated with favour, when, though reduced from opulence, they were allowed simple necessaries.

6. *Suppression of places and pensions, without indemnifying the individuals who had possessed them.* This kind of attack upon security deserves more particular mention, because, instead of being blamed as an injustice, it is often approved as an act of good government and economy. Envy is never more at ease than when it is able to conceal itself under the mask of the public good: but the public good only demands the reform of useless places — it does not demand the misery of the individuals holding the place reformed.

The principle of security requires, that in all reforms the indemnity should be complete. The only benefit that can be legitimately derived from them is limited to the conversion of perpetual into transitory charges.

Is it said, that the immediate suppression of these places is a gain to the public? It would be a sophism. The sum in question would without doubt, considered in itself, be a gain if it came from abroad, if it were gained by commerce, &c; but it is not a gain when drawn from the hands of certain individuals who form a part of the public. Would a family be enriched because the father had taken every thing from one of his children, the better to endow the others? But even in this case, the stripping of one son would increase the inheritance of his brothers: the

evil would not be pure loss; it would produce some portion of good. But when it refers to the public, the profit of a suppressed place is divided among all, whilst the loss presses altogether upon a single person. The profit spread among the multitude divides itself into impalpable parts; the whole loss is felt by him who supports it alone. The result of the operation is in no respect to enrich the the party who gains, but to impoverish him who loses. Instead of one place suppressed, suppose a thousand, ten thousand, a hundred thousand: the total disadvantage remains the same. The spoil taken from thousands of individuals must be divided among millions: your public places would every where present you with unfortunate citizens, whom you would have plunged into indigence; whilst you would scarcely see a single individual sensibly enriched by these cruel operations. The groans of sorrow and the cries of despair would resound on all sides: the shouts of joy, if there were any such, would not be the expression of happiness, but of the antipathy which rejoices in the misery of its victims. Ministers of kings and of the people, it is not by the misery of individuals that you can procure the happiness of nations: the altar of the public good does not demand more barbarous sacrifices than that of the Divinity.

I cannot yet quit this subject; it appears so essential, for the establishment of the principle of security, to trace the error into all its retreats.

How do individuals deceive themselves or others with regard to such great injustice? They have recourse to certain pompous maxims, in which there is a mixture of truth and falsehood, and which give to a question, in itself simple, an air of profundity and political mystery. "The interest of individuals," it is said, "ought to give way to the public interest." But what does this mean? Is not one individual as much a part of the public as another? This public interest which you personify, is only an abstract term: it represents only the mass of the interests of individuals. They ought all to be taken account of, instead of considering some as every thing, and the rest as nothing. If it be proper to sacrifice the fortune of one individual, in order to augment the fortune of others, it would be still better to sacrifice a second, a third, even a hundred, even a thousand, without it being possible to assign any limits; for whatever may be the number of those you have sacrificed, you always have the same reason for adding one more. In a word, the interest of the first is sacred, or the interest of no one can be so.

Individual interests are the only real interests. Take care of individuals; never injure them, or suffer them to be injured, and you will have done enough for the public. Can it be conceived that there are men so absurd as to love posterity better than the present generation; to prefer the man who is not, to him who is; to torment the living, under pretence of promoting the happiness of those who are not born, and who may never be born?

In a multitude of occasions, the men who suffer by the operation of any law have not dared to make themselves heard, or have not been listened to, on account of this obscure and false notion, that private interest ought to give way to the public interest. But if this were a question of generosity, who ought the rather to exercise it? All towards one, or one towards all? Who, then, is the greatest egotist—he who desires to preserve what he has? or he who wishes to take, and even to seize by force, that which belongs to another? An injury felt, and a benefit not felt, such is the result of these fine operations in which the interest of individuals is sacrificed to that of the public.

I conclude by a grand general consideration. The more the principle of property is respected, the more is it strengthened in the minds of the people. Small attacks upon this principle prepare for greater. It has required a long period to attain to the point at which we have arrived in civilized society; but fatal experience has shown with what facility security may be overturned, and how the savage instinct of robbery may assume an ascendancy over the laws. The people and governments are in this respect only like tame lions: if they taste blood, their natural ferocity is rekindled:—

"Si torrida parvus
Venit in ora cruor, redeunt rabiesque furorque:
Admonitæque tument gustato sanguine fauces
Fervet, et à trepido vix abstinet ira magistro."
Lucan, iv.

CHAPTER XVI.

OF FORCED EXCHANGES.

"According to Xenophon, Astyages once asked of Cyrus an account of his last lesson: There was, said he, in our school a great boy, who, having a little coat, gave it to one of his companions who was of small stature, and took from him his coat, which was larger: our master having made me the judge in this quarrel, I decided that things should be left as they were, and that the one and the other would thus be better accommodated in this respect: upon which he showed me that I had decided wrongly, for I had only considered what was fitting, whilst I ought, in the first place, to have provided for what was just, which would not allow any one to be forced with regard to what belonged to him." Montaigne's Essays, Book 1. ch. 24.

Let us see what ought to be thought of this decision. At the first glance it seems that a forced exchange is not contrary to security, provided that an equal value is received. How can I have lost in consequence of the law, if, after it has had its full effect, the mass of my fortune remain the same as before? If one has gained, without another having lost, the operation appears good.

No: it is not. He whom you consider to have lost nothing by the forced exchange, has really experienced a loss. As all things, moveable and immoveable, may have different values to different persons, according to circumstances, every one expects to enjoy the favourable chances which may augment the value of any part of his property. If the house which Peter occupies is of greater value to Paul than to Peter, this would not be a good reason for gratifying Paul, by obliging Peter to give it up to him, for what might be of the same value to him. This would be to deprive Peter of the natural benefit which he might have expected to derive from this circumstance.

But if Paul should say, that for the benefit of peace, he has offered a price above the ordinary value of the house, and that his adversary only refuses from obstinacy; it may be replied to him, This surplus, that you pretend to have offered, is only a supposition on your part: the contrary supposition is just as probable: for if you have offered more than the house is worth, he would have hastened to seize so fortunate a circumstance, which might never recur, and the bargain would have soon been concluded to his satisfaction: if he does not accept it, it is a proof that you have been deceived in the estimation you have made, and that if you take his house from him, upon the conditions you have proposed, his fortune will be injured, if not with reference to what he possesses, at least with reference to what he has a right to require.

No, replies Paul; he knows that my valuation is higher than any he can expect in the ordinary course of things: but he knows my necessity, and he refuses a reasonable offer, in order to derive an abusive advantage from my situation.

The following principle may serve to remove the difficulty between Peter and Paul. Things may be distinguished into two classes: those which have commonly only an intrinsic value, and those which are susceptible of a value in affection. Ordinary houses, a field cultivated in an ordinary manner, a stack of corn or hay, the common productions of manufactures, appear to belong to this first class. To the second may be referred a pleasure-garden, a library, statues, pictures, collections of natural history. As to objects of this kind, the exchange ought never to be forced: it is not possible to appreciate the value that the feeling of affection may give them. But objects of the first class may be subjected to forced exchanges, if this be the only method of preventing great losses. I possess an estate of considerable value, to which I can only go by a road which borders on a river. The river overflows and destroys the road: my neighbour obstinately refuses me a passage over a strip of land which is not worth one hundredth part of my estate: ought I to lose all my benefit, from the caprice or the enmity of an unreasonable man?

But to prevent the abuse of so delicate a principle, it would be proper to lay down strict rules. I say, then, that exchanges may be forced, in order to prevent great loss; as in the case of land rendered inaccessible, unless a passage is taken across that of a neighbour.

It is in England that all the scruples of the legislator in this respect should be observed, in order to understand all the respect which ought to be borne to property. Is a new road to be opened? In the first place, an act of parliament is necessary, and all the parties interested are heard: afterwards the assignment of an equitable indemnity only to the proprietors is not considered sufficient; but with regard to objects which may possess a value in affection, such as houses and gardens, they are protected against the law itself by being recognised as exceptions.

These operations may also be justified, when the obstinacy of an individual, or a small number of persons, is manifestly injurious to the advantage of a great number. It is thus that the inclosure of commons in England is not stopped by certain oppositions, and that, for the convenience and salubrity of towns, the sale of houses is often forced by law.

The question discussed here relates only to forced exchanges, and not to forcible removals; for a removal which should not be an exchange—a removal without an equivalent, were it even for the profit of the state, would be a pure injustice, an act of power devoid of the softening necessary to reconcile it with the principle of utility.

CHAPTER XVII.

POWER OF THE LAWS OVER EXPECTATION.

THE legislator is not the master of the dispositions of the human heart: he is only their interpreter and their servant. The goodness of his laws depends upon their conformity to the general *expectation*. It is highly necessary, therefore, for him rightly to understand the direction of this expectation, for the purpose of acting in concert with it. Such is the object in view: let us proceed to the exa-

mination of the conditions necessary for its accomplishment

1. The first of these conditions, but at the same time the most difficult to be attained, is, that *the laws may be anterior to the formation of the expectation.* If we could suppose a new people, a generation of children: the legislator, finding no expectations formed which could oppose his views, might fashion them at his pleasure, as the sculptor fashions a block of marble. But as there already exists among all people a multitude of expectations, founded upon ancient laws or ancient usages, the legislator is obliged to employ a system of conciliations and concessions, which constantly restrain him.

The first laws themselves have always found some expectations formed; for we have seen, that before the laws there existed a feeble kind of property; that is to say, a certain expectation of keeping what each one had acquired: hence the laws have received their first direction from these anterior expectations; they have given birth to new ones, they have excavated the bed in which desires and hopes have flowed. It is no longer possible to make any change in the laws of property, without more or less disturbing the established current, and without its opposing a greater or less resistance.

Do you wish to establish a law in opposition to the actual expectations of men? If it is possible, let it begin to have effect at a distant period: the present generation will perceive no change, and the rising generation will be all prepared for it; you will find among its youth, auxiliaries against the ancient opinions; you will not injure existing interests, because they will have leisure to prepare for the new order of things. Every thing will become smooth before you, because you will have prevented the birth of expectations which would have been opposed to you.

2. Second condition — *Let the laws be known.* A law which is unknown can have no effect upon expectation: it does not serve to prevent an opposite expectation.

This condition, it may be said, does not depend upon the nature of the law, but upon the measures taken for its promulgation. These measures may be sufficient for their object, whatever may be the law.

This reasoning is more specious than true. There are some laws naturally more easily understood than others; such are, laws conformable to expectations already formed; laws which repose upon *natural* expectations. This natural expectation, this expectation produced by early habit, may be founded upon superstition, upon a hurtful prejudice, or upon a sentiment of utility: this is of no importance; the law which is conformed to it maintains its place in the mind without effort; it was there, so to speak, before it was promulgated; it was there before it received the sanction of the legislator. But a law opposed to this natural expectation, is understood with much greater difficulty, and is with still greater difficulty imprinted upon the memory: it is another disposition of things, which always presents itself to the mind; whilst the new law, altogether strange, and without roots, tends incessantly to slip from the place in which it is only artificially fixed.

Codes of ritual observances, among others, possess this inconvenience, that their fantastic and arbitrary rules, never being well known, fatigue the understanding and the memory; and the subject of them, always fearing, always at fault, always fancying himself morally diseased, can never reckon upon his innocence, and lives in want of perpetual absolutions.

Natural expectation directs itself towards the laws which are most important to society; and the foreigner who should be guilty of theft, fraud, or assassination, would not be permitted to plead his ignorance of the laws of the country, because he could not but have known that acts, so manifestly hurtful, were every where considered as crimes.

3. Third condition — *That the laws should be consistent with themselves.* This principle has a close relation with the preceding one; but it will serve to place a great truth in a new light. When the laws have established a certain arrangement upon a principle generally admitted, every arrangement in conformity with this principle will naturally be conformable to the general expectation. — Every analogous law is, so to speak, presumed beforehand: every new application of the principle contributes to strengthen it. But a law which does not possess this character dwells alone, as it were, in the mind, and the influence of the principle to which it is opposed is a power which incessantly tends to expel it from the memory.

That at the death of a man, his goods should be transmitted to his nearest relations, is a rule generally admitted, to which expectations naturally direct themselves. A law respecting successions, which should be consistent with this rule, would obtain general approbation, and would be understood by every mind. But the more this principle is disregarded, by the admission of exceptions, the more difficult it will be to comprehend and to retain them. The *Common Law* of England offers a striking example. It is so complicated with regard to the descent of property; it admits distinctions so singular; the previous decisions, which serve to regulate it, are so subtilized, that not only is it impossible for simple good sense to presume them, it is also difficult for it to comprehend them. It is a study profound as that of the most abstract sciences: it belongs only to a

small number of privileged men: it has been necessary even for them to subdivide themselves; for no one lawyer pretends to understand the whole. Such has been the fruit of a too superstitious respect for antiquity.

When new laws happen to oppose a principle established by former laws, the stronger this principle is, the more hateful appears the inconsistency. There results a contradiction of opinions, and the disappointed expectant accuses the legislator of tyrrany.

In Turkey, when a man in office dies, the Sultan appropriates to himself all his fortune, at the expense of his children, who fall at once from opulence to misery. This law, which overturns all the natural expectations, is probably derived from certain other eastern governments, in which it is less inconsistent and less odious, because the sovereign only confers office upon eunuchs.

4. Fourth condition — It is only possible to make laws truly consistent, by *following the principle of utility.* This is the general point of union for all expectations.

Still a law conformed to utility may be found opposed to public opinion. But this is only an accidental and transient circumstance: it is only necessary to render this conformity sensible, in order to bring back all minds. As soon as the veil which hides it is withdrawn, expectation will be satisfied, and public opinion reconciled. But the more it is certain that the laws are conformed to utility, the more manifest will that utility become. If a quality be attributed to a subject which does not possess it, the triumph of this error may not endure for a day: a single ray of light is sufficient to dissipate the illusion. But a quality which really exists, though unknown, may be happily discovered at any instant. At the first moment, an innovation is surrounded by an impure atmosphere: a collection of clouds, formed by caprice and prejudice, floats around it; its form is distorted by the refractions caused by these deceptive mediums: it requires time for the eye to fix itself, and to separate from the object every thing which is foreign to it. But, by degrees, just views will gain the ascendency. If the first efforts are not successful, the second attempts will be more fortunate; because the point of difficulty to be overcome will be better known. The plan which favours the greatest number of interests cannot fail at last to obtain the greatest number of suffrages; and the useful novelty, at first repelled with disgust, will soon become so familiar that its beginning will not be recollected.

5. Fifth condition — *Method in the laws.* An error in form in a code of law may produce, with respect to its influence upon expectation, the same inconvenience as incoherence and inconsistency. There may result from it the same difficulty of comprehension and retention. Every man has his determinate measure of understanding: the more complex the law, the greater the number of those who cannot understand it. Hence it will be less known; it will have less hold upon men; it will not occur to their minds on the occasions on which it ought, or, what is still worse, it will deceive them, and give birth to false expectations. Both the style and arrangement ought to be simple. The law should be a manual of instruction for every individual, and he ought to be able to consult it, under all his doubts, without requiring an interpreter.

The more conformable laws are to the principle of utility, the more simple will be their systematic arrangement.

A system founded upon a single principle might be as simple in its form as in its foundation. It only is susceptible of a natural arrangement and a familiar nomenclature.

6. Sixth condition — For the purpose of overcoming expectation, it is also necessary that the law should be present to the mind *as about to be executed;* or at least, no reason should be perceived to lead to a contrary presumption.

Does a man hope easily to escape from the law? He forms an expectation in a manner opposed to the law. The law is therefore useless; it only retains its force for the purpose of punishment; and these inefficacious punishments are another evil with which to reproach the law. Despicable in its weakness, hateful in its strength, it is always bad, whether it reach the guilty, or they enjoy impunity.

This principle has been often disregarded in a striking manner: for example, when, under the banking system of the projector Law, people were prohibited from retaining in their own hands more than a certain sum of money, every one presumed upon a successful disobedience to this law.

A multitude of prohibitory commercial laws are defective in this respect. This multitude of easily eluded regulations forms, so to speak, an immoral lottery, in which individuals speculate in opposition to the legislature.

This principle forms a good reason for placing the domestic authority in the hands of the husband. If it had been given to the wife, the physical power being on the one side, and the legal power on the other side, discord would have been eternal. If equality had been established between them, this nominal equality could not have been maintained, because, between two opposite wills, one or the other must necessarily turn the scale. The subsisting arrangement is therefore most favourable to the peace of families, because, by making both powers to act in

concert, every thing has been done which is necessary for its exercise.

This same principle will be very useful in assisting in the resolution of some problems which have too much embarrassed lawyers, such as this: in a certain case, ought a *thing found* to be considered the property of the finder? The more easily he can appropriate the thing independently of the law, the more desirable is it, not to make a law which shall disappoint this expectation: or, in other words, the more easy it is to elude the law, the more cruel would it be to make a law which, appearing to the mind almost incapable of execution, could not fail to produce evil when it should chance to be executed. Let us illustrate this by an example: Suppose I find a diamond in the earth: my first movement will be to say this is mine; and the expectation of keeping it will naturally be formed at the same moment, not only from the inclination of the desires, but also from analogy with the habitual ideas of property: 1*st*, I have possession of it, and this possession alone is a good title, when there is no opposite title. 2*dly*, Its discovery is due to me: it is I who have drawn this diamond from the dust, in which it was unknown to all the world, and where it was of no value. 3*dly*, I may flatter myself with keeping it without the knowledge of the law, and in opposition to the laws themselves, because it will be enough if I can hide it till I have a pretence for making it to be believed that I have acquired it by some other title. Hence, when the law would dispose of it in favour of some other person than me, it does not hinder this first movement, this hope of keeping it; and therefore, by taking it from me, it makes me experience that pain of disappointed expectation, which is commonly called *injustice* or *tyranny*. This reason would therefore be sufficient for giving a thing found to the finder, unless there be a stronger opposite reason.

This rule might therefore vary according to the chance which the thing naturally presents of its being kept without the knowledge of the laws: a vessel shipwrecked, that I have been the first to discover upon the shore — a mine — an island that I may have discovered, are objects respecting which, a previous law might prevent in me all idea of property, because it is not possible for me to appropriate them in secret. The law which refuses them to me, being of easy execution, would have its full and entire effect upon my mind. Therefore, upon consulting this principle alone, the legislator would be at liberty, either to grant or refuse the thing to the author of the discovery. But there is one particular reason in his favour: it is a reward given to industry; it tends to augment the general wealth. If all the profit of a discovery went into the public treasure, this all would be but little.

7. The seventh and last condition for regulating expectation is, that the *laws should be literally understood*. This condition depends in part upon the laws, and in part upon the judges. If the laws are not in harmony with the intelligence of the people — if the laws of a barbarous age are not changed in an age of civilization, the tribunals will depart by degrees from the ancient principles, and insensibly substitute new maxims. Hence will arise a kind of combat between the law which grows old, and the custom which is introduced, and in consequence of this uncertainty, a weakening of the power of the laws over expectation.

To interpret has signified entirely different things in the mouth of a lawyer, and in the mouth of another person: to interpret a passage of an author, is to show the meaning which he had in his mind; to interpret a law, in the sense of a Roman lawyer, is to neglect the clearly expressed intention, in order to substitute some other, by presuming that this new sense was the actual intention of the legislator.

With this manner of proceeding there is no security. When the law is difficult, obscure, incoherent, the citizen has always a chance of knowing it: it gives a blind warning, less efficacious than it might be, but always useful: the limits of the evil which may be suffered are at least perceived. But when the judge dares to arrogate to himself the power of interpreting the laws, that is to say, of substituting his will for that of the legislator, every thing is arbitrary — no one can foresee the course which his caprice may take. It is not enough to regard this evil in itself alone: how great soever it may be, this is a trifle in comparison of the weight of its consequences. The serpent, it is said, can cause its whole body to enter at the opening through which its head will pass: with regard to legal tyranny, it is against this subtle head that we should guard, for fear of shortly seeing displayed in its train all its tortuous folds. It is not only evil which should be distrusted, but good also, if derived from this source. All usurpation of a power superior to the law, though useful in its immediate effects, ought to be an object of dread for the future. There are limits, and narrow limits to the good which may result from this arbitrary power: there are none to the evil, there are none to the alarm, which may arise from it; the danger indistinctly lowers over every head.

Without speaking of ignorance and caprice, what facilities for prevarication! The judge, sometimes by conforming to the law, sometimes by becoming its interpreter, may always give right or wrong to whom he pleases: he

is always sure to save himself, either by the literal, or by the interpretative sense. He is a conjuror, who, to the great astonishment of the spectators, draws from the same fountain bitter waters, or sweet, as he pleases.

This is one of the noblest characteristics of the English tribunals: they have generally followed the declared will of the legislator with scrupulous fidelity, or have directed themselves as far as possible by previous judgments, with regard to that still imperfect portion of legislation which depends on *custom*. This rigid observation of the laws may have had some inconveniences in an incomplete system, but it is the true spirit of liberty which inspires the English with so much horror for what is called an *ex post facto* law.

All the conditions which constitute the excellence of the laws, have so close a connexion, that the accomplishment of one alone supposes the accomplishment of the others: intrinsic utility, manifest utility, connexion, simplicity, cognoscibility, probability of execution—all these qualities may be considered as reciprocally cause and effect, the one of the others.

If the obscure system called *custom* were no longer suffered to exist, and the whole law were reduced to writing—if the laws which concern every individual were collected in one volume, and those which concerned certain classes were in separate collections—if the general code were universally circulated—if it were made, as among the Jews, a portion of the religious service, one of the manuals of education—if it were required to be engraven upon the memory before admission to the exercise of political privileges—the laws would then become truly known; every deviation from them would be sensible, every citizen would be their guardian; there would be no mystery to conceal them—no monopoly in their explanation—no fraud or chicane to elude them.

It is also necessary that the style of the laws should be as simple as their arrangement; that the language in ordinary use should be employed; that their formulas should have no scientific apparatus; and, in a word, that if the style of the book of the laws were distinguished from the style of other books, it should be by its superior perspicuity—by its greater precision—by its greater familiarity, because it is intended to be understood by all, and particularly by those least enlightened.

When one has formed a conception of this system of laws, and comes to compare it with those that exist, the feeling which results is far from being favourable to our existing institutions.

We must, however, distrust grievous declamations and exaggerated complaints, though the laws may be imperfect. He who should be so confined in his views, or so unreasonable in his ideas of reform, as to seek to inspire revolt or contempt against the general system of the laws, would be unworthy of attention at the tribunal of an enlightened public, who can enumerate their benefits—I do not say under the best, but under the worst of governments. Do we not owe to them all that we possess of security, property, trade, abundance? Do they not preserve peace among our fellow-citizens, the sanctity of marriage, and the gentle perpetuity of families? The good which they produce is universal—it is enjoyed every day and every moment: the evils which result from them are transitory. But the good does not make itself felt; it is enjoyed without being referred to its source, as if it were in the ordinary course of nature; whilst the evils are vividly perceived, and in describing them, there is accumulated into one moment, and upon one point, sufferings which are dispersed over a large space, and a long tract of time. There are abundant reasons for loving the laws, notwithstanding their imperfections.

Innovations in the laws should be made with great caution. It is not well to destroy everything, upon pretence of reconstructing the whole: the fabric of the laws may be easily dilapidated, but is difficult to be repaired, and its alteration ought not to be entrusted to rash and ignorant operators.

PART II.

CHAPTER I.

OF TITLES WHICH CONFER A RIGHT TO PROPERTY.*

THUS far we have shown the reasons which should lead the legislator to sanction the existence of property. But we have only considered wealth in the mass: it is, however, necessary to descend to details; to take the individual objects which compose it, and seek out the principles which ought to govern the distribution of property at the periods when it presents itself to the law for appropriation to such or such an individual. These principles are the same that we have already laid down: *Subsistence*, *abundance*, *equality*, *security*. When they accord, the

* See this word *Title*, in the Essay entitled "A general view of a body of law." This subject is only glanced at here.

decision is easy: when they separate, it is necessary to learn to distinguish which ought to be preferred.

1. *Actual Possession.*

Actual possession is a title to property, which may precede and supply the place of all others: it will be always good against every man who has no other title to oppose to it. Arbitrarily to take away from him who possesses, in order to give to him who possesses not, would be to create a loss upon one side and a gain upon the other. But the amount of the pleasure would not be equal to the amount of the pain. First reason: — One such act of violence would spread alarm among all proprietors, by attacking their security. Second reason: — Actual possession, therefore, is a title founded upon the good of the first order and the good of the second order.

What is called the right of the *first occupant*, or the *original discoverer*, amounts to the same thing. When the right of property is granted to the first occupant — 1*st*, He is spared the pain of disappointment; that pain which he would feel at finding himself deprived of the thing which he had occupied before all others. 2*dly*, It prevents contests; the combats which might take place between him and successive competitors. 3*dly*, It gives birth to enjoyments which, without it, would not exist for any one: the first occupier, trembling lest he should lose what he had found, would not dare openly to enjoy it, for fear of betraying himself; hence, all that he could not immediately consume would be of no value to him. 4*thly*, The good that is secured to him, acting in the character of reward, becomes a spur to the industry of others, who are led to seek to procure for themselves similar advantages; and the increase of the general wealth is the result of these individual acquisitions. 5*thly*, If every unappropriated thing did not belong to the first occupier, it would always be the prey of the strongest: the weak would be subject to continual oppression.

All these reasons do not present themselves distinctly to the minds of men: but they perceive them confusedly, and feel them as by instinct. Hence they say reason, equity, justice, direct it. These words, repeated by every body, without being explained by any one, express only a sentiment of approbation; but this approbation, founded upon solid reasons, can but acquire new force from the support of the principle of utility.

The title of original occupation has been the primitive foundation of property. It may be employed again, with regard to newly-formed islands, or lands newly discovered, reservation being made of the right of governing — the superior right of the sovereign.

2. *Ancient* bonâ fide *Possession.*

Possession of a certain standing, fixed by the law, ought to be superior to all other titles. If you have allowed so long a time to elapse without claiming your right, it is a proof that you have not known of its existence, or that you did not intend to make use of it. In these two cases, there has not been any attempt on your part — any desire to obtain possession of the thing; but on mine there has been the attempt and the desire to preserve it. To leave me in possession, is not to oppose security: to transfer it to you, is to attack it, and is to make all possessors uneasy, who know of no other title to their property than ancient *bonâ fide* possession.

But what time should be requisite to produce this displacement of hope? or, in other words, what time is requisite to legalize property in the hands of its possessors, and to extinguish all opposing titles? Nothing can be precisely determined: the lines of demarcation must be drawn at hazard, according to the value of the goods to which they refer. If this line of demarcation does not always prevent *disappointment* among those interested, it will prevent at least all evils of the second order. The law warns me, that if, during one year, ten years, or thirty years, I neglect to claim my right, the loss of this right itself will be the result of my negligence. This threat, the effects of which I can prevent, does not injure my security.

I have supposed that the possession is honestly obtained: in the contrary case, to confirm it would be, not to favour security, but to reward crime. The age of Nestor ought not to be sufficient to secure to an usurper the wages and the price of his iniquity. For why should there be a period when the malefactor should become tranquil? why should he enjoy the fruits of his crimes under the protection of the laws which he has violated?

With respect to his heirs, it is necessary to make distinctions. Are they honest? There may be alleged in their favour the same reason as for the ancient proprietor, and they have possession, besides, to incline the balance in their favour. Are they dishonest, as their predecessors were? They are his accomplices, and impunity ought never to be the privilege of fraud.

Second Title — *Ancient bonâ fide Possession, notwithstanding opposite title.*

This is what is commonly called *prescription.* — Reasons upon which it is founded: Prevention of disappointment — General security of proprietors.

3. *Possession of the* Contents, *and of the* Produce *of Land.*

Property in land includes all that this land

contains, and all that it *produces*. Can its value be any thing but its contents and its produce? By its contents, are understood every thing which is below the surface, as mines and quarries; by its produce, every thing which belongs to the vegetable kingdom. All possible reasons unite for the giving this extent to the right of property in land — security, subsistence, the increase of the general wealth, the blessing of peace.

4. *Possession of what the Land* nourishes, *and of what* it receives.

If my land nourish animals, it is to me they owe their birth and their nourishment; their existenee would have been a loss to me, if the possession of them did not secure me an indemnity. If the law give them to any one but me, there will be all the loss on one side, and all the gain on another — an arrangement opposed as well to equality as to security. It would then be my interest to diminish their number, and to prevent their increase, to the detriment of the general wealth.

If chance have thrown upon the earth things which have not yet received the seal of property, or which have lost the impression; as a whale cast on shore by a tempest, the scattered remains of a shipwreck, or uprooted trees; these things ought to belong to the possessor of the land. The reason of this preference: — He is so situated as to derive a profit from them, without loss to any individual: they cannot be refused to him, without occasioning a pain of disappointment; and indeed no one can take possession of them without occupying his land, or without encroaching upon his rights. He has in his favour all the reasons of the first occupant.

5. *Possession of neighbouring Lands.*

The waters which have covered unappropriated lands leave them: —To whom shall the property in these new lands be granted? There are many reasons for giving them to the proprietors of the neighbouring lands: 1*st*, They only can occupy them without encroaching upon the property of others. 2*d*, They only can have formed any hope respecting these lands, and previously considered them as belonging to themselves. 3*d*, The chance of gaining by the retreat of the waters is only an indemnity for the chance of losing by their invasion. 4*th*, The property in lands aequired from the waters will operate as a reward exciting to the labours necessary for this kind of conquest.*

6. *Amelioration of one's own things.*

If I apply my labour to one of those things which are already considered as belonging to me, my title acquires new force. These vegetables which my land produces — I have sown and gathered them. I have tended these cattle, I have dug up these roots, I have felled these trees, and I have hewn them. If I should have suffered on having these things taken from me in a rough state, how much more shall I not suffer now, since each effort of my industry has given to these objects a new value, has strengthened my attachment to them, and the wish I have to keep them? These sources of future enjoyments, continually augmented by labour, would not exist without security.

7. *Mutual Possession and bonâ fide Amelioration.*

But if I apply my labour to a thing which belongs to another, treating it as if it were my own; for example, if I have made cloth with your wool; to which of us ought the thing produced to belong? Before answering this question, the question of fact must be cleared up: Was it honestly or dishonestly that I treated the thing as my property? If I have acted dishonestly, to leave me possessed of the thing produced, would be to reward the crime: if I have acted honestly, it remains to be examined, which of the two values is the greater — the original value of the thing, or the value added to it by the labour? How long has the first possessor lost it? how long have I possessed it? To whom does the place belong, in which it is found situated, at the moment it is reclaimed — to me, to the ancient possessor, or to another?

The principle of caprice having no regard to the measure of pains and pleasures, gives all to one of the parties, without caring for the other. The principle of utility, desirous of reducing to the lowest term, an inevitable inconvenience, weighs the two interests, seeks a method of reconciling them, and prescribes indemnities. It awards the article to that one of the two claimants, who would lose the most if his claim were rejected, but subject to the charge of giving to the other a sufficient indemnity.

It is after these same principles, that the same question ought to be resolved, with regard to an article which has been mixed and confounded with another; as metal belonging

* Thus much for the theory: as to execution, it would require many details, otherwise this conversion would resemble the division of the new world which the Pope made between the Spaniards and Portuguese. The waters quit a bay: there are many proprietors upon its borders. Shall the distribution be regulated by the quantity of land belonging to each proprietor, or by the extent which he occupies along its sides? Lines of demarcation are necessary; but it is not necessary to wait to trace these lines till the event happens, and the value of the derelict lands is known; for all will then entertain hopes which can be realized only by some individuals. Before this period, expectation not being yet formed, easily follows the finger of the legislator.

to you, which has been mingled in the crucible with metal belonging to me; liquor belonging to me, which has been poured into the same vessel with liquor belonging to you. There have been grand debates among the Roman lawyers, to determine to whom to give the whole. The one party, under the name of *Sabinians*, would give the whole to me; the other party, under the name of *Proculians*, would give all to you. Which was right? Neither of them: their decision always left one suffering party. One simple question would have prevented all these debates: Which of the two, by losing what had been his, would lose most?

The English lawyers have cut the gordian knot. They have not taken the trouble to examine where would be the greatest injury: they have neither considered honesty nor dishonesty, nor the greatest real value, nor the greatest desire to keep. They have decided that moveable property shall always be awarded to the possessor at the time, subject to the charge of indemnifying the original proprietor.

8. *Exploring of Mines in the Lands of another.*

Your land incloses in its bosom treasures; but, either from want of knowledge, or want of means, or want of confidence in your success, you will not seek for them, and the treasures remain hidden. If I, a stranger to your property, have all that you want for their exploring, and I ask to do it, ought the right to do so to be awarded to me without your consent? Why not? Under your land, the buried wealth does good to no one: in mine it will acquire great value; thrown into circulation, it will animate industry. What injury is done to you? You lose nothing: the surface, the only thing from which you derive any thing, remains always in the same state. But what the law, attentive to your interests, ought to do for you, is to award you a greater or less considerable part of the product; for though this treasure was nothing in your hands, it left you a certain expectation of profiting by it some day, and this chance ought not to be taken from you without indemnity.

Such is the law of England. In certain districts, it permits, upon certain conditions, the pursuit of a vein of metal discovered in the field of another, to whosoever wishes to try the adventure.

9. *Liberty of Fishing in Great Waters.*

Great lakes, great rivers, great bays, and especially the ocean, are not occupied as exclusive property. They are considered as belonging to no person, or, to speak more correctly as belonging to all.

There is no reason for limiting the right of fishing in the ocean. The multiplication of most kinds of fishes appears inexhaustible. The prodigality, the munificence of nature in this respect, surpasses every thing which can be conceived. The indefatigable Lewenhoek has estimated the number of eggs in the roe of a single cod at above six millions. What we can take and consume in this immense magazine of food is absolutely nothing, compared with the destruction produced by physical causes, which we neither know, nor can prevent, nor weaken. Man in the open sea, with his nets and lines, is only a feeble rival to the great tyrants of the ocean; whilst as to the fishes of rivers, lakes, and little gulfs, the laws take efficacious and necessary precautions for their preservation.

There is no reason for jealousy, no danger of diminishing the sources of wealth, by the number of competitors: the right of the first occupant may be left for each, and every species of labour encouraged, which tends to increase the general abundance.

10. *Liberty of Hunting upon Unappropriated Lands.*

It is the same with uncultivated and unappropriated lands, wild forests. In those vast countries which are not peopled in proportion to their extent, these tracts form considerable spaces, in which the right of hunting may be exercised without restraint. Man is there as yet only the rival of the carnivorous animals, and the chase extends the sources of subsistence without injury to any one.

But in civilized societies, in which agriculture has made great progress, where the unappropriated lands bear only a small proportion to those which have received the seal of property, there are many reasons which plead against the right of chase granted to the first occupier.

First Inconvenience. — In those countries where the population is numerous, the destruction of wild animals may proceed faster than their reproduction. Render the chase free, the kinds of animals which are its objects may be sensibly diminished, and even annihilated. The sportsman would then have as much trouble to procure a single partridge, as he has now to procure a hundred; and this would make them a hundred-fold dearer. He would not himself lose, but he would only furnish to society one hundredth part of the value he now furnishes. In other and more simple terms, the pleasure of eating partridges would be reduced to a hundredth part of what it is.

Second Inconvenience. — The chase, without being more productive than other labours, has unhappily more attractions: play is there combined with labour, idleness with exercise, glory with danger. The charm of a profes-

sion, so well suited to all the natural tastes of man, draws into this career a great number of competitors: by their rivalry they reduce the price of the labour employed upon it to the most simple subsistence; and in general this class of adventurers will be poor.

Third Inconvenience.—The chase having particular seasons, there will be intervals in which the activity of the hunter will be chained up. He will not easily return from a wandering to a sedentary life—from independence to subjection—and from a habit of idleness to a habit of labour. Accustomed, like the gamester, to live upon chances and hopes, a small fixed salary will have few attractions for him. His is a state which leads a man to crime, from its misery and idleness.

Fourth Inconvenience.—The exercise even of this profession is naturally fruitful in crimes. The multitude of quarrels, of lawsuits, prosecutions, convictions, imprisonments, and other punishments to which it gives rise, are more than sufficient to counterbalance its pleasures. The hunter, tired of vainly waiting for his prey in the high-roads, spies out in secret the game of the neighbouring proprietors. Does he think himself observed? he turns aside, he hides himself, he uses patience and cunning. Does he think there are no witnesses? he no longer respects any bounds; he passes the ditches, he leaps the hedges, he lays waste the inclosures, and his cupidity, betraying his prudence, throws him into situations from which he often cannot escape without misfortune or crime.

If the right of chase were permitted on the high-roads, an army of guards would be requisite to prevent the wanderings of the hunters.

Fifth Inconvenience.—If this right of chase be allowed to exist, though so little advantageous when exercised in such narrow limits, an assortment of laws is requisite in the civil and penal code, to determine its exercise and to punish its violations. This multiplication of laws is an evil, because they cannot be multiplied without being weakened. Besides, the severity necessary to prevent such easy and attractive crimes, gives an odious character to property, and places the rich man in a state of war with his indigent neighbours. The means of cutting short this inconvenience is not to regulate, but to suppress this right.

The prohibitory law once known, no expectation will be formed of enjoying this privilege: partridges will be no more coveted than fowls, and in the minds of the multitude, poaching will not be distinguished from theft.

It is true, that at present popular ideas are in favour of this right of chase; but if it be sometimes necessary to yield to popular ideas, it is only upon those occasions in which they have great strength, and in which there is no hope of changing their course. When pains shall be taken to enlighten the people, to discuss the motives of the law, to make them consider it as a means of peace and security, by showing that the exercise of this right is reduced almost to nothing—that the life of a hunter is miserable—that this ungrateful profession incessantly exposes him to criminality, and his family to indigence and shame, I dare affirm that popular opinion, pressed by the continual and gentle force of reason, will in a short time take a new direction.

There are some animals whose value after death does not compensate for the damages they do: such are foxes, wolves, bears, all carnivorous beasts, the enemies of the species subjected to man. Far from preserving them, it is only desirable that they should be destroyed. One method is to give the property in them to the first occupant, without regard to the territorial proprietor. Every hunter who attacks hurtful animals ought to be considered as employed by the police. But this exception should only be admitted with regard to animals capable of causing great waste.

CHAPTER II.

ANOTHER MODE OF ACQUISITION—CONSENT.

IT may, however, happen, that after any thing has been possessed (by a legal title), the individuals may wish to give it up, by abandoning its enjoyment to another. Shall this arrangement be confirmed by the law? Without doubt it ought to be: all the reasons which plead in favour of the ancient proprietor are no longer on his side, but plead in favour of the new. Besides, the former proprietor must have had some motive for abandoning his property. He who speaks of a *motive*, speaks of a *pleasure* or its equivalent: *pleasure of friendship*, or of *benevolence*, if the thing be given for nothing; *pleasure of acquisition*, if it be made an object of exchange; benefit of *security*, if it have been given to save him from some evil; *pleasure of reputation*, if he propose by it to acquire the esteem of his fellows. The sum of enjoyment, as to these two interested parties, is necessarily augmented by the transaction. The acquirer puts himself in the place of the collater as to the ancient advantages, and the collater acquires a new advantage. We may therefore establish it as a general maxim, that *every alienation implies advantage*. Some good always results from it.

* See the chapter *Of Collative and Ablative Events with regard to Property.* The explanation of the word Title will be found there. I have here avoided reference to questions of method and nomenclature.

If there be an exchange, there are two alienations, each of which has its separate advantages. This advantage for each of the contracting parties is the difference between the value which they put upon what they give up, and the value of what they acquire. In each transaction of this kind, there are two new masses of enjoyment. In this consists the advantage of commerce.

We may observe, that in all the arts there are many things which can only be produced by the concurrence of a great number of workmen. In all these cases, the labour of one would possess no value, either for himself or others, if he could not exchange it.

2. *Causes of Invalidity in Exchanges.*

There are some cases in which the law ought not to sanction exchanges, and in which the interests of the parties ought to be regulated as if the bargain did not exist; because, instead of being advantageous, the exchange would be found hurtful either to one of the parties or to the public. All the causes which invalidate exchanges, may be ranged under the nine following heads: —

1. Undue concealment.
2. Fraud.
3. Undue coercion.
4. Subornation.
5. Erroneous supposition of legal obligation.
6. Erroneous supposition of value.
7. Interdiction—Infancy—Madness.
8. Things liable to become hurtful by the exchange.
9. Want of right on the part of the collator.

1. *Undue Concealment.*—If the object acquired be found to be of an inferior value to that which has served as the motive for its acquisition, the new proprietor experiences regret, and feels the pain of disappointment. If this value be below that which he has given in exchange, instead of a gain, he has made a loss. It is true that the other party has made a profit, but the pleasure of gaining is not equal to the evil of losing. I have paid ten pounds for a horse, which is worth them, if he were sound; but since he is pursy, he is not worth two: the seller has gained eight pounds, and I have lost the same sum. When the interests of these two parties are weighed together, the bargain is not advantageous, but contrariwise.

However, if at the time of the bargain, this degradation in value was not known to the former proprietor, why should the bargain be void? — why should he be constrained to make a disadvantageous exchange? The loss must fall upon some one: why should it be made to fall upon him, rather than the other?

Suppose even that he knew of this circumstance which depreciated the value of the article: was it his place to make it known, rather than that of the buyer to inquire respecting it?

These two questions ought always to be asked in connexion with invalidity, resulting from *undue concealment:* — Did the seller know of the existence of the defect? Was the case one of those in which he was obliged to reveal it? The solution of these questions requires too many details and researches to have place here; besides, it is not possible to frame an answer which would embrace all cases, and different modifications would be requisite, according to the different kinds of things.

2. *Fraud.* — This case is more simple than the preceding. A fraudulent acquisition ought never to be permitted, if it can be hindered: it is an offence which approaches to theft. You have asked of the seller if the horse be pursy; he has replied in the negative, knowing the contrary. To sanction the bargain, would be to reward a crime. The reason given in the preceding case may be added, namely, the evil for the buyer is greater than that for the seller, and it is clear that this cause of invalidity is well founded.

3. It is the same with *undue Coercion.* — The seller, whose horse is only worth two pounds, constrains you by violence and threats to buy it for ten pounds: suppose that you would have been willing to pay him two pounds, the surplus is so much gained by a crime. It is true, that this loss was an advantage to you in comparison with the evil with which you were threatened in case of refusal; but neither this comparative advantage, nor that of the delinquent, ought to counterbalance the evil of the crime.

4. It is the same *with Subornation.* — I understand, by subornation, the price of a service which consists in the commission of a crime; as money offered to engage a man to take a false oath. There are two advantages in the bargain — that of the suborned, and that of the suborner; but these two advantages are nothing equal to the evil of the crime.

I remark in passing, that in cases of fraud, undue coercion, and subornation, the law should not content itself with annulling the act: it ought to oppose a stronger counterpoise by means of punishments.

5. *Erroneous Supposition of Legal Obligation.* — You have delivered your horse to a man, believing that your steward had sold him; and this had not happened: you have delivered your horse to a man, believing that he was authorized by the government to make you give him up for the service of the state; but he had no such commission: in a word, you have believed yourself under a

legal obligation to sell, and this obligation did not exist. If the alienation should be confirmed after the error is discovered, the buyer would find that he had made an unexpected gain, the seller an unexpected loss. But we have seen that the *advantage of gaining*, cannot be compared with the *evil of losing*; besides, this case may be referred back to the head of undue cœrcion.

6. *Erroneous Supposition of Value.*— If, in alienating any thing, I am ignorant of a circumstance which tends to increase its value, when I discover my error, I experience regret for the loss. But is this a proper cause of invalidity? On the one hand, if such causes of nullity are admitted without restriction, there is great risk of throwing discouragement upon exchanges; for where is the security for my acquisitions, if the former proprietor could break the bargain by saying, "I did not understand what I did?" On the other hand, there would be a lively pain of regret, if, after having sold a diamond as a piece of crystal, there were no method of recovering it. To maintain an even balance between the parties, the diversity of circumstances and things must be regarded. It is necessary always to examine whether the ignorance of the seller were not the result of negligence; and even in cancelling the bargain, if the case demand it, it is proper, before every thing else, to provide for the security of the buyer interested in its confirmation.

However, it may happen, that a bargain free from all these defects may at last be found disadvantageous. You have bought this horse only for one journey; and the journey is not made. You were ready to set out; the horse fell ill and died. You set out; the horse throws you, and you break your leg. You mount the horse; but it is that you may go to rob upon the highway. The fancy which led you to purchase it being passed, you resell it at a loss. Cases might be multiplied to infinity, where a thing, whatever it may be, acquired on account of its value, may become useless, or burthensome, or dangerous, either to its acquirer, or to another. Are not these exceptions to the axiom, that every alienation implies advantage? — are not these as reasonable grounds of invalidity as the others?

No: all these unfavourable events are only accidents, and subsequent to the conclusion of the bargain: the ordinary case is, that the article is worth what it sells for. The total advantage of advantageous exchanges is more than equivalent to the total disadvantage of unfavourable bargains. The gains of commerce are greater than its losses, since the world is richer at present than in its savage state. Alienations ought, therefore, in general, to be maintained. But to annul alienations for accidental losses, would be to interdict alienations in general; for no person would buy — no person would sell — if the bargain might at any moment be made void in consequence of some subsequent event, which could neither be foreseen nor prevented.

7. There are some cases in which, foreseeing the evil of contracts, the legislature has prohibited them beforehand. Thus, in many countries, prodigals are interdicted; that is to say, all bargains made with them are declared invalid. But they begin by stating the danger, that is to say, the disposition which renders the prodigal unable to guide his affairs: every body is, or at least may be, informed of the imbecility with which he is struck, by the tutelary hand of justice.

Interdiction exists every where with regard to the two analogous cases of infancy and mental imbecility. I say analogous; for what an infant is for a time, which can be tolerably well determined, though by a demarcation always more or less arbitrary, a madman is for an indeterminate time, or for ever. The reasons are the same as in the preceding case. Minors and madmen are, by their condition, either ignorant, rash, or prodigal. They are presumed to be so, by a general indication, which does not require to be supported by particular proofs.

It will be easily seen, that in these three cases, the interdiction can only extend to things of a certain importance: to apply it to the trifling objects of daily consumption, would be to condemn these three classes to die by hunger.

8. The law also renders bargains invalid, on account of some probable inconvenience which may result from them.

I have an estate situated upon the confines of the state: acquired by a neighbouring power, it might become the focus of certain hostile intrigues, or favour dangerous preparations against my country: whether I think of this effect or not, the law ought to think of it for the public; it ought to prevent the evil, by refusing beforehand the guarantee of its seal to such bargains.*

The restraints which it has been thought necessary to put upon the sale of drugs capable of being employed as poisons, belong to this same head. It is the same with the prohibition of the sale of murderous weapons,

* The greater number of states, without perhaps thinking of it, have obviated this danger by a general law which interdicts the acquisition of landed property by strangers. But they have gone too far. The reason of this prohibition does not extend beyond the particular case which I have mentioned. The foreigner who wishes to buy an immoveable in my country, gives the least equivocal proof of his affection for it, and the most certain pledge of his good conduct. The state can only gain in this case, even under the simple head of finance.

such as stilettoes, of which such frequent use is made in Italy, in the most ordinary quarrels.

It is to the same motive, well or ill founded, that all prohibitions relative to the introduction or sale of certain kinds of merchandise must be referred.

In the greater number of cases, the custom is to say, that the *bargain is null in itself.* It is only to open the books of law to see how much nonsense has been written upon this erroneous notion, and into how much embarrassment lawyers have fallen, from not having seized the only cause of nullity, as respects bargains made under these circumstances, which is, that more evil than good results from them.

After saying that these conventions are null in themselves, to be consistent, it is necessary to conclude, that they ought not to have any effect — that they ought to be destroyed—that no trace should be left of them. In many cases, however, it is enough to modify them, to correct their inequalities by compensations, without altering the foundation of the primitive contract.

No bargain is void in itself — no bargain is valid of itself: it is the law which in each case gives or refuses validity. But for permitting or refusing, there ought to be reasons. Equivocal generation is banished from sound philosophy: some day, perhaps, it will be banished from jurisprudence. This *null in itself* is precisely an equivocal generation.

3. *Of Obstacles to the Alienation of Land.*

To say that the power of alienation is useful, is as much as to say that the arrangements which tend to destroy it are in general pernicious.

It is only with regard to immoveables that this inconsistency has been exercised, both by entails and unalienable foundations; and yet, besides the general reasons in favour of the power of alienation, there are particular reasons in favour of the power of alienating lands.

1. He who seeks to get rid of his lands, shows plainly that it does not suit him to keep them: he cannot or he will not employ any thing in improving them; often, indeed, he cannot restrain himself from lowering their future value, in order to satisfy a present want. On the contrary, he who seeks to acquire them has certainly not the intention of deteriorating them; and it is probable that he purposes to increase their value.

It is true, that the same capital which would be employed in the amelioration of land might be employed in trade; but though the benefit of these two employments might be the same for the individuals, it is not the same for the state. The portion of wealth applied to agriculture is more fixed; — that which is applied to trade is more fugitive. The first is immoveable; the second may be carried away at the will of the proprietor.

2. By pledging an immoveable, a productive capital may be procured: thus one part of the value of an estate may be employed in ameliorating another, which, without this resource, could not be done. To hinder the alienation of lands is, therefore, to diminish productive capital nearly to the amount of their selling value; since, in order that an article may serve as a pledge, it is necessary that it be capable of alienation.

It is true, that a loan only has been here contemplated: there is no new capital created by the transaction. This same capital might have received a destination not less useful in the hands in which it was first found; but it ought to be observed, that the greater the means of employing capital, the more it will flow towards the country: that which is derived from abroad, forms a clear addition to that which is derived from home.

These restraints upon alienation, though condemned by the soundest notions of political economy, subsist almost every where. It is true that they have gradually diminished, as governments have better understood the interests of agriculture and trade; but there are still three causes which operate for their maintenance: —

The first is the desire of preventing prodigality. But it is not necessary, for obviating this evil, to hinder the sale of lands: it is sufficient to protect their value by not leaving it at the disposal of the individual. In a word, the specific method against this inconvenience is interdiction.

The second is pride of family, connected with the agreeable illusion, which represents the successive existence of our descendants as a prolongation of our own. To leave them the same amount of wealth is not enough to satisfy the imagination: we wish to secure them the same lands, the same houses, the same natural objects. This continuity of possession appears as a continuity of enjoyment, and presents a point of support to a fanciful feeling.

The third cause is the love of power — the desire of governing after death. The preceding motive supposes posterity: this does not suppose it. It is to this cause must be referred, as well those foundations which have in view an object of utility, well or ill understood, as those which repose only upon fancies.

If the foundation consist only in the distribution of benefits, without imposing any condition — without exacting any service, it seems sufficiently innocent, and its continuance is not an evil. It is proper to except foundations for the distribution of alms, applied without discernment, and adapted only

to the encouragement of mendicity and idleness. The best of these establishments are those of charity for the poor of a rank already a little elevated — a means which offers to these unfortunate persons a more liberal relief than the general rule would allow; whilst, as to the benefices which are only granted upon the discharge of certain duties, as in colleges, convents, churches, their tendency is useful, indifferent, or hurtful, according to the nature of the duties required.

One singularity which deserves to be observed is, that in general these foundations, these particular laws that individuals have established by the indulgence of the sovereign, have experienced more respect than the public laws which originate directly with the sovereign. When a legislator has desired to tie the hands of his successor, this pretension has appeared either inconsistent or futile. The most obscure individuals have arrogated this privilege, and none have dared to disappoint them.

It would seem, that lands left to corporations, to convents, churches, would be liable to be deteriorated. Indifferent as to his successors, each passing proprietor would seek to squeeze as much as possible out of the transitory possession, and neglect the care of them, especially in old age. This may sometimes have happened: justice ought, however, to be rendered to the religious communities. They have more often been distinguished for a good, than a bad economy. If their situation inflame their cupidity and avarice, it also represses pomp and prodigality: if there be causes which excite their selfishness, there are others which combat it, by what is called *esprit de corps*.

There is no necessity for expatiating with regard to public property; that is, with regard to things used by the public, such as roads, churches, markets. To fulfil their design, they ought to possess an indefinite duration, with the exception of their admitting those successive changes which circumstances may require.

CHAPTER III.

ANOTHER MEANS OF ACQUISITION — SUCCESSION.

AFTER the death of an individual, how ought his property to be disposed of?

The legislature should have three objects in view: —1*st*, To provide for the subsistence of the rising generation; 2*dly*, To prevent the pain of disappointment; 3*dly*, To promote the equalization of fortunes.

Man is not a solitary being. With few exceptions, every man is surrounded by a larger or smaller circle of companions, united to him by the ties of relationship, marriage, friendship, or services — who *in fact* share with him the enjoyment of the property which by right belongs exclusively to him. His fortune is commonly, with regard to many of them, the sole source of their subsistence. To prevent the calamities of which they would become the victims, if death, which deprives them of their friend, should also deprive them of the succour which they derive from his fortune, would require a knowledge of what they habitually enjoy, and in what proportion they participate in it. But as these are facts which it would be impossible to establish but by direct proofs — without entering upon embarrassing procedures and infinite disputes, it has been found necessary to refer to general presumptions, as the only base upon which a decision can be established. The habitual part of each survivor, in the possessions of the deceased, may be presumed from the degree of affection which ought to subsist between them; and this degree of affection may be presumed from the proximity of relationship.

If this proximity were the sole consideration, the law of successions would be very simple. In the *first degree*, with respect to you, are all those who are connected with you, without any intermediate person — your wife, your husband, your father, your mother, and your children. In the *second degree*, all those whose connexion with you requires the intervention of a single person, or a single couple of intermediate persons — your grandfathers and grandmothers, your brothers or sisters, and your grandchildren. In the *third degree* come those whose connexion supposes two intermediate generations — your great-grandfathers, your great-grandmothers, your great-grandchildren, your uncles and aunts, nephews and nieces.

But though this arrangement may possess every possible perfection on the side of simplicity and regularity, it would not well answer the political and moral object. It does not answer better to the degree of affection of which it might be thought to furnish a presumptive proof; and would not accomplish the principal object, which is to provide for the wants of the rising generations. Let us therefore leave this genealogical arrangement for the adoption of one founded upon utility. It consists in *constantly giving to the descending line, however long, the preference to the ascending or collateral line* — in giving the preference infinitely to the descendants of each parent, over all those who cannot be reached without taking another step in the ascending line.

It will happen, however, that the presumptions of affection or of necessity, which serve as the foundation of these rules, will often be defective in practice; and that consequently the rules themselvse will diverge from their

object. But the power of making a will, as we shall see, offers an efficacious remedy to the imperfection of the general law; and this is the principal reason for preserving it.

Thus much for general principles. But how can they be applied in detail, when it is necessary to decide among a crowd of competitors?

The model of a law upon this subject, will supply the place of a multitude of discussions:

ARTICLE I. *Let there be no distinction between the sexes. Let what is said with regard to the one, be understood with regard to the other. The portion of the one shall always be equal to the portion of the other.*

REASON — *Good of equality.* If there be any difference, it ought to be in favour of the weakest — in favour of the females, who have more wants, fewer means of acquisition, and are less able to make use of the means they have. But the strongest have had all the preference. Why? Because the strongest have made the laws.

ARTICLE II. *After the death of the husband, the widow shall keep a moiety of the common property, unless otherwise provided for by the marriage-contract.*

ARTICLE III. *The other moiety shall be distributed in equal portions among the children.*

REASONS: 1. Equality of affection on the part of the father. 2. Equality of co-occupation on the part of the children. 3. Equality of wants. 4. Equality of all imaginable reasons on the one side and on the other.

Differences of age, temperament, talent, strength, &c. may produce some difference with respect to wants in point of fact; but it is not possible for the law to appreciate them: it is for the father to provide for them by means of his right of making a will.

ARTICLE IV. *If a child die before its father, leaving children, his portion shall be distributed among them in equal portions; and so on for all their descendants to infinity.*

Remarks. — The distribution by roots, instead of by branches, is preferred for two reasons:—1. In order to prevent *the pain of disappointment.* That the portion of the elder should be diminished by the birth of each younger child, is a natural event, by which expectation ought to regulate itself. However, in general, when one of the children begins to exercise its reproductive power, that of the father is generally nearly exhausted. At this period, the children ought to believe themselves arrived at the boundary of the diminutions that their respective portions ought to experience. But if each little grandson or little granddaughter produce a diminution equal to that produced by a son or daughter, the diminution would have no limits; there would be no certain grounds upon which to form a plan of life. 2. Grandchildren have for their immediate resource the property of their deceased father. Their custom of co-occupation detached from their grandfather has been exercised by preference, if not exclusively, upon the funds of paternal industry. It may be added, that they have, in the goods of their mother and of her parents, a resource in which the other children of their grandfather have no share.

ARTICLE V. *If there be no descendants, the property shall go in common to the father and mother.*

Remarks. — Why to the descendants before others?—1. *Superiority of affection.* Every other arrangement would be contrary to the paternal feelings. We love those better who depend upon us, than those upon whom we depend. It is more pleasant to govern than to obey. 2. *Superiority of wants.* It is certain that our children could not exist without us, or some one who should take our place. It is probable that our parents might exist without us, because they have existed before us.

Why should the succession pass to the father and mother, rather than to the brothers and sisters?—1. The relationship being more immediate, a superior affection is presumed. 2. It is a recompense for services rendered, or rather an indemnity for the pains and expenses of education. What forms the relationship between my brother and myself? Our common relation to the same father and the same mother. What renders him more dear to me than any other companion with whom I have passed an equal portion of my life? It is because he is more dear to those who have my first affections. It is not certain that I am indebted to him for any thing, but it is certain that I owe every thing to them. Hence, upon all occasions in which the stronger titles of my children do not intervene, I owe them those indemnities to which a brother cannot pretend.

ARTICLE VI. *If either of the two be dead, the portion of the deceased shall go to his descendants, in the same manner as it would have gone to the proprietor's own relations.*

Remarks. — In poor families which only possess household furniture, it is more desirable that the whole should pass to the surviving father or mother, with the charge of providing for the support of the children. The expenses of the sale, and the dispersion of the property, would ruin the survivor, whilst the portions, too small to serve as a capital, would soon be dissipated.

ARTICLE VII. *In default of such descendants, the property shall go entirely to the survivor.*

ARTICLE VIII. *If both be dead, the property shall be divided, as before directed, among their descendants.*

ARTICLE IX. *But in such manner, that the*

portion of the half blood shall only be the half of the portion of the whole blood, when there is any such.

Reason — *Superiority of affection.* Of the two bonds which attach me to my brother, there is only one which attaches me to my half brother.

ARTICLE X. *In default of relations in the foregoing degrees, the property shall be applied to the revenue.*

ARTICLE XI. *But on condition of distributing the interest as an annuity among all the relations in the ascending line, in whatever degree, in equal portions.*

Remarks.—This part of the law may either be established or not, according to the condition of the country with regard to taxes; but I have been unable to discover any solid objection against this fiscal resource.

The collateral relation who would be excluded, it may be said, may be in want; but this want is an incident too casual for the foundation of a general rule. They have for their natural resource the property of their respective ancestors; and they cannot have fixed their expectations or their plan of life upon this foundation.

On the side even of the uncle, the expectation of inheriting from a nephew can be but feeble, and a positive law would suffice to prevent its existence, or to extinguish it without violence. The uncle has not the titles of the father or grandfather. It is true, that in case of the death of these, the uncle may have taken their place, and filled the place of a father to his nephew. This is a circumstance which deserves the attention of the legislator. The power of leaving legacies may answer the end; but this means of obviating the inconveniences of the general law would be null in case the nephew should die before he became of age — before he had the faculty of making a will. If, therefore, it be desirable to soften this fiscal regulation, the first departure from the rule ought to be in favour of the uncle, either in relation to the principal or the interest.

ARTICLE XII. *In making division among many heirs, the mass ought to be put up for public sale, saving the right to make any other arrangement, if they are agreed.*

Remark.—This is the only method of preventing community of goods—an arrangement of which we have elsewhere shown the pernicious consequences. The goods of inheritance, which may possess a value in affection, will find their true price from the competition of the heirs, and will turn to the common advantage, without occasioning those disputes which produce durable animosities in families.

ARTICLE XIII. *In arranging the sale and division, every thing shall be referred to the oldest male of full age, saving to the law to make other arrangements, for fear of misconduct, upon cause stated.*

Remark.—Women in general are less apt in affairs of interest and embarrassment, than men. But a certain woman, in particular, may possess a superior aptitude, indicated by the general wish of the relations: she ought to obtain the preference.

ARTICLE XIV. *In default of a male of full age, every thing should be referred to the guardian of the oldest male, saving the discretionary power given in the preceding article.*

ARTICLE XV. *The succession which falls to the revenue for want of natural heirs, shall in like manner be sold by public auction.*

Remark.—Government is incapable of managing the greater portion of specific goods; their management costs too much; they yield little, and are liable to be destroyed This is a truth which has been established almost to demonstration by Adam Smith.

It appears to me that this project of a law is simple, concise, easy to be understood; that it is little favourable to fraud, to diversity of interpretations; in short, that it is analogous to the affections of the human heart, to the habitual inclinations which arise from the social relations, and that consequently it is calculated to conciliate the approbation of those who judge from feeling, and the esteem of those who can appreciate reason.

Those who reproach this plan with being too simple, and discover, that at this price the law would no longer be a science, may find wherewith to satisfy, and even to astonish themselves, in the labyrinth of the English common law upon successions.

To give to foreigners an idea of these difficulties, it would be necessary to begin by a dictionary altogether new to them; since, when they should see the absurdities, the subtleties, the cruelties, the frauds, which abound in this system, they would imagine that they were reading a satire, and that it was intended to insult a nation, on other accounts so justly renowned for its wisdom.

On the other hand, it would be proper to show what has reduced this evil within sufficiently narrow limits: this is the right of making a will. It is only in successions upon intestacy, that it is necessary to pass through the tortuous routes of the common law. These wills may therefore be compared to the arbitrary pardons which correct the harshness of the penal laws.

CHAPTER V.

OF WILLS.

1. THE law cannot know individuals, nor accommodate itself to the diversity of their wants. All that can be required of it is, that it shall offer the best chance of supply-

ing these wants. It remains for each proprietor, who may, and who ought to know the circumstances in which those who depend upon him will be placed after his death, to correct the imperfections of the law in those cases which it could not foresee. The power of making a will, is an instrument placed in the hands of individuals for the prevention of private calamity.

2. This same power may also be considered as an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of families. The power of this instrument, it is true, may be turned in an opposite direction: happily these cases would always form the exceptions to the rule. The interest of each member of the family is, that the conduct of each should be conformable to virtue, that is to say, to general utility. Passion may produce accidental wanderings, but the law ought to regulate itself by the ordinary course of affairs. Virtue is the prevailing foundation of society: even vicious parents are found as jealous as others, of the honesty and reputation of their children. The man least scrupulous in his business would be in despair, if his secret conduct were known to his family: among these he never ceases to be the apostle of that honesty, of which he stands in need from those who serve him. In this respect, every proprietor may obtain the confidence of the law. Clothed with the power of making a will, which is a branch of penal and remuneratory legislation, he may be considered as a magistrate set over the little kingdom which is called a family, to preserve it in good order. This magistrate may do wrong, and it would even seem, that as he is not restrained in the exercise of his power, either by responsibility or publicity, he would be more liable to abuse it than any other magistrate: but this danger is more than counterbalanced by the bonds of interest and affection, which place his inclinations in accordance with his duties. His natural attachment to his children or his relations, is a pledge of his good conduct, which gives as much security as can be obtained for that of the political magistrate; so that, every thing considered, the authority of this non-commissioned magistrate, besides that it is absolutely necessary for minor children, will be more often found salutary than hurtful for adults themselves.

3. The power of making a will is advantageous under another aspect: it is a means of governing, under the character of *master*, not for the good of those who obey, as in the preceding article, but for the good of those who command. The power of the present generation is thus extended over a portion of the future, and the wealth of each proprietor is in some respect doubled. By means of an assignment upon a time when he shall be no more, he procures a multitude of advantages beyond what he actually possesses. By continuing beyond the term of their minority, the submission of children, the indemnity for parental cares is increased; an assurance is given to the parent against ingratitude; and though it would be more pleasant to think that such precautions were superfluous, yet, if we reflect upon the infirmities of old age, it will be perceived, that it is necessary to leave all these factitious attractions to serve as their counterpoise. In the rapid decline of life, it is proper to husband every resource; and it is not without advantage, that interest is made to act as the monitor of duty.

Ingratitude on the part of children, and contempt for old age, are not common vices in civilized societies; but it ought to be recollected, that, more or less, the power of making a will exists every where. Do these vices exist more frequently where this power is most limited? To decide this question, it would be necessary to observe what passes in the families of the poor, where there is little to leave: but still this ground of judgment would be defective, since the influence of this power, established in society by the laws, tends to form the general manners; and the general manners afterwards determine the sentiments of individuals. This power given to parents, renders parental authority more respectable, and the parent who, from his indigence, cannot exercise it, unwittingly profits by it, from the general habit of submission to which it has given birth.

However, in making the father a magistrate, it is proper to guard against making him a tyrant. If the children may do wrong, he may do wrong also; and though the power of punishing them may be given to him, it does not follow that he ought to be authorized to make them die of hunger. Thus the institution of what is called in France a *legitime*, is a suitable medium between domestic anarchy and tyranny. Even this *legitime*, parents ought to be allowed to take from their children, for causes determined by the law and judicially proved.

Another question presents itself: Shall a proprietor be allowed to leave his property to whom he pleases, whether distant relations or strangers, in default of natural heirs? In this case, the fiscal resource of which we spoke under the head of successions, would be much diminished; it would only exist in the case of intestates. Here the reasons of utility divide themselves: there is a medium to be taken.

On the one side, in default of relations, the services of strangers are necessary to a man, and his attachment to them is almost the same. It is necessary that he should be able

to cultivate the hopes, and recompense the cares, of a faithful servant — to soften the regrets of the friend who has grown old by his side; without speaking of the female who has wanted only a ceremony in order to be called his widow, and of orphans who are his children in the eyes of every body except the legislator.

On the other hand, if to increase the inheritance of the public treasury you take from him the power of leaving to his friends, do you not force him to spend all upon himself? If his capital will be no longer at his disposal the moment he is dead, will he not be tempted to convert it into annuities upon his own life? will it not encourage his being a spendthrift, and almost operate as a law against economy?

These reasons are without doubt to be preferred to the interest of the revenue. It is necessary at least to leave to the proprietor who has no near relations, the right of disposing of the half of his property after his death, keeping the other half for the public. To be content in this case with the smaller share, would probably be a means of obtaining more. But it would be still better not to attack the principle which permits every one to dispose of his property after his death, and not to create a class of proprietors who should regard themselves as inferior to others, on account of this legal impotence which should have struck the half of their fortune.

All that has been said respecting alienations among the living may be properly applied to wills. Upon the greater number of points, we shall be instructed by their conformity, and in the others by the contrast.

The same causes of nullity which apply to alienations among the living, apply to wills, except that, in the case of *undue concealment* on the part of the receiver, there must be substituted *erroneous supposition* on the part of the testator. The following is an example: — I leave a certain property to Titius, who is married to my daughter, supposing this marriage legal, and ignorant of the dishonesty of Titius, who, before espousing my daughter, had contracted another marriage, which was still subsisting.

Wills are exposed to a sufficiently unfortunate dilemma. Shall their validity be permitted, when made upon the bed of death? They are then exposed to undue coercion and fraud. Shall formalities incompatible with this indulgence be required? Testators will then be liable to be deprived of assistance at the moment of their greatest need. Barbarous heirs may torment them, in order to hasten their death, or secure the advantage of a will passed in these forms. A dying person who has nothing to give or to take away is no longer to be feared. In order to reduce these opposite dangers to the lowest term, a multitude of details would be required.

CHAPTER V

OF RIGHTS RESPECTING SERVICES — MEANS OF ACQUIRING THEM

AFTER *things*, it remains to distribute *services:* a kind of property sometimes confounded with things — sometimes presenting itself under a distinct form.

How many kinds of services are there? As many as there are ways in which man may be useful to man, either by procuring good for him, or by preserving him from evil.

In the exchange of services which constitutes social intercourse, some are free, some are forced. Those which are required by the law, constitute rights and obligations. I have a right to the services of another; he is in a state of *obligation* with regard to me: these two terms are correlative.

In their origin, all services must have been free: it is only by degrees that the laws have intervened to convert the more important into positive rights. It is thus that the institution of marriage has converted into legal obligations the connexion which formerly was voluntary between the husband and wife, between the father and the children. The law in the same manner has converted into an obligation, in certain states, the support of the poor, a duty which still remains amongst most nations in undefined liberty. These political duties are, with respect to duties purely social, the same as particular inclosures in a vast common, in which a certain kind of cultivation is tended with precautions which insure its success. The same plant might grow in the common, and even be protected by certain conventions; but it would always be subject to more hazards than in this particular boundary traced by the law, and guaranteed by the public force.

Still, whatever the legislator may do, there are a great number of services upon which he has no hold: he cannot direct them, because it is not possible to define them, and even because constraint would change their nature, and convert them into evils. For the punishment of their violation, such an apparatus of research and of punishments would be required, as would spread terror through society. Besides, the law does not know the real obstacles which prevent their being rendered: it cannot put into activity hidden forces; it cannot create that energy, that superabundance of zeal, which surmounts difficulties, and goes a thousand times farther than commands.

The imperfection of the law upon this point is corrected by a species of supplemental law; that is to say, by the moral or social code — a code which is not written —

which consists altogether in opinion, in manners, customs—and which begins where the legislative code ends. The duties which it prescribes—the services it imposes, under the names of equity, patriotism, courage, humanity, generosity, honour, disinterestedness, do not directly borrow the assistance of the laws, but derive their strength from other sanctions which lend their punishments and rewards. As the duties of this secondary code do not bear the impress of the law, their discharge has more eclât—is more meritorious; and this surplus in honour happily compensates for their deficiency in real strength. After this digression respecting morals, let us return to legislation.

The kind of services which occupy the most prominent place consists in the disposal of property in favour of another.

The kind of property which acts the greatest part in civilized society is money, the almost universal representative standard. It is thus that the consideration of *services* often leads back into that of *things*.

There are some cases in which it is necessary to require the service for the advantage of him who commands it: such is the case of the master with relation to the servant.

There are some cases in which it is necessary to require the service for the advantage of him who obeys: such is the case of the guardian and ward. These two correlative states are the foundation of all others. The rights which belong to them are the elements of which all the other states are composed.

The father ought to be, in certain respects, the guardian—in others, the master of the child. The husband ought to be, in certain respects, the guardian—in others, the master of the wife.

These conditions are capable of a definite and indefinite duration, and form domestic society. The rights which it is proper should belong to them will be treated of separately. The public services of the magistrate and the citizen constitute other classes of obligations, the establishment of which belong to the constitutional code. But besides these constant relations, there are some transitory and occasional relations in which the law may require the services of an individual in favour of another.

The means of acquiring these services, or, in other words, the causes which determine the legislator to create these obligations, may be referred to three heads: 1. *Superior need.* 2. *Former service.* 3. *Agreement or Contract.* Let us consider these heads in detail.

1. *Superior Need;*

That is to say, *need of receiving the service, superior to the inconvenience of rendering it.*

Every individual has for his constant occupation the care of his own welfare—an occupation no less legitimate than necessary: for suppose that it were possible to reverse this principle, and to give to the love of others a superiority over self-love, the results of this arrangement would be most ridiculous and disastrous. There are, however, many occasions, in which it is possible to make a considerable addition to the happiness of others, by a slight and almost imperceptible sacrifice of one's own. To do, in certain circumstances, what depends upon us for preventing the evil ready to fall upon another, is a service which the law may require: and the omission of this service, in the cases in which the law has exacted it, would be a kind of offence which might be called a *negative* offence, in order to distinguish it from a *positive* offence, which consists in being one's self the instrumental cause of an evil.

But to employ one's efforts, however light they may be, may be an evil: to be constrained to employ them is certainly one, for all constraint is an evil. Hence, in order to exact from *you* some service in favour of *me*, the evil of not receiving it ought to be so great, and the evil of rendering it so small, that no one ought to fear to undergo the one, for the prevention of the other: there is no means of fixing the precise limits. Reference must be made to the circumstances of the parties interested, by leaving to the judge the care of pronouncing upon the cases of individuals as they present themselves.

The good Samaritan, by assisting the wounded traveller, saved his life. It was a noble action, a trait of virtue; we may say more, it was a moral duty. Ought it to have been made a political duty?—ought an action of this kind to be commanded by a general law? No; not, at least, unless tempered by exceptions more or less vague. It would be proper, for example, to establish a dispensation in this case in favour of a surgeon attending upon many wounded persons in extreme danger—or of an officer going to his post to repel the enemy—or of the father of a family going to the assistance of one of his children in danger.

This principle of *superior need* is the foundation of many obligations. The duties required of a father towards his children may be burthensome to him; but this evil is nothing, in comparison of the evil which would result from their neglect. The duty of defending the state may be still more burthensome; but if the state were not defended, it would not exist. When the taxes are not paid, the government is dissolved. When public functions are not discharged, the course is open for all kinds of misfortunes and all kinds of crimes.

It must be understood that the obligation of rendering the service falls upon a certain individual, in consequence of his particular

situation, which gives him, more than any other one, the power or the inclination of discharging it. It is thus that a guardian for orphans is chosen from among their relations or friends, to whom this duty will be less burthensome than to a stranger

2. *Former Service* —

Service rendered, in consideration of which there is required of him who received the benefit, an indemnity, an equivalent, in favour of him who has supported the burthen.

Here the object is more simple: it is only necessary to value a benefit already received, in order to assign an indemnification. Less latitude need be left to the discretion of the judge.

A surgeon has given his assistance to a sick person who had lost all feeling, and who was not in a condition to send for him. A depositary has employed his labour, or has made pecuniary advances necessary for the preservation of the deposit, without being required so to do. A man has exposed himself during a fire, to save valuable property, or to rescue persons in danger. The property of an individual has been thrown into the sea, to lighten the vessel and preserve the rest of the cargo. In all these cases, and in a thousand others which might be imagined, the laws ought to secure an indemnification as the price of the service.

This title is founded upon the best of reasons: Grant the indemnification, he who has supplied it will still be a gainer: refuse it, and you leave him who has rendered the service a loser.

This regulation would be less for the advantage of him who receives the indemnification, than for those who may stand in need of services: it would be a promise made beforehand, to every man who may have the opportunity of rendering a service burthensome to himself, for the purpose of preventing any opposition between his personal interest and his benevolence. Who shall say how many evils would be prevented by such a precaution? In how many cases has not prudence arrested the legitimate desires of benevolence? Would it not be wisdom on the part of the legislator, as much as possible to reconcile them? Ingratitude, it is said, was punished at Athens as a species of fraud which obstructed the communication of benefits, by weakening this kind of credit. I do not propose to punish, but to prevent it in many cases. If the man to whom you have rendered a service is ungrateful, it is of no consequence: the law, which does not reckon upon virtues, secures you an indemnity, and on essential occasions will make the indemnity rise to a reward.

Reward! this is the true means of obtaining services: in comparison with this, punishment is a feeble instrument. In order properly to punish the omission of a service, it is proper to be sure that the individual had the power of rendering it — that he had not an excuse for not rendering it. All this requires a difficult and doubtful procedure: besides, as it acts by means of the fear of punishment, that only will be done which is absolulely necessary for avoiding the punishment. But the hope of reward animates the hidden powers, triumphs over real obstacles, and gives birth to prodigies of zeal and ardour, in cases in which threats would have only produced repugnance and dejection.

In arranging the interest of the two parties, three precautions should be observed: first, to prevent a hypocritical generosity from converting itself into tyranny, and requiring the price of a service that would not have been received, if it had not been believed to be disinterested: the second is, not to allow a mercenary zeal to snatch a reward for services that might have been rendered by the party to himself, or obtained at a less expense: the third is, not to allow a man to be overwhelmed by a crowd of assistants, who can only be fully indemnified by exchanging for a loss all the advantage of the service.*

It is easily understood that *former service* forms a justifying base to many classes of obligations. It is upon this that the rights of parents over their children are founded: when, in the order of nature, the strength of adult age succeeds to the weakness of early years, the necessity of receiving ceases, and the duty of restitution begins. It is upon this that the rights of wives, during the period of the union, is equally founded, when time has effaced the attractions which were its first moving causes.

Establishments at the public expense for those who have served the state, repose upon the same principle. Reward for past services is an instrument for creating future services.

3. *Agreement or Contract;*

That is to say, *the making a promise between two or more persons, upon the understanding that it is regarded as legally binding.*

All that has been said relative to *consent* in the disposal of property, applies to *consent* in the disposal of services: The same reasons for sanctioning this disposal as for sanctioning the other — the same fundamental axiom — *every alienation of service implies advantage:* no one will bind himself except from a motive of utility.

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* This may be applied to the situation of a King re-established on the throne of his ancestors, as Henry IV. or Charles II., at the expense of his faithful servants — an unfortunate situation, in which discontent is still increased, unless the kingdom itself, reconquered by their efforts, be distributed among them in detail.

The same reasons which annul consent in the one case, annul it in the other — undue concealment, fraud, coercion, subornation, erroneous supposition of legal obligation, erroneous supposition of value, interdiction, infancy, madness, pernicious tendency of the execution of the contract without fault of the contracting parties.*

We shall not dwell upon the following causes which produce the dissolution of a contract: — 1. *Accomplishment;* 2. *Compensation;* 3. *Express or tacit remission;* 4. *Lapse of time;* 5. *Physical impossibility;* 6. *Intervention of superior inconvenience.* In all these cases, the reason which had sanctioned the service no longer exists; but the two last bear only upon the literal or specific accomplishment, and may leave occasion for an indemnity. If, in a reciprocal contract, one of the parties alone have performed his part, or if he have only done more than the other, compensation becomes necessary for the restoration of an equilibrium.

An exhibition of principles only, is here attempted, without attending to the details: arrangements must necessarily vary, to correspond with the diversity of circumstances. At all times, if a small number of rules are well understood, particular arrangements will not create much difficulty, and may be all directed by the same spirit. The following rules appear sufficiently simple, to allow their developments to be passed by: —

1. Avoid producing the pain of disappointment.

2. When a portion of this evil is inevitable, diminish it as much as possible, by dividing all loss among the parties interested, in proportion to their property.

3. Observe, in the distribution, to throw the greater part of the loss upon him who ought, by his attention, to have prevented the evil, in such manner as to punish his negligence.

4. Avoid especially the production of an accidental injury greater than the evil of the disappointment.

General Observation.

We have laid the foundation of the whole theory of obligations in utility: we have supported the whole of this vast edifice upon three principles: *Superior Need, Former Service, Agreement or Contract.* Who would believe that, to arrive at notions so simple, and even so familiar, it has been necessary to open a new route? Consult the masters of the science — Grotius, Puffendorf, Burlamqui, Vattel, even Montesquieu himself, Locke, Rousseau, and the crowd of commentators: do they wish to ascend to the principle of obligations? They speak of a natural right, of a law anterior to man, of the divine law, of conscience, of a social contract, of a tacit contract, &c. &c. I know that these terms are not incompatible with the true principle; because there is not one of them that may not be brought, by explanations more or less long, to signify some good or some evil. But this oblique and winding method announces uncertainty and embarrassment, and does not put an end to disputes.

They have not seen that a contract, speaking rigorously, is no reason in itself, and that it requires a foundation — a first and independent reason. A contract serves to prove the existence of the mutual advantage of the parties contracting. It is this reason of utility which gives it force: it is by this that the cases may be distinguished in which it ought to be confirmed, from those in which it ought to be annulled. If a contract constituted a reason in itself, it would always have the same effect; if its pernicious tendency render it void, it is then its useful tendency which renders it valid.

CHAPTER VI.

COMMUNITY OF GOODS—ITS INCONVENIENCES.

THERE is no arrangement more contrary to the principle of utility, than community of goods, especially that kind of indeterminate community in which the whole belongs to every one.

1. It is an inexhaustible source of discord: far from being a state of satisfaction and enjoyment, for all parties interested, it is one of discontent and disappointment.

2. This undivided property always loses a great part of its value to all the co-partners. Subject, on the one hand, to dilapidations of every kind, because it is not under the protection of personal interest; on the other hand, it receives no improvement. Why should I undertake an expense of which the burthen will be certain, and will fall altogether on myself, whilst the advantage will be precarious, and necessarily divided.

3. The apparent equality of this arrangement would only serve to hide a real inequality. The strongest would abuse his strength with impunity, the richest would enrich themselves at the expense of the poorest. Community of goods always recalls the idea of that kind of monster which is sometimes found to exist; that is, of twins attached by the back to one another—the stronger necessarily draws the weaker along.

Reference is not here made to the community of goods between husbands and wives: called to live together, to cultivate their own interests and those of their children together,

* It is to this head that the English law may be referred, which declares every marriage void, contracted by persons of the royal family without the consent of the king.

they ought to enjoy together a fortune often acquired, and always preserved by their common cares. Besides, if their wills cross each other, the conflict will not be eternal, the law having confided to the man the right of decision.

Reference is also not made to this community between associates in commerce. This community has acquisition for its object, and does not extend to enjoyment. Now, when it refers to acquisition, the associates have only one and the same object, one and the same interest; when it refers to enjoyment and consumption, each becomes independent of the other: besides, the associates in commerce are few in number; they are freely chosen, and they can separate from each other. It is precisely otherwise in common property.

In England, one of the greatest and best understood improvements is the division of commons. When we pass over the lands which have undergone this happy change, we are enchanted as with the appearance of a new colony: harvests, flocks, and smiling habitations, have succeeded to the sadness and sterility of the desert. Happy conquests of peaceful industry! noble aggrandisements, which inspire no alarms and provoke no enemies! But who would believe it, that in this island, where agriculture is so well understood, and so much esteemed, that millions of acres of productive land are abandoned to this sad state of commonalty. It is not long since that the Government, desirous of knowing its territorial domains, has collected in each district all the facts which have made known this interesting truth, so well adapted to become fruitful.*

The inconveniences of community are not experienced in the case of servitudes; that is to say, in the partial rights of property exercised over immovables (as a right of way, or right of water,) except by accident. These rights are in general limited; the value lost by the land serving is not equal to the value acquired by the land served; or in other words, the inconvenience to the one is not so great as the advantage to the other.

In England, freehold land which is worth thirty years purchase, would not be worth more than twenty years purchase if it were copyhold. This arises from there being in the latter case a lord of the manor possessing certain rights, which establish a kind of community between him and the principal proprietor. But it must not be thought that what is lost by the vassal is gained by the lord: the greater part falls into the hands of the lawyers, and is consumed in useless formalities or vexatious triflings. These are remains of the feudal system.

"It is a beautiful sight," says Montesquieu, of the feudal law; and he afterwards compares it to an old and majestic oak. We may the rather compare it to that fatal tree, the manchineel tree, whose juices are poisons to man, and whose shade is destructive to vegetation. This unfortunate system has infused into the laws confusion and complexity, from which it is difficult to deliver them. As it is every where interwoven with property, it requires much management to destroy the one without injuring the other.

CHAPTER VII.

OF DISTRIBUTION OF LOSS.

Things form one branch of the objects of acquisition: *Services* form another. After having treated of the different methods of acquiring and losing (ceasing to possess) these two classes of objects, the analogy between gain and loss seems to indicate, as an ulterior labour, the different methods of distributing the losses to which these possessions are liable. This task will not be very long. An article comes to be destroyed, damaged, lost? The loss is already experienced. Is the proprietor known? upon him the weight of this loss rests. Is he not known? no one bears it: it is, as to every body, as null, and as if it had not happened. Ought the loss to be transferred to any other than the proprietor? that is to say, in other words, is there due to him a satisfaction, either from one cause or another? This is a subject which will be discussed in the Penal Code.

A single particular case will here suffice, as an indication of the principles.

When the buyer and seller of merchandise are at a distance from each other, it must necessarily pass through a number, more or less, of intermediate hands. It may be carried by land or by water: the merchandise becomes destroyed, damaged, or lost: it does not reach its destination in the condition in which it ought to be: upon whom shall the loss fall? upon the seller or the buyer? I say upon the seller, saving his recourse against the intermediate agents. He may by his care contribute to the security of the merchandise: it is for him to choose the moment and the manner of sending it, to take the necessary precautions: on him depends the proof. All this ought to be more easy to the merchant who sells, than to the particular individual who buys: whilst, as to him, it is only by

* There may be some circumstances not included in ordinary rules: the citizens of the smaller Swiss Cantons, for example, possess in common the greater portion of their lands, that is to say, the High Alps. It is possible that this arrangement may alone be suitable for pastures which are only accessible for part of the year. It is possible that this manner of holding their lands forms the base of a purely democratic constitution, suited to a people shut up in the bosom of their mountains.

accident that his cares can contribute in any manner to bring about the desired event.—*Reason*, Superior preventive faculty. *Principle*, Security.

Particular situations may indicate the necessity of departing from this general rule, by corresponding dispositions. For a much stronger reason, individuals may depart from it themselves, by agreements made among themselves. Indication can here only be made of the principles: their application would be out of place.

PART III.

OF THE RIGHTS AND OBLIGATIONS ATTACHED TO DIFFERENT PRIVATE CONDITIONS.

INTRODUCTION.

We now proceed to consider in greater detail the rights and obligations which the law attaches to the different conditions which compose the domestic or private condition. These conditions may be divided into four—those of Master and Servant;
Guardian and Ward;
Parent and Child;
Husband and Wife.

If we were to follow the historical or the natural order of these relations, the last in the list would become the first: for the sake of avoiding repetitions, beginning with the most simple object has been preferred. The rights and obligations of a father and a husband are composed of the rights and obligations of a master and a guardian; these two first conditions are the elements of all the others.

CHAPTER I.

OF MASTER AND SERVANT.

When the question of slavery is not considered, there is little to say respecting the condition of *master* and its correlative conditions, constituted by the different kinds of servants. All these conditions are the effects of contracts; these contracts the parties interested may arrange to suit themselves.

The condition of *master*, to which the condition of apprentice corresponds, is a mixed condition: the master of an apprentice is at the same time master and tutor; tutor for the art which he teaches, master as to the profit which he derives from him.

The work that the apprentice does, after the period at which the produce of his labour is worth more than what it costs to develope his talent, is the salary or reward of the master for his former pains and expenses.

This salary will naturally be greater or less according to the difficulty of the art. Some arts may be learnt in seven days; others may require seven years. The competition among the dealers regulates the price of these mutual services, as well as of all other objects of commerce: and here, as in other cases, industry finds its just reward.

The greater number of governments have not adopted this free system. They have sought to establish what they call order among the professions; that is, to substitute an artificial for a natural arrangement, that they might have the pleasure of regulating that, which would regulate itself. As they have meddled with what they did not understand, they have been most frequently led by an idea of uniformity in objects of very different natures. For example, the ministers of Elizabeth fixed the same term of apprenticeship, the term of seven years, for the most simple as well as for the most difficult arts.

The regulating mania disguised itself under a common pretext. It would perfect the arts; it would prevent there being any bad workmen; it would secure the credit and the honour of the national manufactures. For the accomplishment of this object, a natural and simple method presented itself: permission to every one to use his own judgment, to reject the bad, to choose the good, to determine his preferences by merit, and thus to excite emulation in all the artists by the liberty of competition. But no:—it determined that the public was not in a condition to judge of the quality of any work; but so soon as a workman had been employed upon a certain kind of labour a certain number of years, his work ought to be regarded as good. That the proper question to be asked respecting an artisan is not, does he work well? but how long has been his apprenticeship? for if it be necessary still to judge of work by its merit, so much the better would it be to allow every one liberty to work at his own peril and risk.

One might then be a master without having served an apprenticeship; another might remain all his life only an apprentice.

CHAPTER II.

OF SLAVERY.

When the habit of serving forms a condition, and the obligation of continuing in this con-

dition with respect to a certain individual, or to others who derive their titles from him, embraces the whole life of the servant, this condition is called slavery.

Slavery is susceptible of many modifications and alleviations, according to the greater or less certainty of the services which it is permitted to exact, and according to the means of coercion which it is permitted to employ. There was a great difference between the condition of a slave at Athens and Lacedemon; there is still more between that of a Russian serf and a negro in the southern states of America. But whatever may be the limits as to the modes of exercising authority, if the obligation of service be unlimited in point of duration, I always call it *slavery*. In drawing the line of separation between slavery and freedom, it is necessary to stop at some point, and this appears the most prominent and the most easily proved.

This characteristic mark drawn from its *perpetuity*, is so much the more essential, in as much as, wherever it is found, it weakens, it enervates, it renders more or less precarious the most prudent precautions for the mitigation of authority. Unlimited power, in this sense, can with difficulty be limited in any other. If we consider, on the one hand, the facility which the master possesses of aggravating his yoke by degrees; of rigorously exacting the services which are due to him; of extending his pretensions under divers pretexts; of seeking out opportunities for tormenting an insolent subject, who has dared to refuse that which he did not owe: if we consider, on the other hand, how difficult it is for slaves to claim and obtain legal protection; how much more distressing their domestic condition becomes after a public struggle against their master; how much rather they are led to seek his favour by unlimited submission, than to irritate him by refusal; — we shall easily perceive that the project of mitigating slavery by law, is more easily formed than executed; that the fixation of services is a very feeble instrument in the mitigation of the lot of slavery; that under the empire of the best laws in this respect, their most flagrant infractions only will be punished, whilst the ordinary course of domestic rigour will mock all tribunals. I do not, therefore, say that slaves ought to be abandoned to the absolute power of the master; that they ought not to receive any protection from the laws, because this protection is insufficient. But it was necessary clearly to point out this circumstance, to show the evil inherent in the nature of slavery, namely, the impossibility of subjecting the authority of a master over his slaves to legal restraint, and of preventing the abuse of his power, if he be disposed to abuse it.

That slavery is agreeable to the masters, is not doubtful — since they could, in an instant, cause it to cease if they wished so to do; that it is disagreeable to the slaves, is a fact no less certain—since they are only retained in this condition by restraint. No one who is free is willing to become a slave; no one is a slave but he wishes to become free.

It is absurd to reason as to the happiness of men, otherwise than with a reference to their own desires and feelings. It is absurd to seek to prove by calculation, that a man ought to be happy when he finds himself miserable, and that a condition into which no one is willing to enter, and which every one desires to leave, is in itself a pleasant condition, and suited to human nature. I can easily believe that the difference between liberty and slavery is not so great as it appears to be to some ardent and prepossessed minds. Being accustomed to the *evil*, and much more, never having experienced the *better* condition, the interval which separates these two conditions, which at first sight appear so opposed, is greatly diminished. But all reasonings upon probabilities are superfluous, since we have proofs of the fact, that this condition is never embraced from choice, but, on the contrary, that it is always an object of aversion.

Slavery has been compared to the condition of a scholar prolonged during life; and how numerous are the persons, who have said that the time passed at school was the happiest period of their life?

The parallel is correct only in one respect. The circumstance common to the two conditions is subjection; but it is any thing rather than this circumstance which produces the happiness of the scholar. That which renders him happy, is the freshness of spirit, which gives to all his impressions the charm of novelty; it is the comparison of the noisy and active pleasures in which he engages with companions of his own age, with the solitude and the quiet of his father's house. And after all, how many are the scholars who have sighed for the moment when this condition should cease? Who among them would resolve to remain a scholar always?

If it could be arranged in such a manner that slavery should be so established that there should be only one slave to one master, there might be ground for hesitation in pronouncing before-hand which would have the advantage, and which the disadvantage; and it might be possible, that, all things considered, the sum of good in this arrangement would be nearly equal to that of evil.

But things are not thus arranged. As soon as slavery is established, it becomes the lot of the greatest number. A master counts his slaves as his flocks, by hundreds, by thousands, by tens of thousands. The advantage

is only on the side of a single person; the disadvantages are on the side of the multitude. If the evil of slavery were not great, its extent alone would suffice to make it considerable. Generally speaking, and every other consideration apart, there can, therefore, be no ground for hesitation between the loss which would result to the masters from enfranchisement, and the gain which would result from it to the slaves.

Another strong argument against slavery may be drawn from its influence upon the wealth and power of nations. A free man produces more than a slave. Set at liberty all the slaves which a master possesses, this master would, without doubt, lose a part of his property; but the slaves, taken together, would produce not only what he lost, but still more. But happiness cannot but be augmented with abundance, whilst public power increases in the same proportion.

Two circumstances concur in diminishing the produce of slaves: the absence of the stimulus of reward, and the insecurity of their condition.

It is easily perceived, that the fear of punishment is little likely to draw from a labourer all the industry of which he is capable, all the work that he can furnish. Fear leads him to hide his powers, rather than to show them; to remain below, rather than to surpass himself.

By a work of supererogation, he would prepare punishment for himself: he would only raise the measure of his ordinary duties by displaying superior capacity. His ambition is the reverse of that of a free man; and he seeks to descend in the scale of industry, rather than to ascend. Not only does he produce less; he consumes more, not in enjoyment, but lavishly, wastefully, and by bad economy. Of what importance to him are interests which are not his own? Every thing which saves his labour is a gain for him; every thing which he allows to be lost, is only the loss of his master. Why should he invent new methods of doing more or doing better? In making improvements, he must think; and thinking is a labour to which no one gives himself without a motive. Degraded to a beast of burden, a slave never raises himself above a blind routine, and one generation succeeds another without any progress in improvement.

It is true that a master, who understands his own interests, will not dispute with his slaves the little profits which their industry may furnish to them: he will not be ignorant that their prosperity is his own, and that to animate them to labour, he must offer them the allurement of an immediate reward. But this precarious favour, dependent on the character of the individual, is not sufficient to inspire in them that confidence which directs the views to the future, which shows in the savings of to-day the foundation of future wealth, and which leads to extended projects respecting the fortune of their children. They well understand, that the richer they are the more they are exposed to extortion, if not from their master, at least from his agents, and all their subordinates in authority, more greedy and more formidable than their master. There is, therefore, no to-morrow for the greater number of slaves. The enjoyments which are realized at the instant are those alone which can tempt them. They, therefore, become gluttons, idle, dissolute, without reckoning the other vices which result from their situation. If they have a longer foresight, they hide their little treasures. All the faults destructive of industry, and all the habits most mischievous to society, are nourished in them by the sad feeling of insecurity, without compensation and without remedy. This result is not the deduction of a vain theory, it is a result drawn from facts, in all times and all places.

But it is said, the free labourer in Europe is very nearly upon the same footing, with regard to labour, as the slave. He who is paid by the piece has reward for his motive, and each effort has its payment. He who is paid by the day has no other motive than punishment; whether he does little or much, he receives only his day's wages, therefore he has no reward. If he does less than usual, he may be discharged, as the slave in the same case may be beaten; the one and the other are excited only by fear, and have no interest in the produce of their labour.

Three things may be replied:—1. It is not true that the day-labourer has not the motive of reward. The most skilful and the most active are better paid than others; those who distinguish themselves are more constantly employed, and are always preferred for the most lucrative employments: here, then, is a real reward which accompanies all their efforts.

2. If he were actuated by no other than penal motives, there would be still more hold upon the day-labourer than upon the slave. The free labourer has his point of honour as well as others. In a free country, shame attaches to the character of an idle or unskilful workman; and in this respect the eyes of his companions are so many helpers to those of the master: this punishment of the popular sanction is inflicted upon a multitude of occasions, by judges who have no interest in sparing it. Hence they exercise reciprocal inspection, and are sustained in their efforts by emulation. This motive has much less force upon slaves: the treatment to which they are subject renders them but little sensible of so delicate a punishment as that of shame; and as the injustice of labouring for the advantage of another, without indemnifi-

cation, has not escaped their observation, slaves have no shame in acknowledging one to another a dislike to labour, which is common to them all.

3. Whatever appears to the day-labourer as a gain, is a certain gain; every thing which he acquires is his own, and no one else has a right to touch it: but we have seen that there is no real security for the slave. Exceptions in this respect may be cited. Some Russian nobleman, for example, may possess industrious slaves who possess many thousands of roubles, and who enjoy them as their master enjoys his property; but these are particular cases, which do not alter the ordinary rule. When a judgment is to be formed respecting a general arrangement, it is not necessary to stop at these singular and transient cases.

In this short exposition of the inconveniences of slavery, no attempt has been made to excite emotion, nothing has been addressed to the imagination, no odious character has been thrown upon masters in general: by generalizing particular abuses of power, nothing has been said of the terrible methods of rigour and constraint employed in their domestic government, without law, without process, without appeal, without publicity, and almost without restraint: since responsibility, as we have seen, can only exist in extraordinary cases. Every thing which belongs to feeling may be easily accused of exaggeration, but the simple evidence of reason cannot be gainsayed, and it is so strong there can be no need to employ any suspicious colours. The proprietors of slaves, whom personal interest has not made insensible to feeling and humanity, must acknowledge the advantages of liberty, and desire the abolition of slavery, if this abolition could take place without overturning their own condition and their fortunes, and without attacking their personal security. The injustice and the calamity which have accompanied precipitate attempts, form the greatest objection against projects of emancipation.

This operation need not be suddenly carried into effect by a violent revolution, which, by displeasing every body, destroying all property, and placing all persons in situations for which they were not fitted, might produce evils a thousand times greater than all the benefits that can be expected from it.

Instead of rendering emancipation burthensome to the master, it ought, as much as possible, to be rendered advantageous to him: and the first means which naturally offers itself for this purpose, is to fix a price at which every slave shall have the right to purchase his freedom. Unhappily this means is exposed to one strong objection: when the interest of the master is opposed to that of the slaves, he would prevent their obtaining the sum fixed for their ransom. To leave them in ignorance, to keep them in poverty, to clip their wings in proportion as they grew—such would be his policy. But there is this danger only in fixing the price: the liberty of purchasing his freedom by mutual consent has no such inconvenience. The interest of the slave will lead him to work well for himself, that he may have a large price to offer. The interest of the master will lead him to allow his slave rapidly to enrich himself, that he may derive the greater ransom from him.

A second method consists in limiting the right of making a will, in such manner, that in those cases where there is no successor in the direct line, emancipation should be of right. The hope of inheritance is always very weak in distant successions, and this hope would no longer exist when the law became known. There would be no injustice, when no expectation was disappointed.

It would be possible even to go a step further: at each change of ownership, even in the nearest successions, a small sacrifice might be made of property in favour of liberty: for example, a tenth part of the slaves might be set at liberty. An inheritance which has just devolved does not present to the heir a determinate value. The diminution of a tenth would be scarcely sensible. At this period this would be less a loss than a privation of gain. Upon nephews, who have, from another side, received an inheritance from their fathers, the tax in favour of liberty might be still heavier.

This offering to liberty ought to be determined by lot. Choice, under the pretext of honouring the most worthy, would be a source of cabals: it would cause more discontent and jealousy than happiness. The lot is impartial; it gives all an equal chance of happiness; it spreads the charm of hope among those whom it does not favour; and the dread of being deprived of this chance, on account of any crime committed, would be another bond to the fidelity of the slaves.*

Emancipation ought to take place by families, rather than by individuals. A father a slave, and a son free; a son a slave, and a father free. The contrast is sad and shocking!—a source of domestic grief.

There are other means of accelerating this

* This method might give the slaves a temptation to employ murder to accelerate their emancipation. This is a very weighty objection against this lottery. It must, however, be observed, that even its uncertainty would weaken its danger. Few would be led to commit a crime of which they were not sure to reap the profit. But this temptation would vanish, if emancipation were not allowed to take place when the master had been poisoned or assassinated, either by one of his slaves, or by a person unknown. This means of liberation would thus become a source of security to the master.

desirable object; but they can only be discovered by studying the particular circumstances of each country.

However, the bonds of slavery, which the legislator cannot break by a single blow, time destroys by little and little; and the march of liberty, though slow, is not the less certain. All the progress of the human mind, of civilization, of morality, of public wealth, of commerce, hasten forward, by degrees, the restoration of individual liberty. England and France were once what Russia, the Polish provinces, and part of Germany, are at present.

Landowners need not be alarmed at this change. Those who possess the soil have a natural power over those who live by their labour. The fear that the emancipated bondsmen, once free, would remove, would abandon their native soil, and leave the earth uncultivated, is absolutely chimerical, especially if emancipation were effected in a gradual manner. Because the slave escapes when he can, it is not to be concluded that the free man will remove. The opposite conclusion would be more correct. The motive for flight no longer exists, and all the motives for remaining are strengthened.

In Poland, some landowners, enlightened as to their own interests, or animated by a love of glory, have effected a total and simultaneous emancipation in their vast seignories. Did this generosity cause their ruin? Altogether the contrary. The farmer, interested in his labour, has been in a condition to pay more than the slave; and their lands, cultivated by free hands, have received every year a new and increased value.

CHAPTER III.

OF GUARDIAN AND WARD.

THE weakness of infancy requires continual protection. Every thing must be done for the infant, which can do nothing for itself. The perfect development of its physical powers requires many years: the development of its intellectual faculties is more slow. At a certain age, it has already strength and passions, but it has not yet sufficient experience to regulate them. Too sensible of the present, and too little sensible of the future, it requires an authority more immediate than that of the laws; it requires to be governed by rewards and punishments, which do not act at long intervals, but continually, and which may be adapted to all the details of its conduct, during the progress of its education.

The choice of a situation in life, or of a profession for a child, also requires that he should be subject to a particular authority. This choice, founded upon personal circumstances, upon expectations, upon talents, or the inclinations of the young pupils; upon their facility of applying to one thing in preference to another—in a word, upon the probability of success; this choice is too complicated to be made by the public magistrate; each case requires particular consideration, and its decision such an acquaintance with particular details as a public magistrate cannot possess.

This power of protection and government, with respect to individuals considered incapable of protecting and governing themselves, constitutes Guardianship: a kind of domestic magistracy, founded upon the manifest wants of those who are subject to it, and which ought to comprehend all the powers necessary for attaining its end, without going beyond it.

The powers necessary for the education of a ward, are those of choosing his station, and fixing his habitation, together with the means of reprimanding and correcting him, without which authority would be inefficacious. These means may be the more easily reduced upon the side of severity, in proportion as their application is more certain, more immediate, and more easily varied, and because domestic government possesses an inexhaustible fund of rewards; since during the period in which every thing is received, there is no concession which may not be made to take the shape of reward.

With regard to the subsistence of the ward, it can only be derived from three sources; either his own property, or from gifts, or from his labour.

If the ward possess property, it is administered in his name and for his advantage by his guardian; and all that he does in this respect, according to prescribed forms, is ratified by the law.

If the ward have no property, he is supported either at the expense of the guardian, as is most commonly the case where the guardianship is exercised by the father or mother of the child; or at the expense of some charitable establishment; or, it may be, by his own labour, as in the case where his services are engaged in an apprenticeship, in such manner that the period of his non-value is compensated for by the subsequent period.

Guardianship being an office purely burthensome, this service is made to fall upon those who have the greatest inclination and facility for discharging it. The father and mother are eminently in this situation. Natural affection generally more strongly disposes them to it than the law; still, however, the law which imposes it on them is not useless. It is because children have been abandoned by the immediate authors of their being, that this abandonment has been constituted a crime.

If the dying father have appointed a guar-

dian to his children, it is presumed that no person has known better than he, who had the means and inclination to supply his place in this respect. Hence his choice should be confirmed, unless there be strong reasons to the contrary.

If the father have not provided a guardian, this obligation should fall upon a relation, attached by interest to the preservation of the family property, and by affection or honour to the welfare and education of the children. In default of a relation, some friend of the orphans should be chosen, who will voluntarily discharge this office: or some public officer should be appointed for this purpose.

It is proper to pay attention to the circumstances which may render guardianship unnecessary:—Advanced age, a numerous family, infirmities, or reasons of prudence and delicacy, for example, complication of interests, &c.

The particular precautions against the abuse of this power belong to the penal laws against offences:—an abuse of authority against the person of the ward, is referable to the class of personal injuries; illicit gains derived from his fortune, to that of fraudulent acquisitions, &c. The only thing to be considered is the peculiar circumstance of the offence, *the violation of confidence*. But though this renders the offence more odious, it is not always a reason for augmenting its punishment; on the contrary, we shall see elsewhere that it is often a reason for diminishing it: the position of the delinquent being more particular, the detection of the offence is more easy, reparation is more certain, and the alarm is less. In the case of seduction, the character of guardian is an aggravation of the offence.

As regards general precautions, guardianship has often been subject to division, by giving the administration of the property to the next of kin who is entitled to succeed to it, who, in character of heir, will have the greatest interest in increasing its value; and the care of the person to some other relation, more interested in the preservation of his existence.

Some legislators have taken other precautions, such as forbidding guardians to purchase the property of their wards, or of permitting to these to re-enter upon their property sold within a certain number of years after attaining their majority. Of these two methods, the first does not appear subject to great inconveniences; the second can only affect the interests of the ward, by diminishing the price of his lands, in as much as the value is diminished to the purchaser himself, in proportion as his possession is rendered precarious, and he is afraid to undertake improvements which might prove disadvantageous to him, by furnishing an additional motive for re-entry. Both these methods appear useless, if the sale of the property be only permitted to be made publicly, and under the inspection of the magistrate.

The most simple method is to allow any person to act in legal matters as the friend of the infant against his guardians, either in cases of malversation as to his property, or of negligence or violence. The law would thus put these feeble beings, who are unable to protect themselves, under the protection of every generous individual.

Pupillage being a state of dependence, is an evil which ought to cease as soon as it is possible, without occasioning a greater evil. But at what age ought this emancipation to take place? This question can only be decided by general presumptions. The English law, which has fixed the epoch at the age of twenty-one years, seems much more reasonable than the Roman law, which has been followed in almost every country in Europe, and which fixed it at twenty-five years. At twenty-five years old, the faculties of the man are developed; he is sensible of all his powers; he yields to advice what he refuses to authority, and will be not longer content to be restrained by the bonds of childhood: hence the prolongation of domestic authority often produces a state of animosity and irritation, equally hurtful to both the parties interested. But there are some individuals who never reach maturity, or who reach it much later than others. Provision may be made for these cases *by interdiction*, which is only a prolongation of guardianship during a prolonged childhood.

CHAPTER IV.

OF PARENT AND CHILD.

We have already said, that in certain respects a parent is the master of his child, and in others the guardian.

In the character of a master, he will possess the right of imposing labour upon his children, and of employing their labour for his own advantage, until the age at which the law establishes their independence. This right which is given to parents, is an indemnity for the trouble and expense of the education of their children. It is desirable that parents should possess an interest, and take pleasure in the education of their children; whilst this advantage which they may find in rearing them, is not less a benefit for the one than the other.

In the character of guardian, a parent possesses all the rights and all the obligations of which mention has been made under that head.

Under the first relation, the advantage of the parent is considered; under the second, that of the child is considered. These two

characters are easily reconciled in the hands of a parent, in consequence of the natural affection which leads him rather to make sacrifices for his children, than to make use of his rights for his own advantage.

It would seem at the first glance, that the legislator need not interfere between parents and children, and that he might rely upon the tenderness of the one, and the gratitude of the others. But this superficial view would be deceptive. It is absolutely necessary, on one side, to limit the parental power, and on the other, to support filial respect by the laws.

General Rule. It is not proper to give any power, from the exercise of which the child may lose more than the father would gain.

When, in Prussia, the right was given to the father, in imitation of the Romans, of preventing his son from marrying without limitation of age, this rule was not observed.

Political writers have fallen into opposite excesses with respect to the parental authority. Some have sought to render it despotic, as among the Romans; others have sought to annihilate it. Some philosophers have thought that children ought not to be subject to the caprice and ignorance of parents; that the state ought to educate them in common. The systems of Sparta, Crete, and the ancient Persians, are cited in support of this plan. It is forgotten that this public education was only provided for a small class of the citizens; because the mass of the people was composed of slaves.

In this artificial arrangement, beside the difficulty of apportioning the expense, and the evil of making those parents support the burthen who no longer stand in need of the service, and who would no longer be actuated by a feeling of tenderness for their children, who would have become almost strangers to them, there would also arise a greater inconvenience to the pupils: they would not be early prepared for the diversity of conditions which they would be called to occupy. The choice even of a profession or business depends upon so many circumstances, upon which parents alone can determine, that no one else can judge of what is suitable for them, nor of the expectations nor of the talents and inclinations of these young pupils. Besides, this plan, in which the reciprocal affection between parents and children is reckoned as nothing, would be productive of the worst effects; by destroying family feeling — by weakening the conjugal union — by depriving the fathers and mothers of those pleasures which they derive from beholding this new generation which springs up around them. They would not seek the future welfare of children, who would no longer be their property, with the same zeal. They would not feel towards them a regard which they could not hope to inspire. Industry, no longer excited by paternal affection, would not possess the same activity. Domestic enjoyments would take a course less advantageous to general prosperity.

As a last reason, it may be added, that the natural arrangement, leaving the choice, the manner, and the expense of education to the parents, may be compared to a series of experiments, having for their object the perfection of the general system. Every thing is advanced and developed by this emulation of individuals; by the difference of views and thoughts — in a word, by the variety of particular impulses. But if every thing were cast in the same mould, if instruction every where partook of the character of legal authority, errors would be perpetuated, and there would be no improvement.

This, perhaps, may be considered too long a dissertation respecting a chimera: but this Platonic notion has in our days led certain celebrated authors astray; and an error which has entangled Rousseau and Helvetius, may easily find other defenders.

CHAPTER V.

OF MARRIAGE.

Inde casas postquam, ac pelles ignemque pararunt,
Et mulier conjuncta viro concessit in unum
Castaque privatæ veneris connubia læta
Cognita sunt, prolemque ex se viderc creatam,
Tum genus humanum primum molescere cœpit.
Luc. V.

Under whatever point of view the institution of marriage is considered, the utility of this noble contract is striking. It is the bond of society, the foundation of civilization.

Marriage, considered as a contract, has drawn women from the hardest and most humiliating servitude; it has distributed the mass of the community into distinct families; it has created a domestic magistracy; it has trained up citizens; it has extended the views of men to the future, through their affection for the rising generation; it has multiplied the social sympathies. In order to estimate all its benefits, it is only necessary to imagine, for a moment, what would be the condition of Man without this institution.

The questions relative to this contract may be reduced to seven: — 1. Between what persons may it be permitted? 2. What shall be its duration? 3. Upon what conditions shall it be made? 4. At what age? 5. Who shall choose? 6. Between how many persons? 7. With what formalities?

§ 1. *Between what persons shall Marriage be permitted?*

If we here follow the guidance of historical facts, we shall be greatly embarrassed, or

rather, we shall be unable to deduce a single fixed rule from among the multitude of contradictory customs. Respectable examples are not wanting for authorising unions which we regard as most criminal, nor for prohibiting many which we consider altogether innocent. Every nation has pretended to follow, in this respect, what is called the law of nature, and has viewed with a kind of horror, as polluted and impure, every thing not conformed to its own matrimonial laws. Let us suppose ourselves ignorant of all these local institutions, and only consulting the principle of utility, let us examine between what persons it is proper to permit, and between whom to prohibit this union.

If we examine the interior of a family, composed of persons who differ among themselves in respect of age, sex, and relative duties, strong reasons will present themselves to our minds for prohibiting certain alliances between many individuals of this family.

I see one reason which directly pleads against allowing such marriages at all. A father, a grandfather, or an uncle holding the place of a father, might abuse his power in order to force a young girl to contract an alliance with him which might be hateful to her. The more necessary the authority of the parent is, the less temptation should be given to its abuse.

This inconvenience extends only to a small number of incestuous cases, and it is not the most weighty. It is in the corruption of manners, in the evils which would result from transitory connexions without marriage, that the true reasons for prohibiting certain alliances must be sought.

If there were not an insurmountable barrier against marriages between near relations, called to live together in the greatest intimacy, this close connexion, these continual opportunities, even friendship itself and its innocent caresses might kindle the most disastrous passions. Families, those retreats in which repose ought to be found in the bosom of order, and where the emotions of the soul, agitated in the scenes of the world, ought to sink to rest — families themselves would become the prey of all the inquietudes, the rivalries, and the fury of love. Suspicion would banish confidence; the gentlest feelings would be extinguished; and eternal enmities and revenges, of which the idea alone makes one tremble, would usurp their place. The opinion of the chastity of young women, so powerful an attraction to marriage, would not know upon what to repose, and the most dangerous snares in the education of youth would be found even in the asylum where they could be least avoided.

These inconveniences may be arranged under four heads: —

1. *Evil of Rivalry.* — Danger resulting from a real or suspected rivalry between a bridegroom and certain persons of the number of his relations or connexions.

2. *Hindrance of Marriage.* — Danger of depriving the daughters of the chance of forming a permanent and advantageous establishment by means of marriage, by diminishing the security of those who may desire to espouse them.

3. *Relaxation of Domestic Discipline.* — Danger of inverting the relations among those who ought to command, and those who ought to obey; or, at least, weakening the tutelary authority, which, for the interests of minors, ought to be exercised over them by the heads of the family, or those who hold their place.

4. *Physical Injury.* — Dangers which may result from premature indulgences, with respect to the development of the powers and the health of the individuals.

Table of Alliances to be prohibited.

A man ought not to marry:

1. The Wife or Widow of his Father, or any other of his Progenitors. Inconveniences	1, 3, 4
2. Any one of his Descendants. Inconveniences - - -	2, 3, 4
3. Any one of his Aunts. Inconveniences - - - -	2, 3, 4
4. The Wife or Widow of any one of his Uncles. Inconveniences	1, 3, 4
5. Any one of his Nieces. Inconveniences - - - -	2, 3, 4
6. Any one of his Sisters. Inconveniences - - - -	2, 4,
7. The descendants of his Wife. Inconveniences - -	1, 2, 3, 4
8. The Mother of his Wife. Inconvenience - - -	1
9. The Wife or Widow of any one of his descendants. Inconvenience - - - -	1
10. The Daughter of the Wife of his Father by a former husband, or of the husband of his Mother by a former wife. Inconvenience - - -	4*

Shall a man be permitted to marry the sister of his deceased wife?

There are reasons for and against. The condemnatory reason is the danger of rivalry during the life of the two sisters. The justifying reason is the advantage of the children. If the mother die, what a happiness for them to find a mother-in-law in their own aunt! What so likely to moderate the natural dislike to this connexion, as so near a relation? This last reason appears to me most weighty.

* The table of alliances to be prohibited to the woman would be necessary, in the text of the law, for greater clearness. It is omitted here as a useless repetition.

But in order to obviate the danger of rivalry, power ought to be given to the wife to interdict her house to her sister. If the wife do not wish to have her own sister near her, what legitimate motive can the husband have for admitting this stranger near to him?

Shall a man be permitted to marry the widow of his brother?

There are reasons for and against, in this as in the preceding case. The condemnatory reason is still the danger of rivalry. The justifying reason is still the advantage of the children. These reasons appear to me to have little force on either side.

My brother has no more authority over my wife than a stranger, and can only see her with my permission. The danger of rivalry appears less great upon his part than that of any other. The opposing reason is reduced almost to nothing. On the other side, what the children have to fear from a father-in-law is trifling. If a mother-in-law be not the enemy of the children of another bed, it is a prodigy; but a father-in-law is commonly their friend, their second guardian. The difference of the condition of the two sexes, the legal subjection of the one, the legal empire of the other, expose them to opposite foibles, which produce contrary effects. The uncle is already the natural friend of his nephews and nieces. They have nothing to gain in this respect if he become the husband of their mother. If they find in a strange father-in-law an enemy, the protection of their uncle is their resource. Do they find in him a friend? They have acquired another protector which they would not have done if their uncle had become their father-in-law. The reasons *for*, and the reasons *against*, having little force on the one side or the other, it seems that the benefit of liberty ought to cause the balance to incline in favour of permitting these marriages.

Instead of the reasons that are given above for prohibiting marriages within a certain degree of relationship, ordinary morality ploughs its way, and decides upon all these points of legislation without the trouble of examination. "These marriages," it says, "are repugnant to nature; therefore they ought to be proscribed."

This argument alone does not furnish a justifying reason, in sound logic, for forbidding any one action whatsoever. In those cases in which the repugnance is real, the law is useless. To what good purpose prohibit what no one wishes to do? The natural repugnance is a sufficient prohibition. But in those cases where the repugnance does not exist, the reason ceases. Ordinary morality has nothing further to say respecting the prohibition of the act in question, since all its argument, founded upon natural distaste, is destroyed by the opposite supposition. If it be proper to conform to nature, that is to say, to the inclination of the desires, it is proper equally to conform to its decisions, whatever they may be. If it be proper to prohibit these marriages when they are disliked, it is proper to permit them when they are approved. Nature deserves not more regard when it hates, than when it loves and desires.

It is very seldom that the passion of love developes itself within the circle of individuals among whom it ought properly to be prohibited: a certain degree of surprise seems necessary for exciting this sentiment, a sudden effect of novelty; and it is this which the poets have cleverly expressed by the ingenious allegory of the bow and arrows, and the blindfolding of Cupid. Individuals, accustomed to be seen and to be known from the age which is incapable of conceiving or inspiring desire, will be seen with the same eyes to the end of life—this inclination will find no determinate period for its commencement. The affections have taken another course; they are, so to speak, a river which has dug its own bed, and which cannot change it.

Nature therefore agrees sufficiently well with the principle of utility: still it is not proper to trust to it alone. There are circumstances which may give birth to the inclination, and in which the alliance might become an object of desire, if it were not prohibited by the laws, and branded by public opinion.

Among the Grecian dynasty of the Egyptian sovereigns, the heir to the throne commonly espoused one of his sisters. This was apparently to avoid the danger of an alliance with the family of a subject, or with the family of a stranger. In such a rank, such marriages may be exempt from the inconveniences attendant upon them in private life. Royal opulence admits a separation and a seclusion, which could not be maintained in a medium station.

Policy has produced some examples almost similar in modern times. In our days, the kingdom of Portugal has approximated to the Egyptian custom; the reigning queen has had for her husband her nephew and subject. But in order to efface the stain of incest, Catholic princes and nobles can apply to an experienced chemist, who changes at pleasure the colour of certain actions. Protestants, to whom this laboratory is shut, have not the faculty of marrying their aunts. The Lutherans have, however, given the example of an extension of privileges.

The inconveniences of these alliances are not felt by those who contract them: the evil is altogether in the example. A permission granted to one, makes every body else

feel the prohibition as tyrannical. Where the yoke is not the same for all, it appears more weighty to those who bear it.

It has been said, that these marriages into the same blood cause the race to degenerate, and that there is a necessity of crossing the race among men, as well as among animals. This objection might have some value, if under the empire of liberty, marriages among relations should become the most common. But it is enough to refute bad reasons; and even this would be too much, if a good cause were not served when the feeble and fallacious arguments by which it is sought to support it are destroyed. Some well-intentioned persons think that they ought not to take from good morals any of its supports, even when they are founded in falsehood. This error is related to that of the devotees, who have thought to serve the cause of religion by pious frauds: instead of strengthening, they have weakened it, by exposing it to the derision of its adversaries. When a depraved mind has triumphed over a false argument, it reckons that it has triumphed over morality itself.

§ 2. *For what period? Examination of Divorce.*

If the law had not determined any thing respecting the duration of the marriage contract; if individuals were permitted to form this engagement, like every other, for a longer or shorter term, — what would be the most common arrangement under the auspices of liberty? Would it be very different from the established rules?

The object of the man in this contract might be only to satisfy a transient passion, and this passion satisfied, he would have had all the advantage of the union without any of its inconveniences. It cannot be the same with the woman: this engagement has for her durable and burthensome consequences. After the inconveniences of pregnancy, after the perils of child-birth, she is charged with the cares of maternity. Hence the union, which confers upon the man pleasures only, is for the woman the commencement of a long circle of pains, whose inevitable termination would be death, if she were not beforehand assured of the cares and protection of a husband, both for herself and the germ which she ought to nourish in her bosom. "I give myself to you," she says to him, "but you shall be the guardian of my condition of weakness, and you shall provide for the preservation of the fruit of our love." Such is the beginning of a society which would be prolonged during many years, if we suppose the birth of only a single child; but other births would form other ties; in proportion as years advance, the engagement is prolonged; the limits which might have been first assigned will have disappeared, and a new career will have opened itself to the pleasures and reciprocal duties of the married persons.

When the mother can no longer hope for more children, when the father has provided for the support of the youngest of the family, will the engagement be dissolved? After a cohabitation of many years, will it be supposed that the married persons will separate? Habit will have entwined around their hearts a thousand and a thousand ties which death only could destroy. The children will form a new centre of union; they will create a new source of pleasures and hopes; they will render the father and mother necessary the one to the other, by the cares and charms of a common affection, which no one could share with them. The ordinary course of the conjugal union would therefore be for the duration of life; and if it is natural to suppose, in the woman, sufficient prudence thus to stipulate with respect to her dearest interests, ought less to be expected from a father or a guardian, who possesses more maturity of experience?

The woman has also a particular interest in the indefinite duration of the connexion: time, pregnancy, suckling, cohabitation itself, — all conspire to diminish the effect of her charms. She must expect to see her beauty decline, at a time when the strength of the man still goes on increasing: she knows, that after having spent her youth with one husband, she would with difficulty find a second; whilst the man would not experience a similar difficulty in finding a second wife. Hence this new clause, which foresight would dictate to her: "I give myself to you; you shall not leave me without my consent." The man demands the same promise; and hence, on both sides, a legitimate contract is founded upon the happiness of the two parties.

Marriage for life is therefore the most natural marriage; the best suited to the wants and circumstances of families; the most favourable for individuals, and for the generality of the species. If there were no laws to ordain it, that is to say, no other laws than those which sanction contracts, this arrangement would be always the most common, because it is that which is most suitable to the reciprocal interests of the persons marrying. Love on the part of the man, love and foresight on the part of the woman, all concur with enlightened prudence and affection on the part of parents, in impressing the character of perpetuity upon the contract of this alliance.

But what should we think if the woman should add this clause: "It shall not be lawful for me to be separated from you, should we come to hate each other as much as we now love one another." Such a condition

would appear to be an act of madness. It is something contradictory and absurd, which shocks at the first glance: every body would agree to regard such a vow as rash, and to think that humanity ought to cause it to be abolished.

But this cruel and absurd clause is not demanded by the woman, is not sought for by the man; it is imposed upon them both, as a condition from which they cannot escape. The law unexpectedly intervenes between the contracting parties: it surprises them in the transports of their youth, in the moments which open all the vistas of happiness. It says to them, "You unite yourselves in the hope of being happy, but I tell you that you enter into a prison, whose door will be closed against you. I shall be inexorable to the cries of your grief, and when you dash yourselves against your fetters, I shall not permit you to be delivered."

To believe in the perfection of the beloved object, to believe in the eternity of the passion which is felt, and which is inspired — such are the illusions which may be pardoned to two children in the blindness of love. But aged lawyers, legislators whose heads are whitened by years, ought not to give place to this chimera. If they believe in this eternity of these passions, to what good purpose interdict a power which no one would ever wish to use? But no: they have foreseen inconstancy, they have foreseen hatred; they have foreseen that the most violent love may be succeeded by the most violent antipathy, and it is with all the coolness of indifference that they have pronounced the eternity of this vow, even when the sentiment which has dictated it shall be effaced by the contrary feeling. If there were a law which permitted an associate, a guardian, a superintendent, a companion, only on condition of never separating from them, every one would exclaim against such tyranny and such folly. A husband is a companion, a guardian, a superintendent, a partner, and still more, all at once; and yet it is only possible in the greatest number of civilized countries to have eternal husbands.

To live under the constant authority of a man that one detests, is already a species of slavery: to be constrained to receive his embraces, is a misery too great to be tolerated even in slavery itself. It has been said, the yoke is reciprocal: — the reciprocity only doubles the misery.

If marriage commonly present to men the only means of fully and peaceably satisfying the imperious desires of love, to deter them from it, is to deprive them of its sweets, is to produce an evil proportionably great. But what greater bugbear can there be than the indissolubility of this contract? Marriage, service, country, whatsoever condition there is a prohibition against quitting — there is a prohibition against entering.

In conclusion, when death is the only means of deliverance, what horrible temptations, what crimes, may not result from a position so terrible? The unknown instances are perhaps more numerous than those which are known; but that which will most frequently take place in this respect, is the *negative offence*. When the crime is easy, even to hearts which are not perverted — when nothing more is necessary for its accomplishment than inaction — if a detested wife and an adored mistress are exposed to the same danger — will the same efforts be made, as sincerely, as generously, for the first as for the second?

It is not proper to dissimulate: there are objections against the dissolubility of marriages. We shall endeavour to collect and to answer them.

First Objection. — "Permit divorce, neither of the parties will regard their lot as irrevocably fixed. The husband will cast his eyes around him to find a wife who would be more advantageous: the woman would make similar comparisons, and form projects for changing her husband. Hence perpetual and reciprocal insecurity would result with respect to this precious kind of property, with regard to which the whole plan of life is arranged."

Answer 1. — This same inconvenience exists in part, under other names, when marriages are indissoluble. According to the supposition, reciprocal attachment is extinct. It is not a new wife that is sought, but a new mistress; it is not a second husband, but another lover. The duties of Hymen, and its prohibitions, too easily eluded, may perhaps serve to excite inconstancy rather than to prevent it. It is well known that prohibitions and constraint serve to stimulate the passions. It is a truth deduced from experience, that even obstacles, by occupying the imagination, by directing the mind to the same object, serve only to strengthen the desire of overcoming them. The reign of liberty produces less wandering fancies than that of conjugal captivity. Render marriages dissoluble, there will be more apparent, but there will be fewer real separations.

2. The inconveniences need not be considered alone: the advantages ought to be regarded also. Each one knowing what he was liable to lose, would cultivate those means of pleasing which originally produced the reciprocal affection. Each will more carefully study the other's character, and the means of managing it. Each will feel the necessity of making some sacrifices of caprice and self-love. In a word, care, attention, complaisance, will be continued in the married state; and that which was done only to obtain love, will be done to preserve it.

3. Marriageable young persons would be less frequently sacrificed by the avarice and cupidity of their relations. It would be necessary properly to consult their inclinations, before forming bonds which would be broken by repugnancies. The real suitability upon which happiness reposes — the relations of age, education, and taste — would then enter into the calculations of prudence. It would be no longer possible to marry the property, as has been said, without marrying the person. Before an establishment were formed, there would be an examination whether it would be durable.

Second Objection. — "Each party regarding the connexion as transitory, would only espouse with indifference the interests, and especially the pecuniary interests of the other. Hence would arise profusion, negligence, and every species of bad management."

Answer. — The same danger exists in commercial partnerships, and yet the danger is very rarely realized. A dissoluble marriage has a bond which these partnerships have not, the strongest, the most durable of all moral ties: affection for their common children, which cements the reciprocal affection of married persons. Among indissoluble marriages, is not this bad management more frequently found than in commercial partnerships? Why? It is an effect of the indifference and distaste which give to married persons, who are tired of each other, a continual desire to escape from themselves, and to seek for new distractions. The moral tie of their children is dissolved; their education, the care of their future welfare, is scarcely a secondary object; the charm of their common interest has vanished; each one, in the pursuit of his own pleasures, troubles himself but little with what will happen after him. Hence, a principle of disunion among married persons introduces negligence and disorder, by a thousand channels, into their domestic affairs; and the ruin of their fortune is often an immediate consequence of the estrangement of their hearts. Under the reign of liberty, this evil would not exist. Before there was a disunion of interests, disgust would have separated the persons.

The facility of divorce tends rather to prevent than to give birth to prodigality. It would produce a dread of giving so legitimate a reason for discontent to an associate whose esteem it is desirable to conciliate. Economy, appreciated at its full value by the interested prudence of both parties, would always have so much merit in their eyes as would cover many faults, and in its favour they would pardon many wrongs. It must also be perceived, that in case of a divorce, that one of the two parties who shall have the character of having behaved ill, and been extravagant, would have much less chance of forming other more advantageous connexions.

Third Objection. — "The dissolubility of marriage will give the stronger of the two parties an inclination to maltreat the feebler, for the purpose of constraining its consent to the divorce."

Answer. — This objection is well founded; it deserves the greatest attention on the part of the legislator. A single precaution, however, is happily sufficient to diminish the danger: in case of maltreatment, liberty to the party maltreated and not to the other. In this case, the more a husband desired a divorce for the purpose of marrying again, the more he would avoid behaving ill towards his wife, for fear lest certain acts should be construed as acts of violence intended to constrain her consent. Gross and brutal methods being forbidden, there remain only gentle methods of engaging her to a separation.

Fourth Objection. — This is drawn from the interest of the children. "What will they do when the law has dissolved the union between the father and the mother?"

Answer. — That which they would have done if death had dissolved it. But in the case of divorce, their disadvantage is not so great: the children may continue to live with the parent whose cares are most necessary for them; for the law, consulting their interest, would not fail to entrust the boys to the father, and the daughters to the mother. The great danger to which children are exposed after the death of a parent, is that of passing under the government of a father or mother-in-law, who shall look upon them with the eyes of an enemy. Daughters especially are exposed to the most vexatious treatment under the habitual despotism of a stepmother. In the case of a divorce this danger does not exist. The boys will have their father for their governor, and the daughters will have their mother. Their education will suffer less than it would have suffered from their domestic strifes and quarrels. If, then, the interest of the children were a sufficient reason for prohibiting second marriages in case of a divorce, it is a still stronger reason for prohibiting them in case of death.

In conclusion, the dissolution of a marriage is an act sufficiently important to be submitted to some formalities, which would at least have the effect of preventing caprice, and allowing the two parties time for reflection. The intervention of a magistrate is necessary, not only for proving that there has been no violence on the part of the man in forcing the consent of the wife, but also for the purpose of interposing a greater or less delay between the demand for a divorce and the divorce itself.

This is one of those questions upon which opinions will be always divided. Every one will be led to approve or condemn divorce according to the good or evil which he has seen resulting from particular cases, or according to his particular interest.

In England, a marriage may be dissolved in case of adultery. But it is necessary to seek for a divorce through many tribunals; and an act of parliament upon this subject costs at least five hundred pounds sterling. Divorce is therefore accessible only to a very limited class.

In Scotland, adultery is a sufficient ground for a divorce. The law is mild in this respect, but it has a rigorous side: it does not permit the culpable party to contract another marriage with the accomplice of his guilt.

In Sweden, divorce is permitted for adultery on both sides: this amounts to the same as if it were permitted upon mutual consent; the man allows himself to be accused of adultery, and the marriage is dissolved. In Denmark, the law is the same, at least when collusion cannot be proved.

Under the Code Frederick, parties might separate by agreement, and afterwards be remarried, upon condition of remaining single a whole year. It would seem that this interval, or a part of this interval, would have been better employed in delay before granting the divorce.

At Geneva, adultery was a sufficient reason; but the separation might also be effected on account of simple incompatibility of character. A woman, by quitting the house of her husband, and retiring to that of her friends and relations, afforded grounds for a demand, which had always the legal effect of a divorce. Divorces were, however, rare; but as they were proclaimed in all the churches, this proclamation acted as a species of punishment or public censure, which was always dreaded.

When marriages were rendered dissoluble in France at the will of the parties, there were between five and six hundred divorces at Paris in two years; but these took place whilst the institution was new, and when, therefore, it would not be possible to judge of its usual operation.

Divorces are not common in those countries in which they have been long authorized. The same reasons which hinder legislators from permitting them, deter individuals from availing themselves of them when they are permitted. The government which interdicts them, takes upon itself to decide, that it understands the interests of individuals better than they do themselves. The effect of the law is evil or null.

In all civilized countries, the woman who has experienced ill-treatment on the part of her husband, has obtained from the tribunals what is called a *separation*. There does not result from this, permission to either of the parties to re-marry. The ascetic principle, the enemy of pleasure, has permitted the mitigation of punishment; but the injured wife and her tyrant are subjected to the same condition. This apparent equality covers great real inequality. Opinion allows great liberty to the stronger sex, but imposes great restraint upon the weaker one.

§ 3. *On what Conditions?*

The only inquiry at present is, what are the matrimonial conditions which, according to the principle of utility, are suitable to the greatest number: for it ought to be lawful for the parties interested in these contracts, to make their own particular stipulations; in other words, the conditions ought to be left to their own will, saving the ordinary exceptions:—

First Condition. — "The wife should submit to the laws of the husband, saving recourse to justice." Master of the wife as to what regards his own interests, he ought to be guardian of the wife as to what regards her interests. Between the wishes of two persons who pass their life together, there may at every moment be a contradiction. The benefit of peace renders it desirable that a pre-eminence should be established, which should prevent or terminate these contests. But why is the man to be the governor? Because he is the stronger. In his hands power sustains itself. Place the authority in the hands of the wife, every moment will be marked by revolt on the part of the husband. This is not the only reason: it is also probable that the husband, by the course of his life, possesses more experience, greater aptitude for business, greater powers of application. In these respects there are exceptions; but the question is, what ought to be the general law?

I have said, "*saving recourse to justice;*" for it is not proper to make the man a tyrant, and to reduce to a state of passive slavery the sex which, by its weakness and its gentleness, has the greatest need of protection. The interests of females have too often been neglected. At Rome, the laws of marriage were only the code of the strongest, and the shares were divided by the lion. But those who, from some vague notion of justice and of generosity, would bestow upon females an absolute equality, would only spread a dangerous snare for them. To set them free, as much as it is possible for the laws so to do, from the necessity of pleasing their husbands, would be, in a moral point of view, to weaken instead of strengthen their empire. The man, secure of his prerogative, has no uneasiness arising from his self-love, and derives enjoyment even from sacrificing it.

Substitute to this relation a rivalry of powers, the pride of the strongest would be continually wounded, and would prove a dangerous antagonist for the more feeble; and placing a greater value upon what was taken, than upon what was still possessed, it would direct all its efforts to the re-establishment of its pre-eminence.

Second Condition.—"The administration should belong to the man alone." This is a natural and immediate consequence of his empire. Besides, it is commonly by his labour that the property is acquired.

Third Condition.—"The right of enjoyment should be in common." This condition is admitted; 1*st*, For the benefit of equality. 2*d*, In order to give to both parties the same degree of interest in the domestic prosperity: but this right is necessarily modified by the fundamental law, which subjects the wife to the authority of the husband.

The diversity of conditions, and the nature of property, would require many details on the part of the legislator. But this is not the place for stating them.

Fourth Condition.—"The wife shall observe conjugal fidelity." The reasons which direct that adultery should be considered as a crime, need not be exposed here; they belong properly to the penal code.

Fifth Condition.—"The husband shall observe similar conjugal fidelity." The reasons for considering the adultery of the husband as criminal will also belong to the penal code: they have less weight, but there are still sufficient reasons for establishing this legal condition.

§ 4. *At what Age?*

At what age should it be lawful to marry? It ought not to be before the age at which the contracting parties can be considered capable of understanding the value of this engagement; and more regard should be paid to this particular, in those countries in which marriages are considered indissoluble. How many are the precautions which ought to be taken, in order to prevent a rash engagement, when repentance would be useless! The right ought not, in this case, to have a period anterior to that at which the individual enters upon the administration of his property. It would be absurd that a man should be able to dispose of himself for ever, at an age at which it is not lawful for him to sell a field of the value of ten crowns.

§ 5. *Who shall choose?*

Upon whom shall the choice of a husband or a wife depend? This question presents an apparent, if not a real absurdity; as if such a choice could belong to any other than the party interested.

The laws ought never to entrust this power to the parents;—they want two things requisite for its beneficial exercise, the requisite knowledge, and a will directed to the right end. The manner in which parents and children see and feel, is not the same; they have not the same interests. Love is the moving principle of youth; the old scarcely feel it. Fortune, in general, is a feeble consideration among children; it is an important one with parents. What the child wishes, is to be happy; what the parent wishes, is that he may also appear to be so. The child would sacrifice every thing for love; but the parents would often sacrifice this interest to every other.

To receive into their family a son-in-law, or a daughter-in-law, whom they dislike, is a disagreeable circumstance; but is it not much more cruel for the children to be deprived of the husband or the wife which would make them happy? Compare the sufferings on both sides. Is there any equality? Compare the probable duration of the life of the parent and the child: see if you ought to sacrifice that which is just commencing, to that which is drawing to a close. Thus much for the simple right to prevent. What shall be said if, under the mask of a parent, an unpitying tyrant should seek to abuse the gentleness and timidity of his child, in order to compel a union with a person that was detested?

The connexions of children depend greatly upon those of their parents. This is partly true as respects the sons, and entirely as respects the daughters. If the parents neglect to use this right; if they do not strive to direct the inclinations of their family; if they leave the choice of their acquaintances to chance,—to whom are the imprudences of their youth to be ascribed? In conclusion, in taking from them the right to bind or to compel, it is not necessary to take from them that of modifying and retarding. Two periods may be distinguished in the marriageable age: During the first, want of consent on the part of the parents ought to suffice for annulling the marriage. During the second, they should still have the right to retard for some months the completion of the contract. This time should be given them, that they might make use of their advice.

There exists a custom sufficiently singular in one country in Europe renowned for the wisdom of its institutions: The consent of the parents is necessary to the marriage of minors, unless the lovers can travel a hundred leagues without being stopped. But if they have the good fortune to cross a small stream, ascend a slight hill, and reach a certain village, they may in a moment pronounce the nuptial vow before the first comer, though he ask them no question—and the marriage is valid, and the parental authority is over-

thrown. Is it for the encouragement of adventurers that a privilege of this kind is allowed to subsist? Is it from a secret desire to weaken the power of parents, or to favour what are otherwise called *unequal matches?*

§ 6. *How many contracting Parties?*

Between how many persons ought this contract to subsist at one time?—in other words, ought polygamy to be tolerated?—Polygamy is either simple or double. It is simple where there is *Polygynia*, a multiplicity of wives; or *Polyandria*, a multiplicity of husbands.

Is polygynia useful or hurtful? Every thing which it has been possible to say in its favour, has only related to certain particular cases, to certain transitory circumstances: when a man, by the sickness of his wife, is deprived of the sweets of marriage, or when, by his profession, he is obliged to divide his time between two residences, as the commander of a vessel, &c.

That such an arrangement may sometimes be desirable to the man, is possible; but it never can be so to the wives. For every man there would always be two wives, whose interest would be sacrificed.

1. The effect of such a license would be to aggravate the inequality of conditions. The superiority of wealth has already too great an ascendancy, and this institution would make it still greater. A rich man, forming an alliance with a woman without fortune, would take advantage of her position to prevent his having a rival. Each of his wives would find herself in possession only of the moiety of a husband, whilst she might have constituted a source of happiness to another man, who, in consequence of this iniquitous arrangement, would be deprived of a companion.

2. What would become of the peace of families? The jealousies of the rival wives would spread among the children. They would form opposed parties, little armies, having each at their head an equally powerful protectrix, at least, with respect to her rights. What a scene of contentions! what fury! what animosity! From the relaxation of the fraternal bonds, there would result a similar relaxation of filial respect. Each child would behold in his father a protector of his enemy. All his actions of kindness or severity, being interpreted by opposite prejudices, would be attributed to unjust feelings of hatred or affection. The education of the children would be ruined in the midst of these hostile passions, under a system of favour or oppression, which would corrupt the one party by its rigours, and the other by its indulgences. In the East, polygamy and peace are found united, but it is slavery which prevents discord: one abuse palliates another; every thing is tranquil under the same yoke.

There results from it an increase of authority to the husband: what eagerness to satisfy him! what pleasure in supplanting a rival by an action which is likely to please him! Would this be an evil or a good? Those who, from a low opinion of women, imagine that they cannot be too submissive, ought to consider polygamy admirable. Those who think that the ascendancy of this sex is favourable to suavity of manners—that it augments the pleasures of society—that the gentle and persuasive authority of women is salutary in a family—ought to consider this institution as very mischievous.

There is no need of seriously discussing polyandria, nor double polygamy. Perhaps too much has been said upon this first subject, if it were not well to show the true foundations upon which manners are seated.

§ 7. *With what Formalities?*

The formalities of this contract ought to refer to two objects: 1*st*, To ascertain the fact of the free consent of the two parties, and of the lawfulness of their union; 2*dly*, To notify and ascertain the celebration of the marriage for the future. It would also be proper to exhibit to both the contracting powers the rights they are about to acquire, and the obligations with which they will be chargeable according to law.

Most nations have attached a great solemnity to this act; and it is not to be doubted but that ceremonies which strike the imagination, serve to impress the mind with the importance and dignity of the contract.

In Scotland, the law, much too easy, does not require any formality. The reciprocal declaration of the man and the woman, in the presence of a witness, is sufficient to render a marriage valid. Hence it is to a village upon the frontier of Scotland, named *Gretna Green*, that minors, impatient of the yoke of their parents or guardians, hasten to emancipate themselves by an off-hand marriage.

In instituting these forms, two dangers ought to be avoided: 1*st*, The rendering them so embarrassing as to prevent a marriage, when neither freedom of consent nor the necessary knowledge are wanting; 2*dly*, The giving to the persons who ought to concur the power of abusing this right, and of employing it to a bad purpose.

In many countries, it is necessary to tarry long in the vestibule of the temple before advancing to the altar, under the title of *affiances:* the chains of the engagement are borne, without its advantages. What purpose does this work of supererogation answer, except the multiplication of embarrassments and snares? The Code Frederick is justly

chargeable, in this respect, with useless restraints. The English law, on the contrary, has, on this occasion, chosen the part of simplicity and clearness: every one knows to what he is bound: a man is either married, or he is not.

APPENDIX.

OF THE LEVELLING SYSTEM.*

"ALL human creatures are born and remain," says the Declaration of Rights, "equal in rights." It has hence been argued, that they ought to be equal in property; and that all the distinctions which have grown up in society in this respect, should be swept away, and every individual placed on the same level in point of actual possessions.

Such a system would, however, be destructive both of security and wealth. It would be destructive of security. What a man has inherited from his ancestors — what he has himself earned, he hopes to keep; and this hope cannot be interrupted without producing a pain of disappointment. But if, of two persons, the one is to take from the other a portion of the property he possesses to-day, because he is the poorer; for the same reason, a third should take a portion of such property from both to-morrow, as being poorer than either; and so on, till all security in the possession of property — all hope of retaining it, were altogether abolished.

As no man could, at this rate, be secure of enjoying any thing for two moments together, no man would give himself the trouble to improve any thing by his labour: all men would live from hand to mouth.

While the levelling process is going on, it is destructive to security; when completed, it is destructive, and that for ever, of national opulence. The wealth of a nation is the sum of the fortunes of individuals; but the sum of the fortunes of individuals is reduced by the levelling system in an infinity of ways. Whatever be the quantum of wealth allowed of, to reduce fortunes to this standard the community must be emptied of all articles of wealth, which cannot exist but in a quantum superior to that standard.

The English nation is, for a nation of any considerable size, generally acknowledged to be the richest, in proportion to the number of the people, of any nation under the sun. But in this richest nation, those who have reckoned its wealth at the highest, have not set down the annual expenditure of its inhabitants, taking even the very richest into the account, at more than £20 a-year each.

If, then, the whole wealth of the nation were divided with the most perfect equality among its inhabitants; and were all of it capable of being thus divided, it would scarcely be more than sufficient to enable every one of them, so long as the stock of it was kept up at the same level, to spend more than £20 a-year. But were such a distribution to be made, an immense multitude of articles — wealth to an immense amount — must necessarily be struck out, as being incapable of division, and thence incapable of entering into the distribution. At 30 years' purchase, a perpetual income of £20 a-year corresponds to a capital or principal sum of £600. All articles, therefore, of a value superior to £600, must either be destroyed at once, or left to perish, sooner or later, for want of being kept up; that is, kept in repair, and properly taken care of.

The following, then, are the articles to the existence of which the system in question would be fatal; and that not only in the first instance, but for ever after during its continuance; and of which the aggregate value must therefore be struck out of the aggregate amount of the national wealth.

1. All buildings above the mark; that is, all that would now be thought to come under the name of considerable buildings — all considerable dwelling-houses, warehouses, manufactories.

2. All furniture, except what is now of the meanest kind — all furniture suitable to the circumstances of a family having more than £20 a-year a-head to live on.

3. All horses, except a few of those at present kept for husbandry. No one nor two in a family could afford to keep a horse, since the expense of that article alone would exceed the family income. All horses fit for military service; consequently, a great part of the manure which is supplied by that valuable species of cattle would be lost. In the earliest, and what are vulgarly called the purest times of the Roman Commonwealth, those whose wealth enabled them to serve on horseback formed an order of men, distinct from and superior to those who served on foot. A commonwealth that admitted of such distinctions, could never be tolerated under this system of equalisation.

4. All considerable libraries. All libraries

* The following Essay is edited from the MSS. of Bentham.

the value of which depended upon their completeness in regard to any particular branch of literature, and of which the characteristic value would be destroyed by the degree of dispersion which the execution of the equalisation plan would necessitate.

5. All considerable collections of natural history; and hence all means of prosecuting that branch of study to advantage would cease.

6. All considerable laboratories and establishments for the prosecution of experimental inquiries with a view to the advancement of agriculture, manufactures, or arts. Hence all means of promoting the advancement, or even preventing the decay of experimental science, would cease.

7. All fortunes capable of affording funds sufficient for the purchase of the constant supply of publications relative to any branch of knowledge at the rate of abundance at which the literary market is supplied with these productions in the present state of things.

8. All fortunes capable of affording funds applicable to the improvement of land, mines, or fisheries, upon an extensive and advantageous scale.

9. All fortunes capable of affording, at an early period of life, a fund in store sufficient for the maintenance of the numbers of children of which the marriage union may in every instance, and in many instances will eventually be productive.

10. The whole value of the labours of those whose industry is at present employed in supplying the productions adapted to the demands of persons in easy circumstances — of all those at present employed as workmen in the different branches of the arts, and of the finer manufactures — all musicians, architects, painters, sculptors, engravers, carvers, gilders, embroiderers, weavers of fine stuffs, florists, and the like. All these, finding nobody rich enough to deal with them, must immediately betake themselves to husbandry or other coarse labour, which their habits of life have disqualified them from exercising to any advantage.

11. The whole of that property which consists in annuities payable by government out of the produce of taxes imposed on the fruits of industry. As those taxes are imposed almost exclusively on superfluities, and all superfluities will be expunged from the book of national wealth, national bankruptcy will be among the necessary and immediate consequences of such a change.

12. Whether it be of advantage or of detriment to the state, or a matter of indifference, that small farms should be laid into large ones, is a controverted point, upon which it is not necessary here to touch. But what can not admit of controversy is, that in a multitude of instances, farms, large or small, would suffer much in value by being broken down into smaller ones. A spring or pond, a convenient communication with the highway or bridge, serves at present for the whole of a farm: divide this farm among a number of proprietors, and only a small part of the original farm, or perhaps no part at all, will now derive any benefit from that conveniency, which before the division was enjoyed by the whole. A certain portion of land fit for one sort of culture, requires certain other portions of land fit for other sorts of culture, to be employed with most advantage; — to so much arable, so much wood, so much meadow land. Under the division, one man has wherewithal to buy the meadow land only, another the wood-land only, and the arable must be divided into several little plots, to come within the quantum of purchase-money which the equalisation plan allows. There are fields, each of them too large for any one purchaser, and which, without new inclosures correspondent to the number of the purchasers, must lose the benefit of inclosure. But the purchaser's capital is all of it expended in the purchase: he has nothing, no fund left for the expenses of inclosure. One house, one set of outhouses, serves for the whole of the farm in its undivided state. Divide it into the £20 a-year portions, he who gets the dwelling-house is perhaps unable to get the outhouses; if he get the house and outhouses, he perhaps is unable to get any of the land; if he get a small scrap of the land, and it can be but a small one, none of the other fragments of farms carved out of the entire farm has any building belonging to it. But without buildings, they will be worth little or nothing; and as to erecting the buildings, it is impossible: what capital each man had, is expended in the purchase of the naked land. But as every man must have a house to live in, and every man who cultivates a farm must have outhouses of some kind or other to lodge the stock and produce of it, a fund for these articles of indispensable necessity must be provided in the first instance, and the fragments of farms must consequently be reduced to the miserable and unproductive pittance, the annual value of which corresponds to the small remnant of capital that remains to buy them. Thus great is the part of the existing mass of wealth which would therefore be destroyed by the division, as being in its own nature incapable of division. But of that which remained, as not being in its own nature incapable of division, a great part again would be consumed in the process. The whole mass of national property would have to come under the hammer; and every time either the sale of an estate or a division of the produce of the sale came to be made, every sale

and every distribution would afford a fresh source of disputes between the plundered and the plundered, between plunderers and plunderers, and between plunderers and plundered, and a fresh demand for the labours, and a fresh harvest for the men of law. Auctioneers with their retainers are already, in the present system of things, in no small number; men of law in greater number than most people would wish to see. On the system in question, the populousness of these predatory professions would be multiplied beyond all measure. An effective tithe of the national property, not to speak of a nominal tithe like the present ecclesiastical one, would scarcely be sufficient for the payment of this enormous mass of unproductive and disastrous services.

Present time, it may be said, is but a point: it is as nothing in comparison with futurity. Admitting that the existing generation might, upon the whole, be losers by such a change, those whose ardent zeal would prompt them to attempt it, may still think, or affect to think, the change an advantageous one for the human species upon the whole. But futurity would have as little reason to rejoice in it as present time.

Opulence is valuable, not merely on its own account, but as a security for subsistence. The rich, were they to deserve proscription because of their riches, deserve to be saved from proscription in quality of bankers to the poor. Estates broken down to the scantling in question, or to any thing like that scantling, would afford no resource against scarcity, or any other calamity, such as fire, famine, or pestilence, that required a considerable treasure in store to be employed to alleviate the load of it. They would afford no fund for the expenses of a war, even of a defensive one.

Along with the whole stock of opulence, would go that branch of security which depends upon the means of national defence. In war, the measure of raising within the year supplies for the service of the year—desirable as such a measure would in the opinion of every one be, if it were practicable, has always been given up as attended with too much difficulty and even danger, to be attempted; and this even in the present state of opulence, when the number of those capable of contributing, and contributing largely, is so great. How would it be when those who were best able to contribute had but £20 a-year to live on? It is now looked upon as impracticable: then it would be beyond measure more so, even though every man had his £20 a-year; much more when that pittance is reduced to perhaps two-thirds, perhaps half, by the various causes of reduction which would be in operation. At the same time, to raise the supplies otherwise than within the year, would be still more palpably impracticable; it would be physically impossible. At present, if so many millions are raised with so much ease within the year by way of loan, it is because there are so many thousands of persons who have each so many thousands of pounds to lend, so many thousands more than they have need to employ otherwise. Upon the equalisation scheme, all these monied men would be no more: nobody would have any thing he could spare for any length of time, much less for ever; no man would have any thing but from hand to mouth.

As to the gainers—(I speak always of the immediate and momentary gainers, for ultimately, as we shall see, there would scarcely be a real gainer left in the nation)—as to the real gainers, if they were to be looked for any where, it would be in the class of the present day-labourers in husbandry. Their employment need not be changed: they would continue labourers in husbandry, with this comfortable difference, as it would be thought, of labouring upon, and for the benefit of their own property, instead of other people's. But even these would for the most part gain nothing but ruin by the change. Their fragments of farms having no buildings on them, would be useless to them till buildings could be erected. A man might farm profitably, and live comfortably a year or two hence, if he were then alive: but in the meantime he would not be able to farm or live at all. The immense multitude of new created farms, all of them without buildings, would require an immense and instant multiplication of the number of workmen concerned in building. But this number, instead of being multiplied, or so much as increased, would be as immediately and permanently reduced: for they too would have their portions, as well as the labourers in husbandry: if they laboured any longer, it would be upon their own property, not upon other people's. If they laboured at all, what inducement would they have to labour upon other people's property, or indeed for other people? What would they get by it? an addition to their respective portions? But that, by the supposition is not to be suffered. No sooner was it become property, than it would come to be divided: no sooner had they got it, than it would be taken from them.

This supposes every body day-labourers and mechanics devoted to industry, disposed to frugality, proof against all temptation to excess, even in the midst of a sudden and unexpected influx of the momentary means of excess and dissipation. But even in the present system of things, this extraordinary degree of moderation is, under such circumstances, hardly to be expected from one in ten among those classes; and under the pro-

posed new system, industry and frugality would be but folly, as we shall presently have occasion to observe.

Who would be the losers — I mean the immediate losers — by such a change? Those, and at first sight it might seem those only, whose present fortunes are above the mark. But these would be but a small part of the real and effective losers. To the list of present proprietors must be added that of all those sons of industry whose present annual earnings are to a certain amount superior in value to the intended common portion; — all professional men in any tolerable practice — physicians, surgeons, lawyers, artists, factors, and the like; — many handicrafts of the superior kind, such as mathematical-instrument makers, millwrights, shipwrights, musical-instrument makers, &c.; and even mere labourers, where the labour is severe, as coal-heavers, &c. earn from £50 to £200 a-year, which the greater part of them are in the habit of spending as it comes. What would be either their present feelings, or even their future advantage, on changing their £50 or £200 a-year for life into a perpetuity even of £20 a-year, supposing the common portion could amount to so much, instead of falling widely short of that mark, as it will soon be seen to do?

Equalisation laws, made at the expense of existing rights and expectations, are alike destructive to present security in respect to property, and to permanent security in respect of subsistence. The desire to establish such laws, or to cause them to be established — the love, the passion for equality, has its root, not in virtue, but in vice; not in benevolence, but in malevolence.

A law of this complexion is a mere act of robbery — but of robbery upon a large scale. In the nature and quality of its effects, it is undistinguishable from the crime that goes by that name; but in point of extent, the mischief of it is as much greater as the power of the government is greater than that of the private robber. The power of the ordinary robber goes not beyond a few moveables; and such moveables as may easily and speedily be conveyed away: the power of the legislating robber extends to immoveables — to every thing — to the future as well as to the present. The power of the ordinary robber extends not beyond the few whom chance may throw in his way: the power of the authorised robber extends over the whole territory of the state.

The passion for equality has no root in the benevolent affections: its root is either simply in the selfish affections, or in the selfish, combined with the malevolent. You being superior to me in wealth or power; my wish is that we may be equal. What is the object of that wish? in what possible way can it have its gratification? In one or other, and only in one or other of two ways: either by raising myself to your level, or by pulling you down to mine. If it be the first only that is in my thoughts, self-interest, and that only, is my ruling motive: if the first and the second, envy conjoined with selfishness are the passions that govern me. The man of benevolence is the man to whom the spectacle of another's happiness is delightful. The lover of equality, in its most refined form, is the man to whose eyes the spectacle of another's prosperity is intolerable. What is the envious man but the same? What, then, is this so much boasted passion for equality? It is a propensity which begins in vice and leads to ruin. In the scale of merit, it is as much below selfishness as selfishness is below the virtue of benevolence.

Equality, were it brought to the highest pitch of perfection to which the hearts of the most sanguine votaries of the equalisation plan could wish to carry it, would still be but the semblance of equality in effect. If equality in point of wealth be desirable, it can only be so in the quality of an efficient cause of equality in point of happiness: at least in as far as the quantum of happiness depends on that of wealth. But of equality in point of wealth, nothing like equality in point of happiness can be the result: not even in so far as happiness depends on wealth. Equality in point of wealth, is equality in point of *means* of happiness: but what does equality of means, in favour of happiness, where equality in point of wants is wanting? The allotments in point of wealth, to be productive of equality in point of happiness, must be not equal, but proportional; not equal to one another, but all of them proportioned to men's respective wants. It is only from proportionality, not from equality in point of wealth, that equality in point of happiness can arise. Where is the equality between me and my robust and healthy neighbour, if I am dying for want of that relief in the way of medicine, sea-bathing, or change of air, which a portion of his allotment out of the estate that was all of it mine, but is now shared with him and others, would have enabled me to procure?

Inequality is the natural condition of mankind. Subjection is the natural state of man. It is the state into which he is born: it is the state in which he always has been born, and always will be, so long as man is man: it is the state in which he must continue for some of the first years of his life, on pain of perishing. Absolute equality is absolutely impossible. Absolute liberty is directly repugnant to the existence of every kind of government.

All human creatures are born and remain, says the declaration of rights, equal in rights.

The child of two years old has as much right to govern the father, then, as the father has to govern the child.

Without the subjection of either the wife to her husband, or the husband to the wife, no domestic society as between man and wife could subsist. Without the subjection of the children to the parent, no domestic society, as between parent and child, could subsist: all children under a certain age must soon perish, and the species become extinct. But the persons thus placed under subjection by non-age, are at least half of the species, and those placed in a similar state by marriage not less than a third of the remaining half. Subjection, then, is the natural and unavoidable state of at least two-thirds of the species; and if it were possible that any thing like independence could subsist among any part of it, it could only be among the remaining third.

As the doctrine of universal independence is repugnant to possibility and the nature of things, so is the doctrine of universal equality absolutely repugnant to the existence of general independence, in as far as independence is possible. Those who are exempt from domestic subjection, can in no intelligible sense be said to be equal in point of rights to those who are under it. If universal equality, then, were the object that ought to be in view, universal subjection, as strict as domestic subjection, would be the only means of obtaining it. Universal equality by independence you cannot possibly have: equality as universal as you please, by subjection as universal as you please, you may have, if you desire to have it, with one exception only, that of the monarch.

The great point is to get any government at all: it is the most useful point, and the most difficult. When once you have got your government, and got it tolerably settled, then is the time to temper it.

But why combat shadows, it may be said, and expatiate upon a scheme of equalisation which you are representing as impracticable? It is only for equality, so far, and so far only as it is practicable, and practicable to advantage, that we contend: for the lopping off the superfluities of overgrown and excessive opulence, for alleviating the sufferings of excessive misery: for planting and maintaining the virtuous race of industrious proprietors, for planting and maintaining plenty without luxury, and independence without insolence. To push any system to an absurd excess, and then give the abuse of the system as the system itself — what can be more uncandid or more inconclusive? Your objections would be just enough if applied to the abuse of the system proposed, but have no force against a moderate and prudent application of it.

My answer is, that it admits not of any moderate or prudent application: that the principle admits not of your stopping anywhere in the application of it: that on pain of abandoning and passing condemnation on the principle, when once the process of forced equalisation is begun, it must go on and be pursued all lengths, even to the lengths that have been described: that the principles publicly avowed by the professed partisans of equality, go all these lengths in the very words, as well as according to the spirit of their most public and most boasted productions: that the doctrine of equal rights is laid down without reserve: that no line is drawn, or attempted to be drawn; that the words employed exclude the drawing of any such line; and that if any line had been drawn, or were to be attempted to be drawn, the attempt would not so much as palliate, much less remedy the evil: and that to the imputation of error it would only add the reproach of inconsistency and dereliction of principle.

To stop at any one point in the career of forced equalisation, would neither afford security to such of the rich as it left unplundered, nor satisfaction to the poor whom it left unenriched. An object being avowed, which can never be attained so long as I have a penny more than the beggar that plies before my door, what assurance can I give myself any day (says the rich man, who hath as yet been spared), that it may not be my turn the next? Will the vagabonds that have as yet got no share, be satisfied with the plunder that has fallen to the lot of their brother vagabonds that are consuming theirs? Where is the justice, where the equality of this pretended equalisation plan? cries the expectant beggar, whom the division has not yet reached. Why have my wants been so long neglected, while those of my neighbour have been so long satisfied? Am I less a citizen than he? is my happiness less a part of the happiness of the community than his? So far from gaining by the change, I am as yet a loser by it. Till now, only the few, now the many, are above me. Till now, my superiors were out of my sight; now they are incessantly at my elbow. Till now, my superiors were all strangers to me; now my equals, my familiars, swell the list. Not a step can I stir without falling in with an acquaintance, revelling in enjoyments, of which, it seems, I am destined never to partake.

As these discontents will arise at every step made in the progress, so will they at every other that can be made, and always with equal reason — or rather with superior and accumulating reason. Every preceding step will have afforded a precedent, and the commencement of a justification of the succeeding ones: what at first was theory, will have been settled into practice: what at first was innovation, will have become establish-

ment: till at length the original race of proprietors having been reduced to nothing, and all hope or possibility of repairing an injustice done to them being annihilated, the opposition made by justice will have ceased: justice will have become indifferent, and as it were neutral: the injustice of going on will not be exceeded by the injustice of stopping. Name who can the point at which the line of stoppage can be drawn. No such line hath as yet been drawn by any man; no such line attempted to be drawn by any man. Let arbitrary power have decreed (and what but power the most arbitrary could decree) that a line of this sort shall be drawn; that bounds of this sort shall be set to the process of equalisation, — what but caprice can draw it? what but corruption will be said or will be thought to have set them?

The argument that turns on the difficulty of stopping is a common one: it is become commonplace: it is open to abuse, and few have been more abused: it has been employed against salutary measures: and the more frequently and the more eagerly employed, as it is one of those general arguments which may be produced against measures which admit of no particular objections. It is more to the taste of the ignorant fool, and of the cowardly, than of the knowing or the brave: it is more apt to be employed in the defence of old abuses, than in the combating of novelties really pernicious.

It is one of those objections that is much better calculated to confirm partisans already gained, than to gain new ones; still more than to make proselytes from partisans engaged on the other side. To say to me (after admitting that as yet I am in a right track,) to say to me, you will find it impossible or difficult to stop, is to say to me, either prudence or fortune will be wanting to you: it is to say to me, that will happen which you are persuaded will not happen. It is to gall, in a multitude of tender points at once, the irritable frame of human vanity. It is to turn a disbelieving ear to my pretensions of present judgment and present forecast; it is to prophesy to me and my friends, a future deficiency in point of prudence and good fortune.

In the present instance, the argument wears a very different complexion, and strikes with a very different degree of force. It is — not that you will find it difficult to stop at a proper place, but that you ought not to stop anywhere: it is — not that you may be drawn on into the road to ruin, but that you can not, in the nature of things, so long as you pursue your intent, stop anywhere short of ruin: it is — not that you may be led on by heat of temper or untoward accidents beyond the bounds which the principle you set out upon has prescribed to you, but that you can not stop anywhere short of ruin without the dereliction of your principle; without a confession by action, more humiliating than any confession by words, that your whole system was from the first, on the whole, and in every part of it, a pernicious one, and the most pernicious of all political systems that ever were or can be devised. Not only the good expected from such a change would be too expensive, but were it ever so desirable, it would be altogether unattainable — at least unmaintainable for two instants together. Past equality does not answer the intention — present equality is the object; and whatever reason there may be for aiming at it at any one period of time, the same reason will there be for maintaining it at every other period of time. A fresh division must therefore be made upon every division that happened in the number of the sharers: a fresh division upon every birth, and upon every death a fresh division; or the inutility and folly of the original division must stand confessed.

Of this perpetual necessity of fresh divisions, what would be the result? Nobody would have any thing he could call his own: all property would in effect be destroyed — all present property, and all prospect of security in respect of property in future: all idea of subsistence except from hand to mouth: all incentive to labour beyond the satisfaction of the necessities of the day; for why should I bestow my labour to-day in the improvement of that property, which may be torn from me to-morrow?

A fresh division would again require to take place every time a person became helpless to such a degree as to be unable to make his own little property (his £15, his £10 a-year, or whatever the original portion of £20 was reduced to) suffice for his own maintenance — a fresh division, or some other arrangement capable of answering the same purpose. Every birth adds, during the age of helplessness, to the sum of burthens; every death, by taking from the sum of burthens, adds relatively to the sum of benefits. But the addition made to the sum of burthens by infirmity happening to a grown person, is much greater than that made by the birth of an infant: the adult requires many times as much as the infant for his sustenance. The portion of the adult, now become helpless, was too small to afford him subsistence without the benefit of his labour to improve it. Being now incapable of all labour, he must either perish, or, to keep him alive, the portion of other people must be laid under contribution to make up the difference. Here, then, comes the necessity of a system to answer the purpose of the present poor-laws, with this difference — that for maintaining

the growing increase of the poor, there remain none but what are poor already. The dispensations of equality have brought back the age of virtue — be it so: but virtue, however it may diminish disease, will not destroy it; virtue will not extirpate the small-pox nor the contagious fever; virtue will not prevent legs nor arms from breaking; virtue will not give robustness nor agility to the extremity of old age.

Equality amongst the members of a community — equality, whatever be the standard portion — includes two points: that no member shall have more than that portion; and that no one shall have less. The first of these points is attainable by the equalisation system to great perfection: the latter not. To the latter, this pure and exalted system is not more competent than the present abusive and corrupt one: it is even much less so. To industry it affords no new encouragement; on the contrary, it takes from it whatever encouragement it has at present. To what purpose should I earn more than the poorest of my fellow-citizens, when so much as I earn more than them, so much will be taken from me. Neither to idleness or to dissipation does it administer any new discouragement; on the contrary, it gives to both of these dispositions encouragement, and that the greatest they can receive. Putting idleness upon a footing of equality in point of future advantage with industry, and dissipation with frugality, it gives to each the portion of present pleasure with which it is attended, clear. Why, so long as I have a penny left, should I refuse the most expensive desire its gratification — when, whatever I dissipate of my own present stock, must be made up to me from that of other people? To what purpose, while I have a penny left, should I plague myself with working — when, so long as I have any thing to pay, others will work for me with pay, and when I have no longer pay to give them, they must work for me without it?

Here, then, is a perpetual race between dissipation and idleness on the one hand, and that plan of division, whatever it be, by which the law of equalisation is carried into execution, on the other: dissipation and idleness continually widening the gap; division of property using its best endeavours to fill it up. But the pace of dissipation is the pace of the racer; the pace of legal division that of the tortoise.

All this while, the members of the community are divided into two classes: the industrious and frugal, slaves toiling for others: the idle and prodigal, lords and masters, enjoying for themselves. Such would be the fruit of the equalisation system, while the execution of it was going on, until a certain portion of the national wealth having been destroyed in a variety of ways, and a certain portion of the national population destroyed by a mixture of famine and excess, the miserable would awaken from their delirium, curse the system and its inventors, and join their endeavours to bring back the former state of things.

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PRINCIPLES OF PENAL LAW.*

PART I.

POLITICAL REMEDIES FOR THE EVIL OF OFFENCES.

CHAPTER I.

SUBJECT OF THIS BOOK.

After having considered offences as diseases in the body politic,† analogy leads us to regard as remedies the means of preventing and repairing them.

These remedies may be arranged under four classes: —

1. Preventive Remedies.
2. Suppressive Remedies.
3. Satisfactive Remedies.
4. Penal Remedies, or simply Punishments.

Preventive Remedies. — The different methods of preventing a crime may be thus called. Of these there are two sorts: Direct methods, applying immediately to a particular offence: Indirect methods, consisting in general precautions against a whole class of offences.

Suppressive Remedies. — These are means which tend to cause an offence to cease — an offence begun, but not completed, and consequently, to prevent at least a portion of the evil.

Satisfactive Remedies are those by which reparation is made, or indemnification given to an innocent person, on account of the evil he has suffered by an offence.

Penal Remedies, or simply Punishments. When the evil has been made to cease, when the party injured has been indemnified, it is still necessary to prevent the recurrence of similar offences, both on the part of the offender and of every one else.

There are two methods by which this end may be obtained: the one by correcting the will; the other by taking away the power to injure. The will is influenced by fear. Power is taken away by physical restraint. To take away from an offender the will to offend again, is to reform him: to take away the power of offending is to incapacitate him. A remedy which ought to act by means of fear, is it called a *punishment?* has it, or has it not, the effect of incapacitating? This depends upon its nature.

The principal end of punishments is to prevent like offences. The past offence is only as one point; the future is infinite. The past offence concerns only one individual; similar offences may affect every one. In many cases, the evil committed is irreparable; but the will to do evil may always be taken away, because, how great soever the advantage of the offence may be, the evil of the punishment may be made to surpass it.

These four classes of remedies may sometimes require different operations; sometimes the same operation will suffice for all.

We shall treat in this Book of Direct Preventive Remedies—of Suppressive Remedies —and of Satisfactitive Remedies. The second part will treat of Punishments, and the third of Indirect Preventive Remedies.

CHAPTER II.

OF DIRECT METHODS OF PREVENTING OFFENCES.

Before an offence is consummated, it may announce itself in various manners: it may pass through degrees of preparation, which often allow of its being stopped before it reaches its catastrophe.

This part of police may be exercised either by powers conferred on all persons, or by special powers delegated to persons in authority.

The powers conferred on all persons for their protection are such as may be exercised before justice intervenes, and may for this reason be called *antejudicial methods.* Such is the right of opposing by force the execution of an apprehended offence; the seizing a suspected person, and keeping him in custody; the taking him before the judge; the using force; the sequestering in responsible

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* The following work is edited from the Traités de Legislation published by Dumont, and the original MSS. of Bentham.

† See Introduction to Morals and Legislation.

hands any thing supposed to be stolen, or which may be expected to be destroyed; the arresting all the assistants as witnesses; the requiring the aid of every one, in order to conduct before the magistrates those who may be suspected of evil designs.

The obligation of rendering such services might be imposed, and every citizen required to render them, as one of the most important duties in society: it might also be well to establish rewards for those who have assisted in preventing an offence, and delivering the offender into the hands of justice. Will it be said, that these powers may be abused, and that individuals might use them for the purposes of depredation? Such danger is imaginary. This affectation of order and publicity could only oppose their designs, and expose them too manifestly to punishment.

General Rule. — There is not much danger in granting rights which can only be enjoyed by an exposure to all the inconveniences of their exercise in case they should not be recognised.

To refuse to justice the assistance it may derive from all these means, would be to suffer an irreparable evil, from the fear of an evil which could be repaired.

Independently of these powers, which ought to belong to all, there are others which only belong to magistrates, and which may be of great use in preventing offences which are apprehended.

1. *Admonition.* — It is a simple lesson, but given by a judge, cautioning the suspected individual, showing that he is observed, and recalling him to his duty by a respectable authority.

2. *Threatening.* — This is the same method, but enforced by the menace of the law. In the first, it is the paternal voice which uses the language of persuasion: in the second, it is the magistrate who intimidates by the language of severity.

3. *Promises required of keeping from a certain place.* — This method, applicable to the prevention of many offences, is particularly so to quarrels, personal offences, and seditious practices.

4. *Partial Banishment.* — Prohibition to the suspected individual to present himself before the threatened party, to be in the same dwelling-house, or in any other place intended as the theatre of the crime.

5. *Bail.* — Obligation to furnish bondsmen, who will engage to pay a fine in case of contravention of the separation required.

6. Establishment of *Guards* for the protection of persons or things threatened.

7. *Seizure* of arms or other instruments intended to be employed in the apprehended offence.

Besides these general methods, there are some which apply specially to certain offences. We shall not here enter into these details of police and administration. The choice of these methods, the occasion, the manner of applying them, depend upon a great number of circumstances; on the other hand, they are sufficiently simple, and almost always pointed out by the nature of the case. In case of injurious defamation, the writings may be seized before publication. With respect to unwholesome eatables, liquors, or medicines, they may be destroyed before they are made use of. Judicial visits and inspections may serve to prevent frauds, clandestine acts, and smuggling.

These kinds of cases rarely admit of precise rules. Much must necessarily be left to the discretion of the public officers and judges; but the legislator ought to give them instructions, to hinder the abuse of their arbitrary powers.

These instructions should be framed upon the following maxims: The more rigorous the means employed, the more scrupulous should they be in their use. More may be done, in proportion to the grandeur of the offence apprehended and its apparent probability — in proportion also as the offender appears more or less dangerous, and as he has greater or less means of accomplishing his evil designs.

There is one limit which ought never to be neglected: "No method of prevention should be employed, which is likely to cause a greater mischief than the offence itself."

CHAPTER III.

OF CHRONIC OFFENCES.

HAVING treated of suppressive remedies, that is to say, of the methods of causing offences to cease, let us see what are the offences which can thus be made to cease, for all have not this capacity, and those which have, have it not in the same manner.

The possibility of causing an offence to cease, supposes a duration sufficiently great to admit of the intervention of justice. But all offences have not this duration: some have a transient effect; the effect of others is permanent. Homicide and rape are irreparable: theft may last only a moment; it may also last for ever, if the thing stolen have been consumed or lost.

It is necessary to distinguish the circumstances under which offences have a greater or less duration, because they affect the suppressive methods which are applicable to them respectively.

1. An offence acquires duration, by the simple continuance of an act capable of ceasing at each moment, without ceasing to have been an offence. The detention of a person,

the concealment of any thing, are offences of this nature. First class of chronic offences, *ex actu continuo.*

2. Is the design to commit an offence, regarded as an offence? it is clear, that the continued design will be a continued offence. This class of offences may coincide with the former, *ex intentione persistente.*

Among other offences which possess duration, are the greater number of negative offences, of those which consist of omissions: not to provide for the nourishment of a child with which one is chargeable; not to pay his debts; not to surrender to justice; not to discover his accomplices, not to put an individual into possession of a right which belongs to him. Third class of chronic offences, *ex actu negativo.*

4. There are some corporeal works, of which the existence is a prolonged offence: A manufacture injurious to the health of a neighbourhood; a building which obstructs a road; a bank which contracts the course of a river, &c. Fourth class of chronic offences, *ex opere manente.*

5. The productions of the mind may possess the same character, through the intervention of printing. Such are libels, pretended histories, alarming prophecies, obscene prints; in a word, every thing which presents to the eyes of the citizens, under durable signs, ideas which ought not to be presented to them. Fifth class of chronic offences, *ex scripto et similibus.*

6. A train of actions may possess a character of unity, in virtue of which, he who performs them is said to have contracted a habit. Such are the coining of money; of the processes prohibited in a manufacture; smuggling in general. Sixth class of chronic offences, *ex habitu.*

7. There is a kind of duration in certain offences, the which, though they differ among themselves, take a character of unity, from the one having been the occasion of the other. A man having committed waste in a garden, beats the proprietor, who comes to oppose him; he follows him into the house, insults his family, destroys his furniture, kills his favourite dog, and continues his depredations. Thus an indefinite series of offences is formed, during the continuance of which, opportunity may occur for the intervention of justice. Seventh class of chronic offences, *ex occasione.*

8. There is a kind of duration in the case of many offenders, who either, with or without concert, pursue the same object. Thus, of a confused mixture of acts of destruction, threats, verbal and personal, injuries, insulting cries and provoking clamours, is formed the sad and terrible compound called tumult, riot, insurrection — forerunners of rebellion and civil wars. Eighth class of chronic offences, *ex co-operatione.*

Chronic offences are liable to have their catastrophe. The projected offence terminates in the consummated offence. Simple corporal injuries have for their natural termination, irreparable corporal injuries and homicide. With respect to imprisonment, there is no crime which it may not have for its object: to unloose an inconvenient matrimonial connexion — to accomplish a project of seduction — to suppress a testimony — to extort a secret — to hinder the reclaiming of property — to obtain forced assistance in an outrageous enterprise; — in a word, imprisonment may always have some particular catastrophe, according to the design of the offender.

In the course of a criminal enterprise, the end may be changed as well as the means. A thief surprised may, from fear of punishment, or regret for having lost the fruit of his crime, become an assassin.

It belongs to the foresight of the judge to represent to himself, in each case, the probable catastrophe of the offence commenced, in order to prevent it by a prompt and well-directed interposition. In order to determine the punishment, he ought to regard the intentions of the offenders: in applying preventive or suppressive remedies, he ought to regard all the probable consequences, as well those which have been intended, as those which have been neglected or unforeseen.

CHAPTER IV.

OF SUPPRESSIVE REMEDIES FOR CHRONIC OFFENCES.

THE different kinds of chronic offences require different suppressive remedies. These suppressive means are the same as the preventive means, of which we have already given a catalogue. The difference lies only in the time of their application.

In some cases, the preventive means correspond so exactly with the nature of the offence, that it is scarcely necessary to point them out. It is clear that injurious imprisonment requires liberation — that theft requires restoration in kind. The only difficulty is to know where to find the thing or the person detained.

There are other offences, such as seditious mobs, and certain negative offences—in particular, the non-payment of debts, which require more far-fetched means for their suppression. We shall have occasion to examine these under their proper heads.

The evil of dangerous writings is more difficult to suppress. They hide themselves — they re-appear; they spring up with new

vigour after the most rigorous proscriptions. We shall find among the *indirect methods*, those which are most efficacious in opposing them.

Greater latitude must be left to the magistrate with respect to suppressive means, than with respect to preventive means. The reason is clear. Is an offence to be suppressed? there is a crime already proved, and a punishment appointed in consequence? Nothing is risked in making it cease, so long as what would be done for its punishment is not exceeded. Is an offence to be prevented? too many scruples can hardly be felt: there may be no such offence in agitation; it may be attributed to the wrong person; it may be that the individual suspected acts only with a good intention, and, instead of becoming culpable, will stop of himself. All these possibilities require a more gentle and regulated procedure, in proportion as the apprehended crime is problematical.

Particular means for preventing or suppressing illegal detention or deportation.

These means may be reduced to the following precautions: —

1. The keeping a register of all places in which persons are confined, without their consent: Prisons, hospitals for the insane and idiots, and private houses into which invalids of this class are received.

2. The keeping a register of the cause of the detention of each prisoner; the not permitting the detention of a madman but after a judicial consultation of physicians, signed by them. These two registers, preserved in the tribunals of each district, should be publicly exposed, or at least allowed to be freely consulted by every body.

3. To determine upon some signal which should, as much as possible, be in the power of every person who is carried off, to the effect of authorizing the passers by to call the ravishers to account; to accompany them if they declare that they wish to carry the prisoner before the judges; or to take them thither themselves, if they have a different intention.

4. To grant to every one the right to apply for the opening of every house in which he suspects that the person he seeks for is detained against his will.

CHAPTER V.

OF MARTIAL LAW

In England, in the case of seditious mobs, they do not begin with military assassination: warning precedes punishment; martial law is proclaimed, and the soldier cannot act till after the magistrate has spoken.

The intention of this law is excellent: but does the execution correspond with it? The magistrate is to go into the midst of the tumult, and read a long and tiresome formula which no one understands; and woe be to those who, an hour afterwards, are in that place! they are declared convicted of a capital offence. This statute, dangerous to the innocent, difficult to be executed against the guilty, is a compound of weakness and violence.

At the moment of disorder, the presence of the magistrate ought to be announced by some extraordinary sign. The *red flag*, so famous in the French revolution, had a great effect upon the imagination. In the midst of clamour, the ordinary means of language do not suffice. A multitude can only use their eyes: their eyes should therefore be addressed. A speech requires attention and silence, but visible signs have a rapid and powerful operation: they speak the whole at once; they have only one meaning, which cannot be equivocal: an intentional noise, a concerted report, cannot prevent their effect.

Besides, words lose their influence from a crowd of unforeseen circumstances. Is the speaker hated, the language of justice becomes hateful when uttered by him? His character, his behaviour, his first appearance, are these ridiculous? this ridicule extends to his functions, and degrades them — another reason for speaking to the eyes by respectable symbols, which are not subject to the same caprices.

But as it may be necessary to add words to signs, a speaking trumpet is essentially necessary. Even the singularity of this instrument would contribute to give more eclât and dignity to the orders of justice, by removing all idea of familiar conversation, by impressing the conviction that it was not the simple individual himself who was heard, but a privileged minister, the herald of the laws.

This method of making one's self heard at a distance, has been long employed at sea, where distance, the noise of the winds and the waves, have made the weakness of the voice sensible. Poets have often compared a people in commotion to the sea in a storm: ought this analogy to be acknowledged only as a source of amusement? It would be of much greater importance in the hands of justice.

The orders should be in few words — nothing which appears like ordinary discourse or discussion — no reference to the king — but to justice alone. The head of the state may be justly or unjustly an object of aversion — this aversion may even be the cause of the tumult: to recal this idea would be to inflame the passions, instead of calming them. If he be not odious, why expose him

to the liability of becoming so? Every favour, every thing which bears the character of benevolence, ought to be represented as the work of the father of his people. All rigour, all acts of severity, need be attributed to no one. The hand which acts may be artfully hidden. They may be thrown upon some creature of the imagination, some animated abstraction — such as justice, the daughter of necessity and mother of peace, whom men ought always to fear, but never to hate, and who always deserve their first homage.

CHAPTER VI.

OF THE NATURE OF SATISFACTION.

WHAT is satisfaction? A benefit received in consideration of an injury. If it refer to an offence, satisfaction is an equivalent given to a party injured, on account of the injury he has suffered.

Satisfaction is *plenary*, when, upon adding up the two sums — the one of the evil suffered, the other of the good received — the value of the second appears equal to the value of the first, in such manner, that if the injury and the reparation could be repeated, the event would appear indifferent to the party injured. Does the reparation want any thing in value to make it equal in value to the evil? the satisfaction is only partial and imperfect.

Satisfaction has two aspects or two branches: the *past* and the *future*. Satisfaction for the past is called indemnification; satisfaction for the future consists in making the evil of the offence to cease. Does the evil cease of itself? nature exercises the functions of justice, and the tribunals have nothing in this respect to do.

Has a sum of money been stolen? so soon as it is restored to its owner, satisfaction for the future is complete. It remains only to indemnify him for the past, for the temporary loss he has experienced during the continuance of the crime.

But with respect to a thing wasted or destroyed, satisfaction for the future can only have place by giving to the party injured something similar or equivalent. Satisfaction for the past consists in indemnifying him for the temporary privation.

CHAPTER VII.

REASONS UPON WHICH THE OBLIGATION TO MAKE SATISFACTION IS FOUNDED.

SATISFACTION is necessary in order to cause the evil of the first class to cease, and re-establish every thing in the condition it was in before the offence; to replace the individual who has suffered in the lawful condition in which he would have been if the law had not been violated.

Satisfaction is still more necessary in order to cause the evil of the second class to cease: punishment alone does not effect this. It tends, without doubt, to diminish the number of offenders; but this number, though diminished, cannot be considered as null. The examples of crimes committed more or less publicly, will excite more or less of apprehension. Each observer will there see a chance of suffering in his turn. Is it wished that this feeling of dread should disappear? it is necessary that satisfaction should follow as constantly as punishment. If the crime be followed by punishment without satisfaction, so many offenders punished, so many proofs that the punishment is inefficacious, and consequently so much alarm which presses on society.

But we must make one essential observation here. In order to take away the alarm, it is sufficient that the satisfaction should appear complete to the eyes of the observers, when it may not be so to the eyes of the persons interested.

How shall we judge if the satisfaction be perfect, with respect to him who receives it? The balance in the hands of passion will always incline to the side of interest. To the miser you can never give enough: to the revengeful, the humiliation of his adversary never appears sufficiently great. It is necessary, then, to imagine an impartial observer, and to regard as sufficient the satisfaction which would make him think that, for such a price, he would hardly regret to receive such an injury.

CHAPTER VIII.

OF THE DIFFERENT KINDS OF SATISFACTION.

SIX kinds of satisfaction may be distinguished:

1. *Pecuniary Satisfaction.* — The means of procuring almost all pleasures, money is an efficacious compensation for many evils; but it is not always in the power of the offender to furnish it, nor agreeable to the party offended to receive it. Offer an offended man of honour the mercenary price for an insult, it is a new affront.

2. *Restitution in kind.* — This satisfaction consists either in restoring the thing which has been taken away, or in giving a like thing, or an equivalent, for that which has been taken away or destroyed.

3. *Attestative Satisfaction.* — If the evil result from a falsehood, from a false opinion with respect to a point of fact, the satisfaction is completed by a legal attestation of its truth.

4. *Honorary Satisfaction.* — An operation

which has for its object either to maintain or re-establish, in favour of an individual, a portion of honour, that the offence of which he has been the object has made him lose, or run the risk of losing.

5. *Vindictive Satisfaction.* — Every thing which inflicts a manifest pain upon the offender may yield a pleasure of vengeance to the party injured.

6. *Substitutive Satisfaction* — or satisfaction at the expense of a third party; as when a person who has not committed a crime finds himself responsible in his fortune for him who has committed it.

In determining the choice of the kind of satisfaction to be granted to an injured party, three things should be considered: the *facility* of furnishing it; the nature of the evil to be compensated; and the feelings which may be supposed to belong to him. We shall soon recur to these different heads, for the purpose of considering them more at large.

CHAPTER IX.

OF THE QUANTITY OF SATISFACTION TO BE GRANTED.

So much as the satisfaction wants of being complete, so much evil remains without remedy. What is required to prevent deficiency, in this respect, may be reduced to two rules:—

1. The evil of the offence must be followed in all its parts — in all its consequences, that the satisfaction may be proportioned to it.

With respect to irreparable corporal injuries, two things should be considered: a means of enjoyment, a means of subsistence, has been taken away for ever. It is not possible to bestow compensation in kind, but it is possible to apply to the evil a perpetually recurring gratification.

With respect to homicide, it is necessary to consider the loss sustained by the heirs of the deceased, and to make compensation for it, by a gratification once paid, or periodically paid during a longer or shorter time.

With respect to an offence against property, we have seen, in treating of pecuniary satisfaction, all that it is necessary to observe to make the reparation rise to the amount of the loss.

2. In case of doubt, make the balance incline in favour of him who has suffered the injury, rather than of him who has done it.

All the accidents should be placed to the account of the offender: every satisfaction ought to be rather superabundant than defective. If superabundant, the excess can only serve to prevent like offences, in the character of punishment: if defective, the deficiency always leaves some degree of alarm; and, in crimes of enmity, all the evil not compensated is a subject of triumph for the offender.

Laws have every where been imperfect upon this point. On the side of punishment, excess has been little dreaded: on the side of satisfaction, little trouble has been taken with reference to deficiency. Punishment, an evil which when in excess, is purely mischievous, is scattered with a lavish hand; whilst satisfaction, which altogether produces good, is given with a grudging parsimony.

CHAPTER X.

OF THE CERTAINTY OF SATISFACTION.

THE certainty of satisfaction is an essential branch of security. Whatever diminution there is in this respect, is so much security lost.

What should be thought of those laws which, to the natural causes of uncertainty, add factitious and voluntary ones? It is to obviate this defect that we lay down the two following rules:—

1. The obligation of satisfying shall not be extinguished by the death of the party injured. What was due to the deceased on account of satisfaction, remains due to his heirs.

To make the right of receiving satisfaction depend upon the life of the individual injured, would be to take from this right a part of its value: it is the same as if a perpetual rent was reduced to a life annuity. Its enjoyment can only be obtained by a process which may occupy a long time. As regards an aged or infirm person, the value of this right declines with himself; as regards a dying person, this right is worth nothing.

Besides, if you diminish the certainty on the side of satisfaction, you increase in the delinquent the hope of impunity. You show him, in perspective, a period at which he may enjoy the fruit of his crime: you give him a motive for retarding, by a thousand obstacles, the judgments of the tribunals, or even for hurrying on the death of the party injured. You at least put out of the protection of the laws, the persons who have need of the greatest care — the sick and the dying.

It is true, that supposing the obligation to render satisfaction extinct by the death of the party injured, the offender may be subjected to another punishment; but what punishment would be so suitable as this?

2. The right of the party injured shall not be extinguished by the death of the offender, or of the author of the damage. What was due from him on account of satisfaction, shall be due from his heirs.

To determine otherwise, would be again

to diminish this right, and to encourage crime. That a man, because his death is near, should commit an injustice without any other object than the advantage of his children, is a case which is not very rare.

It may be said, that if the party injured be satisfied after the death of the offender, it is by an equal suffering imposed upon his heir. But there is a wide difference. The expectation of the party injured is a clear, precise, decided expectation, firm in proportion to his confidence in the protection of the laws. The expectation of the heir is only a vague hope. What is its object? Is it the entire inheritance? No: It is only the unknown net produce, after all legitimate deductions. That which the deceased might have spent upon his pleasures, he has spent upon his misdeeds.

CHAPTER XI.

OF PECUNIARY SATISFACTION.

THERE are some cases in which pecuniary satisfaction is demanded by the nature of the offence itself: there are other cases in which it is the only one allowed by the circumstances. It ought to be preferred on the occasions in which it promises to have its greatest effect.

Pecuniary satisfaction is at its highest point of suitability in the cases in which the damage sustained by the party injured, and the advantage reaped by the offender, are equally of a pecuniary nature, as in theft, peculation, and extortion. The evil and the remedy are homogeneous — the compensation may be exactly measured by the loss, and the punishment by the profit of the offence.

This species of satisfaction is not so well founded when there is a pecuniary loss on one side, without any pecuniary profit on the other; as in waste, on account of enmity, by negligence or by accident.

It is still less well founded in the cases in which neither the evil suffered by the party injured, nor the advantage reaped by the author of the crime, can be valued in money; as in injuries which relate to honour.

The more a method of satisfaction is found incommensurable with the damage—the more a method of punishment is found incommensurable with the advantage of the offence — the more are they respectively liable to lose their aim.

The ancient Roman law, which awarded a crown as an indemnification for a box on the ear, did not provide for the security of honour. The reparation had no common measure with the outrage, its effect was precarious, whether as satisfaction or as punishment.

There still exists an English law which is a remnant of barbarous times: *manent vestigia ruris.* A daughter is considered as the servant of her father. Is she seduced, the father can obtain no other satisfaction than a sum of money, the price of the domestic services of which it is considered that he may be deprived by the pregnancy of his daughter.

In personal injuries, a pecuniary indemnification may be suitable or not, according to the fortunes on the one side and the other.

In regulating a pecuniary satisfaction, the two branches of the *past* and of the *future* ought not to be forgotten. Satisfaction for the future consists simply in making the evil of the offence to cease: satisfaction for the past, consists in indemnification for the wrong suffered. The payment of a sum due is satisfaction for the future; the payment of the interest accrued on this sum is satisfaction for the past.

Interest ought to accrue from the moment the mischief which it is intended to compensate happens; from the moment, for example, from which the payment due has been delayed — or the thing has been taken, destroyed, or damaged — or the service which ought to have been rendered has been neglected.

Interests granted on account of satisfaction ought to be higher than the ordinary rate of commerce, at least when evil intention is suspected.

This excess is highly necessary: if the interest were only equal, there would be many cases in which the satisfaction would be incomplete, and other cases in which a profit would remain to the delinquent; a pecuniary profit, if he have wished to procure a forced loan at the ordinary rate of interest; a pleasure of vengeance or enmity, if he have wished to hold the injured party in a state of want, and to enjoy his distress.

For the same reason, compound interest ought to be calculated; that is to say, the interest ought to be added to the capital, each time that the interest ought, according to custom, to become due, since the capitalist, at the expiration of every such term, might convert his interest into capital, or derive some equivalent advantage from it. Leave this part of the damage without satisfaction, there will be, on the part of the proprietor, a loss, and on the part of the delinquent a gain.

Among co-delinquents, the expense of the satisfaction ought to be divided among them according to their fortunes, except when this division ought to be modified according to the different degrees of their criminality. In truth, the obligation to make satisfaction is a punishment, and this punishment would be on the pinnacle of inequality, if co-delinquents of unequal fortunes were taxed equally.

CHAPTER XII.

OF RESTITUTION IN KIND.

RESTITUTION in kind is principally of importance with regard to things which possess a value in affection.*

But it ought to be made on all occasions, if possible. The law ought to ensure to me every thing which is mine, without forcing me to accept equivalents, which are not even such so soon as I dislike them. Without restitution in kind, security is not complete. What security is there for the whole, when there is no security for any part?

A thing taken away, either honestly or dishonestly, may have passed into the hands of an honest acquirer. Shall it be restored to the first proprietor? shall it be continued in the possession of the second? The rule is simple: it ought to remain with him who may be presumed to have the greatest affection for it. Now this superior degree of affection may be easily presumed from the relation which has been borne to it, from the time that it has been possessed, from the services which have been drawn from it, from the care and expense which it has cost. These indications commonly unite in favour of the true original proprietor.†

The preference is equally due to him in the cases in which there is any doubt; for these reasons: — 1. The last proprietor may have been an accomplice, without the proofs of this complicity having been obtained. Is the suspicion unjust? Formed by the law, and not by the man, bearing upon the species, and not upon the individual, it does not produce any impeachment of honour. 2. If the acquirer be not an accomplice, he may be culpable from negligence or temerity, either by omitting the ordinary precautions for verifying the title of the vender, or by giving too easy a belief to slight indications. 3. With respect to weighty offences, such as violent robbery, it is proper to give the preference to the first possessor, in order to strengthen the motives which engage him in pursuit of the offender. 4. Has the spoliation arisen from malice? to leave the thing in the possession of any one besides the stript proprietor, would be to leave the offender in possession of the profit of his crime.

A purchase at a low price ought always to be followed by restitution, on the price being repaid. This circumstance, if it do not prove complicity, is at least a strong presumption of dishonesty. The buyer could not hide from himself the probability of an offence on the part of the seller; for that which causes the low price of stolen goods, is the danger of taking them to an open market.

When the acquirer, being deemed innocent, is obliged, on account of the dishonesty of the seller, to restore any article to the original proprietor, this ought to be accompanied by the payment of a pecuniary equivalent, regulated by the judge.

The simple expense of keeping — for still stronger reasons, improvements and extraordinary expenses — ought to be liberally repaid to the posterior acquirer. This is not only a means of promoting the general wealth; it is also the interest even of the original proprietor. According as this indemnity is granted or refused, the improvement of the article is either promoted or hindered.‡

Neither the original proprietor, nor the posterior acquirer, ought to gain at the expense, the one of the other: the loser ought to have recourse for his indemnity, in the first instance, to the delinquent, afterwards to the subsidiary funds, of which we shall hereafter speak.‖

* Of this kind are immoveables in general; family relics, portraits, works executed by esteemed individuals — domestic animals, antiquities, curiosities, pictures, manuscripts, instruments of music; in fact, all that is unique, or appears to be so.

† If it refer to a thing or an animal which reproduces, a judgment may be formed in the same manner, as to the side on which the superiority of affection will be found with respect to the fruits and the products; as the wine of a particular vine, the foal of a favourite horse, &c. However, the pretensions of the anterior proprietor have not so much force in this case, as in the other. The last possessor is only the second proprietor of the animal or thing which produces, but he is first proprietor of the productions themselves.

‡ It matters not whether the acquirer be honest or dishonest. It is not for him, but for you the true proprietor, that an interest is given to him in taking care of the estate or thing which has fallen into his possession. That he should derive a profit from all the good he does to it, nothing can be more wise. It would be possible to establish a punishment against the omissions which should cause it to perish; but its maintenance will be better secured by offering a reward, or rather an indemnification for, care in its preservation. There are many cases in which it would be difficult to prove the offence of negligence; and besides, when reward finds its natural place, and does not produce danger, reward and punishment together are worth more than punishment alone.

‖ I lose a horse worth thirty pounds; you buy it of a man who sells it to you as his own for ten pounds. In virtue of the above rule, you would be obliged to give it up to me, on receiving from me what you gave for it. I am the loser: It remains for me to recover from the seller my ten pounds, and on his default I ought to have relief from the public treasure. But if, instead of adjudging the horse to me, it had been adjudged to you (which might be reasonable under certain circumstances,) then you ought to be obliged to pay me his full value, otherwise I am made to suffer a loss, in order to procure a gain for you. But in this case, you have your remedy against

When identical restitution is impossible, restitution of a similar thing ought, as far as possible, to be substituted. Suppose two rare medals of the same die: the possessor of one of them, after having got possession of the other, either by negligence or design, destroys or loses it. The best satisfaction in this case, is to transfer the medal which belongs to him, to the party injured.

Pecuniary satisfaction, in offences of this kind, is apt to be found insufficient, or even null. Value in affection is rarely appreciated by third persons. It requires a highly enlightened benevolence, an uncommon philosophy, in order to sympathize with tastes which are not our own.

The Dutch florist, paying in pounds of gold for a tulip bulb, smiles at the antiquary who purchases at a great price a rusty lamp.*

Legislators and judges have often thought like the vulgar: they have applied unpolished rules to what demanded a delicate discernment. To offer, in certain cases, an indemnification in money, is no satisfaction — it is insult. Would gold be taken for the portrait of a beloved object, if stolen by a rival?

Simple restitution in kind leaves a deficiency in the satisfaction, proportioned to the value of the enjoyment lost during the continuance of the offence. How shall this value be estimated? This will be made clear by an example. A statue has been illegally taken away: this statue, sold by auction, would fetch one hundred pounds, according to the opinion of the best judges. Between the taking away and the restitution, a year has elapsed: the interest of money is five per cent.; place to the head of satisfaction for the past, ordinary interest, five pounds; for penal interest (according to chap. xi.) say two and a half; total, seven pounds ten shillings per cent.

In valuing interests, the deterioration, whether accidental or necessary, that the object may have undergone in the interval between the commission of the offence and the fact of restitution, ought not to be neglected. The statue may not necessarily have lost any thing, but a horse of the same price would necessarily have diminished in value. A collection of tables of natural deterioration, year by year, according to the nature of the object, is one of the articles needed in the library of justice.

CHAPTER XIII.

OF ATTESTATIVE SATISFACTION.

THIS method of satisfaction is particularly adapted to crimes of falsehood, from which any opinion results prejudicial to an individual, without its being possible to estimate the amount of the damage or its extent, or even the existence of its effects. So long as the error exists, it is a constant source of actual or probable evil: there is only one method of stopping it; that is, establishing the contrary truth by evidence.

The enumeration of the principal offences of falsehood will naturally find a place here. 1. *Simple mental injuries, consisting in spreading false alarms:* for example, tales of apparitions, ghosts, vampires, sorcery, demoniacs, possessions, &c.; false reports of a nature to fill any individual with fear or sorrow: pretended deaths, bad conduct of parents and relations, conjugal infidelity, loss of goods, &c.; falsehoods likely to alarm a more or less numerous class; as reports of pestilence, invasion, conspiracy, incendiarism, &c.

2. *Offences against reputation*, among which may be distinguished many kinds. *Positive defamation*, by facts set down, or by ingenious libels. *Weakening of reputation*, which consists in weakening what cannot be destroyed; in hiding from the public, for example, a circumstance which would add to the eclât of a celebrated action. *Interruption of reputation*, which consists in suppressing a fact, concealing a work honourable to a certain individual, or in taking from him the opportunity of distinguishing himself, by causing an enterprise to be regarded as impossible or accomplished. *Usurpation of reputation:* All plagiarism, whether by authors or artists, are examples of this.

3. *Fraudulent acquisition.* — Examples: — False reports, for the purpose of stock-jobbing; false reports to influence the price of the negotiable securities of any commercial company.

4. *Disturbance of the enjoyment of the rights attached to a domestic or civil condition.* — Example: The denying to the right possessor, the possession of his condition; of a husband with regard to a certain woman — of wife with respect to a certain man — of child with regard to a certain man or woman; the attributing falsely a like condition to

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the property of the offender, or, on his default, against the public treasure.

* Some years ago a Canary bird gave rise to a lawsuit before one of the Parliaments in France. A journalist, who has given an account of it, amused himself at the expense of both parties, and regarded the whole affair as ridiculous. I am not of his opinion. It is imagination which gives their value to the objects we esteem most precious. In laws made solely in accordance with the universal opinions of men, can too marked an attention be made to the preservation of every thing which constitutes their happiness? Ought this sensibility, which attaches us to the beings which we have reared, which we have become accustomed to, and whose whole affections are fixed on us, to be forgotten? This suit, so frivolous in the eyes of the journalist, was only too serious, since one of the parties sacrificed to it, not only his money, but his probity and his honour. An object esteemed at such a price cannot be called a bagatelle.

one's self; the acting a falsehood of the same kind with respect to any civil condition or privilege.

5. *Hindering acquisition.* — Hindering a man from acquiring or selling, by false reports; disputing the value of any thing or the right to sell it; hindering a person from acquiring a certain condition, as marriage, by false reports, which cause it to be deferred, or not to take place.

In all these cases, the arm of justice would be powerless; forcible methods would be in vain, or imperfect. The only efficacious remedy is an authentic declaration which destroys the falsehood. To destroy the error — to publish the truth — these are functions worthy of the highest tribunals.

What form ought to be given to attestative satisfaction? It may be varied according to all the methods of publicity: printing and publication of the judgment at the expense of the delinquent; placards distributed at the choice of the party injured; publication in the national and foreign journals, &c.

The idea of this satisfaction, so simple and so useful, has been derived from French jurisprudence. When a man had been calumniated, the parliaments almost always ordained that the sentence which re-established his reputation should be printed and placarded at the expense of the calumniator.

But why oblige the delinquent to declare that he has uttered a lie, and publicly to recognise the honour of the party injured? This plan was bad in many respects: it was wrong to prescribe to a man the expression of certain sentiments which might not be his own, and to risk the judicially commanding a lie. It was also wrong to weaken the reparation by an act of constraint; for, finally, what does a retractation made at the command of justice prove, but the weakness and the fear of him who pronounces it?

The delinquent may be the organ of his own condemnation, if it is judged proper to augment his punishment: but this may be done without deviating from the exact truth, provided that the formula which is prescribed to him, expresses the sentiments of justice as being those of justice, and not as his own. "The court has judged that I have advanced a falsehood; — the court has judged that I have swerved from the character of an honest man; — the court has judged that in all this affair my adversary has behaved as a man of honour." This is all that concerns the public and the party injured: it is a sufficiently brilliant triumph for the truth, a humiliation sufficiently great for the guilty. What would be gained by obliging him to say — "I have uttered a falsehood; — I have swerved from the character of an honest man; — my adversary has behaved as a man of honour?" This declaration, stronger than the first in appearance, is much less so in reality. The fear which dictates such disavowals, does not change the real sentiments; and whilst the mouth pronounces them before a numerous auditory, the cry of the heart is heard, so to speak, disavowing them.

With reference to a fact, justice is less liable to be deceived, and the direct avowal of falsehood required from the condemned party in his own name, would be almost always conformed to his inward conviction; but with reference to an opinion, to the opinion of the delinquent, the disavowal commanded of him will be almost always opposed to his inward conviction. In such contests, impartial persons would condemn an individual ten times for each once that he condemned himself. Is he for a moment sufficiently calm to give place to reflection? the triumph of his adversary is before his eyes, he is himself the instrument of its publication, and the irritation of wounded pride would augment the prejudices of his mind. He may be honestly deceived, and you oblige him to accuse himself of falsehood; you place him in a cruel position, in which the more honest he is, the more he will suffer; in which he will be punished the more, the less he deserves it.

CHAPTER XIV.

OF HONORARY SATISFACTION.

We have seen in what manner those offences against reputation, which have falsehood for their instrument, may be remedied: but there are other offences of this class, more dangerous. Enmity has more certain methods of deeply attacking honour: it does not always hide itself in a timid calumny; it openly attacks its enemy, but it attacks him not with violence, which puts him in personal danger. Humiliation is the object in view. The proceeding least painful in itself is often most weighty in its consequences: by doing more mischief to the person, less injury is done to honour. A sentiment of pity must not be excited in favour of the sufferer, since this would produce a feeling of antipathy towards his adversary: he must be made an object of contempt. Hatred has exhausted all its refinements in this species of offences. It is necessary to oppose to them peculiar remedies, which we have distinguished by the name of Honorary Satisfaction.

To perceive this necessity, the nature and tendency of these offences must be examined; the causes of their gravity, the remedies which have at present been found for them in duels, and the imperfection of these remedies. These researches, which relate to all that is most delicate in the human heart, have been almost entirely neglected by those

who have made the laws; they are, however, the original foundations of all good legislation in matters of honour.

In the actual state of manners among the most civilized nations, the ordinary, the natural effect of these offences, is to take away from the offended party a more or less considerable portion of his honour; that is to say, he no longer enjoys the same esteem among his fellows: he has lost a proportional part of the pleasures, the services, the good offices of all kinds, which are the fruits of such esteem; and he may find himself exposed to the disagreeable consequences of their contempt.

But since the evil essentially consists in this change which is produced in the opinions of men in general, it is these who ought to be regarded as its immediate authors. The nominal delinquent makes only a slight scratch, which, left to itself, would soon heal: it is these other persons, who, by the poisons they pour into it, make it a dangerous, and often incurable wound.

At first sight, the rigour of public opinion against an insulted individual appears a revolting injustice. A stronger, or more courageous man, abuses his superiority, and ill treats in a certain manner one whose weakness ought to have protected him: all the world, as by a mechanical movement, instead of being indignant against the oppressor, ranges itself on his side, and ungenerously causes sarcasm and contempt, often more bitter than death itself, to fall upon its victim. At the given signal by an unknown individual, the public emulously precipitates itself upon the devoted innocent, as a ferocious dog waits only the signal from his master to tear a passenger. It is thus that a scoundrel, who wishes to deliver an honest man to the torments of opprobrium, employs those whom the men of the world calls honest people as the executioners of his tyrannical injuries; and as the contempt which an injury attracts is in proportion to the injury itself, this domination of evil doers is so much the more inexcusable as the abuse is more atrocious.

Whether a flagrant injury has been deserved or not, no one deigns to inquire, nor whether its insolent author is triumphant, but how it may be aggravated. It is made a point of honour to oppress the unhappy: the affront he has received has separated him from his equals, and rendered him unclean, as by a social excommunication. Thus the true evil, the ignominy with which he is covered, is much more the work of other men than of the first offender: he only points out the prey, it is they who tear it; he directs the punishment, they are the executioners.

Should a man, for example, be so far carried away as to spit in the face of another in public, what would be the mischief in itself? a drop of water, forgotten as soon as shed. But this drop of water may be converted into a corrosive poison, which shall torment him all his life. What produces this metamorphosis? Public opinion — the opinion which distributes at its own pleasure honour and shame. The cruel adversary well knew that this affront would be the forerunner and the symbol of a torrent of contempt.

A churl, a villain, may at his own will dishonour a virtuous man! He may fill with chagrin and regret the close of the most respectable career! How does he maintain this terrible power? He maintains it because an irresistible corruption has subjugated the first and the purest of the tribunals, that of the popular sanction. By a train of deplorable collusion, all the citizens individually depend for their honour upon the most wicked among them, and are collectively under their orders, to execute their decrees of proscription upon each one in particular.

Such is the process which might be instituted against public opinion, and these imputations would not be without foundation. Mere admirers of strength are often guilty of injustice towards the feeble: but when the effects of offences of this kind are examined to the bottom, it is perceived that they produce an evil independent of opinion, and that the sentiments of the public, with respect to affronts received and tolerated, are not in general so contrary to reason as is believed on the first glance: I say in general, because many cases would be found in which public opinion is unjustifiable.

In order to understand all the evil which results from these offences, they must be considered without reference to any remedies: it must be supposed that there are none. According to this supposition, these offences might be repeated at will; an unlimited career would thus be opened to insolence: the person insulted to-day might be insulted to-morrow and the day after, every day and every hour: each new affront would facilitate the next, and render more probable a succession of outrages of the same class. But in the idea of a corporal insult, is comprehended every act offensive to the person, which can be offered without causing a durable physical evil — every thing which produces disagreeable sensation, uneasiness, or sorrow. But an act which would be scarcely sensible, if unique, may produce by repetition a very painful degree of uneasiness, or even an intolerable torment. I have somewhere read, that from water distilled drop by drop, and falling from a certain height upon the shaven crown of the uncovered head, the most cruel tortures have been produced. "A constant dropping wears away stones," says

the proverb.* Thus, the individual obliged by his relative weakness to submit, at the pleasure of his persecutor, to similar vexations, and deprived, as we have supposed, of legal protection, would be reduced to the most miserable condition. Nothing more is required for establishing on the one part an absolute despotism, and on the other an entire slavery.

But he is not the slave of one, but of all who choose to make use of him. He is the puppet of the first comer, who, knowing his weakness, is tempted to abuse it. Like a Spartan Helot, dependent upon every body, always in fear and suffering — the object of general laughter, and of a contempt which is not even softened by compassion — he is, in a word, below those slaves, because their misfortune was forced upon them, and was the subject of complaint, whilst his degradation is connected with the baseness of his character.

These little vexations, these insults, have, even for another reason, a sort of pre-eminence in tyranny above more violent measures. Violent acts of anger often suffice to extinguish at once the enmity of the offender, and are frequently promptly followed by feelings of repentance, and thus present a termination to the suffering they produce: but a malignant and humiliating insult, far from exhausting the hatred which has produced it, seems on the contrary, to serve to nourish it; so that, it presents itself to the imagination as the avant courier of a train of injuries, so much the more alarming as it is undefined.

What has been said of corporal insults may be applied to threats, since even the first are of no importance except as threatening acts.

Offences by words have not altogether the same character. This is only a vague species of defamation, an employment of injurious terms, of which the signification is not determined, and which varies according to the situation of the persons.† What is shown by these injuries to the party injured, is, that he is believed worthy of the public contempt, without pointing out on what account. The probable evil which may result is the renewal of similar reproaches. It may also be feared, that a profession of contempt, publicly expressed, will lead others to join in it; it is indeed an invitation to which they willingly yield. The pride of censuring — of raising one's self at the expense of the others, — the influence of example — the disposition to believe all strong assertions give weight to these kinds of injuries. But it appears that they principally owe their weight to the neglect with which they are treated by the laws, and to the practice of duelling, a subsidiary remedy, by which the popular sanction has sought to supply the silence of the laws.

It is not astonishing that legislators, fearing to give too much importance to trifles, have left in a state of nearly universal neglect this part of security. The physical evil naturally enough taken as a measure of the importance of the crime, was nearly nothing, and the distant consequences escaped the inexperience of those who established the laws. The duel presented itself to supply this omission. This is not the place for inquiring into the origin, and examining the changes and whimsicalities apparent in this practice.‡ It is enough that the practice of duelling exists, and that, in fact, it applies itself as a remedy, and serves to restrain the enormity of the disorder, which, without it, would result from the negligence of the laws.

This practice once established, the following are its direct consequences:—

The first effect of duelling is to make the evil of the offence in a great measure to cease; that is to say, the shame which results from the insult. The offended person is no longer in that miserable condition in which his weakness exposes him to the outrages of the insolent, and the contempt of all. He is delivered from a condition of continual fear.

* In order to form an idea of the torment which results from the accumulation and duration of trifling vexations, almost imperceptible when alone, it is only necessary to recal the prolonged ticklings, and the persecutions so common in the plays and the quarrels of childhood. At this age, the least quarrels lead to acts of violence: the idea of decorum is not yet sufficiently strong to repress them; but the fickleness and the pity natural to early youth, prevents their being pushed to a dangerous point, and reflection does not give them that bitterness which a mixture of accessory ideas imparts to them in the maturity of life.

† To say that any one is a rascal, is not to reproach him with any one action in particular, but it is to accuse him in general of such conduct as brings a man to the gallows. These offensive words ought to be carefully distinguished from special defamation, from that which has a particular object. This may be refuted — it allows of attestative satisfaction. These offensive words, being vague, do not admit of being so dealt with.

‡ Many circumstances concurred in the age of chivalry to the establishment of duelling. Tournaments, single combats fashioned by glory, designed as amusements, led naturally to challenges of honour. The idea of a particular Providence, derived from Christianity, led to the interrogation of Divine Justice in this manner, and to the reference of quarrels to its decision.

Nevertheless, long before the era of Christianity, duelling was established in Spain as a mode of trial. The following passage from Livy leaves no doubt upon the question:— "*Quidam quas disputando controversias finire nequierant aut noluerant, pacto inter se, ut victorem res sequeretur ferro decreverunt. Quum verbis disceptare Scipio vellet, ac sedare iras: negatum id ambo dicere communibus cognatis; nec alium deorum hominumve quam Martem se judicem, habituros esse.*" Book xxviii. sec. 21.

The stain which the affront had imprinted on his honour is effaced; and if the challenge have immediately followed the insult, this stain will not even have made any impression: it will have had no time to fix itself; for the dishonour consists not in receiving an insult, but in submitting to it.

The second effect of duelling is to act as a punishment, and to oppose itself to the reproduction of like offences. Each new example is a promulgation of the penal laws of honour, and reminds every one that he cannot be guilty of such offensive proceedings, without exposing himself to the consequences of a private combat; that is to say, to the danger of undergoing, according to the event of the duel, either different degrees of afflictive punishments, or even the punishment of death. Hence, the courageous individual who, during the silence of the laws, exposes himself in order to punish an insult, secures the general security by exposing his own.

But, considered as a punishment, duelling is extremely defective.

1. It is not a method which can be employed by every body. There are numerous classes who cannot participate in the protection which it yields; as women, children, old persons, invalids, and those who, from defect in courage, cannot resolve to free themselves from the shame at the price of so great danger. On the other hand, by a peculiarity with respect to this point of honour, worthy of its feudal origin, the superior classes have not admitted those below them to the equality of duelling: the countryman, outraged by a gentleman, cannot obtain this satisfaction. The insult, in this case, may have less weighty effects, but it is yet an insult, and an evil without a remedy. In all these respects, duelling, considered as a punishment, is found *inefficacious*.

2. It is not always even a punishment, because opinion attaches to it a reward which may appear to many superior to all its dangers. This reward is the honour attached to this proof of courage; an honour which has often given greater attractions to duelling than its inconveniences have had power to overcome. There has been a period during which it formed part of the character of a gallant man to have fought at least once. A look, an inattention, a preference, a suspicion of rivalry — any thing was sufficient to men who only sought a pretence, and esteemed themselves a thousand times repaid for the perils they had run, by the applause they obtained from both sexes, with whom, from different reasons, bravery is equally in favour. In this respect, the punishment, amalgamated with the reward, loses its true penal character, and in another manner becomes *inefficacious*.

3. Duelling, considered as a punishment, is also defective from its excess; or, according to the proper expression, which will be explained elsewhere, it is too *expensive* a punishment. It is true, that it is often null, but it may be capital. Between these extremes of every thing and nothing, the individual is exposed to all the intermediate degrees — wounds, scars, mutilations, maiming, or loss of limbs. It is clear, that if a choice could be made with respect to satisfaction for offences of this kind, a preference would be given to a punishment less uncertain and less hazardous, which should not extend to the loss of life, nor be altogether null.

There is another peculiarity in this penal justice, which belongs only to duelling: costly to the aggressor, it is no less so to the party injured.* The offended party cannot avail himself of the right to punish the offender, without exposing himself to the punishment which he prepares for him; and even with a manifest disadvantage, for the chance is naturally in favour of him who has been able to choose his man before exposing himself. Hence this punishment is at the same time *expensive* and ill *founded*.

4. Another particular inconvenience of this duelling jurisprudence is, that it aggravates the evil of the offence itself, in all cases in which the revenge is not sought, unless the impossibility of seeking it is acknowledged. Has the offended party refused to have recourse to it, he is forced to convict himself of two capital faults, — want of courage and want of honour; want of that virtue which protects society, and without which it could not maintain itself, — and want of sensibility to the love of reputation, one of the grand foundations of morality. The offended party finds himself, therefore, under the laws of duelling, in a worse situation than if it did not exist; because if he refuse this sad remedy, it is converted into poison for him.

5. If, in certain cases, duelling, in quality of punishment, be not so inefficacious as it seems it ought to be, it is only because an innocent individual exposes himself to a punishment, which consequently is ill founded. Such are the cases of persons who, from some infirmity arising from sex, age, or health, cannot employ this means of defence. They have no resource, in this condition of individual weakness, except as chance gives them a protector, who has at the same time the will and the power to expose his own

* The Japanese surpass in this respect the men of honour of modern Europe. The European, for the chance of killing his adversary, gives him a reciprocal and equal chance. The Japanese, for the chance of leading him to rip up his own belly, begins by setting him the example.

person, and combat in their stead. It is thus that a husband, a lover, a brother, may take upon themselves the injury done to a wife, a mistress, a sister; and in this case, if the duel becomes an efficacious protection, it is only by compromising the security of a third person, who finds himself charged with a quarrel for a matter to which he is a stranger, and with respect to which he could exercise no influence.

It is certain that, considering duelling as a branch of penal justice, it is an absurd and monstrous practice; but altogether absurd, and altogether monstrous as it is, it cannot be denied but that it accomplishes its principal object — *it entirely effaces the stain which an insult imprints upon honour.* Ordinary moralists, in condemning public opinion upon this point, only serve to confirm the fact. But whether, on account of this result, duelling be justifiable or not, is of no importance: the practice exists, and it has its cause. It is essential to the legislator to discover it: a phenomenon so interesting ought not to remain unknown to him.

The insult, we have said, causes him who is the object of it to be considered as degraded by his weakness and his cowardice. Always placed between an affront and a reproach, he can no longer march with an equal step with other men, and pretend to the same regards; but when, after this insult, I present myself to my adversary, and consent to risk in a combat my life against his, I rise, by this act, from the humiliation into which I had fallen. If I die, I am thereby at least set free from the public contempt, and from the insolent domination of my enemy. If he die, I am thereby free, and the guilty is punished. If he be only wounded, it is a sufficient lesson for him, and those who may be tempted to imitate him. Am I wounded myself, or are neither of us wounded? The combat is not useless: it always produces its effect. My enemy finds that he cannot reiterate his injuries, but at the risk of his life: I am not a passive being which can be outraged with impunity: my courage protects me nearly as much as the law would have done, if it had punished such offences with an afflictive or capital punishment.

But if, when this method of satisfaction is open to me, I patiently endure an insult, I render myself despicable in the eyes of the public, because, by such conduct, there is discovered, on my part, a fund of timidity; and timidity is one of the greatest imperfections in the character of a man. A coward has always been an object of contempt.

But ought this defect of courage to be classed among the vices? The opinion which despises cowardice, is it a hurtful or useful prejudice?

It will be doubted by few but that this opinion is conformed to the general interest, if it be considered that the first wish of every individual is for his own preservation. Courage is more or less a factitious quality — a social virtue, which owes to public esteem, more than to any other cause, its birth and its increase. A momentary ardour may be kindled by anger, but a tranquil and sustained courage is only formed and nourished under the happy influences of honour. The contempt which is felt for cowardice is not, then, a useless sentiment; the suffering which rebounds upon cowards, is not a punishment lavished in pure loss. The existence of the body politic depends upon the courage of the individuals who compose it. The external security of the state against its rivals, depends on the courage of its warriors: the internal security of the state against these warriors themselves, depends upon the courage spread among the mass of the other citizens. In a word, courage is the public soul, the tutelary genius, the sacred palladium, by which alone a people can secure itself from all the miseries of servitude, can retain the condition of manhood, and not fall below the brutes themselves. But the more courage shall be honoured, the greater will be the number of courageous men, the more will cowardice be despised, and the fewer cowards will there be.

This is not all: he who, being able to fight, endures an insult, not only discovers his timidity — he also rebels against the popular sanction, which has established the law, and shows himself, in an essential point, indifferent to reputation. But the popular sanction is the most active and faithful servant of the principle of utility, the most powerful and least dangerous ally of the political sanction. If, then, the laws of the popular sanction agree in general with the laws of utility, the more a man is sensible of reputation, the more his character is ready to conform itself to virtue — the less his sensibility in this respect, the more liable is he to the seduction of every vice.

What is the result of this discussion? In the state of neglect in which the laws, till the present time, have left the honour of the citizens, he who endures an insult, without having recourse to the satisfaction which public opinion prescribes to him, by thus acting exhibits himself as reduced to a state of humiliating dependence, and exposed to receive an indefinite series of affronts: he exhibits himself as devoid of the sentiment of courage, which produces general security, and, indeed, as devoid of sensibility to reputation—sensibility, protectrix of all the virtues, and safeguard against all the vices.

In examining the progress of public opinion with regard to insults, it appears to me, generally speaking, to be good and useful; and

the successive changes which it has made in the practice of duels, have brought them more and more into conformity with the principle of utility. The public would do wrong, or, rather, its folly would be manifest, if, being the spectator of an insult, it immediately passed a decree of infamy against the party insulted. But this it does not do: this degree of infamy takes place only when the party insulted rebels against the laws of honour, and himself signs the decision of his degradation from manhood.

The public is in general* right in this system: the real wrong is on the side of the laws. *First wrong:* the allowing this anarchy to subsist with regard to insults, which has rendered a recurrence to this whimsical and mischievous method necessary. *Second wrong:* the having wished to oppose themselves to the practice of duelling — an imperfect, but the only remedy. *Third wrong:* the having opposed it, only by disproportioned and inefficacious means.

CHAPTER XV.

REMEDIES FOR OFFENCES AGAINST HONOUR.

WE shall begin with the methods of satisfaction for offended honour; the reasons which justify them will follow.

Offences against honour may be divided into three classes: Verbal insults — Corporal insults — Insulting threats. The punishment analogous to the offence ought to operate, at the same time, as a means of satisfaction for the party injured.

List of these Punishments.

1. Simple Admonition.
2. Reading of the sentence against the offender, by himself, in a loud voice.
3. The offender kneeling before the party injured.
4. Speech of humiliation which is prescribed to him.
5. Emblematical robes (with which he may be dressed in particular cases.)
6. Emblematical masks, with a snake's head in cases of fraud — with a Magpie's or a Parrot's head in cases of temerity.
7. The witnesses of the insult, summoned to be witnesses of the reparation.
8. The individuals whose good opinion is of importance to the offender, summoned to the execution of the sentence.
9. Publicity of the judgment, by the choice of the place, concourse of spectators, the printing, the placarding, the distribution of the sentence.
10. Banishment, more or less long, whether from the presence of the party injured, or from that of his friends. — For an insult offered in a public place, as a market, theatre, or church, banishment from these places.
11. For a corporal insult, similar infliction, either by the party injured, or, at his choice, by the hand of the executioner.
12. For an insult offered to a woman, the man might be muffled up in the headdress of a woman, and the like insult might be inflicted on him by the hand of a woman.

Many of these methods are new, and some of them may appear singular: but new methods are necessary, since experience has shown the insufficiency of the old ones; whilst, as to their apparent singularity, it is by this that they are adapted to their end, and designed, by their analogy, to transfer to the insolent offender the contempt which he wished to fix upon the innocent. These methods are numerous and varied, that they may correspond with the number and variety of offences of this kind — that they may be adapted to the gravity of the cases, and furnish suitable reparations to the different social distinctions; for it is not proper to treat in the same manner an insult offered to a common person and to a magistrate, to an ecclesiastic and to a military man, to a young and to an old person. All this parade of speeches, attitudes, emblems, forms, solemn or grotesque, according to the difference of the cases; in a word, these public satisfactions converted into shows, would furnish to the injured party actual pleasures, and pleasures of remembrance, which would compensate for the mortification of the insult.

Observe, that the injury having been caused by some mechanical means, it is proper that similar mechanical means should be employed in the reparation, otherwise it will not strike the imagination in the same manner, and will be incomplete.

Has the offender employed a certain kind of injury for turning the public contempt upon his adversary? it is proper to employ an analogous kind of injury to turn this contempt upon himself. The seat of the evil

* Does the public know the reason which it has for its opinion? Is it guided by the principle of utility, or by a mechanical imitation and an ill developed instinct? Does he who fights, act from an enlightened view of his own and the general interest? These are questions more curious than useful. The following observation may serve to resolve them. It is one thing to be guided by the presence of certain motives, it is another thing to perceive their influence. There is no action or judgment without motive, no effect without a cause. But in order to understand the influence which a motive has over us, it is necessary to know how to direct the mind upon itself, and to anatomize its thoughts: it is necessary to divide the mind as it were into two parts, of which the one is to be occupied in observing the other; a difficult operation, of which, from want of exercise, few persons are capable.

is in opinion: it is in opinion that the remedy must be found. The wounds of this lance of Telepheus can only be cured by the touch of the same lance: it is an emblem of the operations of justice in matters of honour. Has the mischief arisen from an affront? it is only by an affront that it can be repaired.

Let us trace the effect of a satisfaction of this kind. The party injured is reduced to a state of intolerable inferiority before his aggressor; can no longer meet him with security in the same place, and sees in the future only a prospect of repeated injuries; but immediately after the legal reparation, he regains what he had lost, he walks with security, erect, and acquires even a positive superiority over his adversary. How is this change produced? It is because he is no longer seen as a feeble and miserable being, who may be trampled under foot: the power of the magistrate is become his. No one will be tempted to repeat the insult of which the punishment has had so much eclât. His oppressor, who appeared for a moment to overtop him, has fallen from his car of triumph; the punishment he has undergone in the presence of so many witnesses, proves that he is not more to be feared than another man; and there remains nothing of his violence but the remembrance of its chastisement. What can the offended party desire more? If he had the strength of a gladiator, where would be the advantage?

If legislators had always properly applied this system of satisfactions, there would have been no duels, which have only been, and still are, a supplement to the insufficiency of the laws. In proportion as this void in legislation is filled up by measures suited to the protection of honour, the use of duels will diminish; and they will cease entirely, when these honorary satisfactions agree exactly with opinion, and are faithfully administered. In former times, duels have been employed as a means of decision in a great number of cases, in which it would be most highly ridiculous now to employ them. A lawyer, who should send a challenge to his antagonist in order to prove a title, or establish a right, would be esteemed a fool: in the twelfth century, this method would have been esteemed valid. Whence arises this change? From the same cause which has by degrees been operating in jurisprudence. Justice, by becoming enlightened, and establishing laws and forms of procedure, has offered methods of redress preferable to that of duelling.* The same cause will produce the same effects. So soon as the law shall offer a remedy for offences against honour, there will be no temptation to have recourse to an equivocal and dangerous proceeding. Does any one love suffering and death? Certainly not. This sentiment is equally a stranger to the heart of the coward and of the hero. It is the silence of the laws — it is the neglect of justice, which obliges the wise man to protect himself by this sad, but sole resource.

In order that honorary satisfaction may have all the extent and force of which it is susceptible, the definition of offences against honour should have sufficient latitude to embrace them all. It should follow public opinion step by step — should be its faithful interpreter; every thing which it regards as an attack upon honour should be regarded as such. A word, a gesture, a look, is either of them regarded by the public as an insult. This word, this gesture, this look, should suffice, in justice, to constitute it an offence. The intention to injure constitutes the injury. Every thing directed toward a man, to express or to attract contempt towards him, is an insult, and ought to have its reparation.

It is said that these insulting signs, doubtful in their nature, fugitive, and often imaginary, would be too difficult to be described, and that some suspicious characters, seeing an insult where there was none, would cause the innocent to undergo undeserved punishments.

This danger is null, because the line of demarcation is easily traced between real and imaginary injury. It is sufficient, on the requisition of the complainant, to interrogate the defendant respecting his intention, "Did you design, by what you have said or done, to mark such an one with contempt?" If he deny it, his answer, true or false, is sufficient to clear the honour of him who has been, or believes himself to have been, offended. For, has the injury itself been only slightly equivocal? to deny it, is to have recourse to a lie, to acknowledge his fault, to disclose his fear and his weakness — in a word, it is to perform an act of inferiority, and to humiliate himself before his adversary.

In forming the catalogue of offences which possess the character of insults, there are necessary exceptions: care must be taken not to include in the decree of proscription useful acts of public censure — the exercise of the power of the popular sanction. The authority necessary for correction and reprimand must be reserved to friends and superiors. The freedom of history and of criticism must be secured.

CHAPTER XVI.

OF VINDICTIVE SATISFACTION.

THIS subject does not demand many particular rules — every species of satisfaction

* It was in 1305 that Phillippe le Bel abolished duelling in civil cases. He had rendered the parliament sedentary at Paris, and done much for the establishment of judicial order.

naturally bringing in its train a punishment to the defendant, a pleasure of vengeance for the party injured.

This pleasure is a gain: it recals the riddle of Samson; it is the sweet which comes out of the strong; it is the honey gathered from the carcase of the lion. Produced without expense, net result of an operation necessary on other accounts, it is an enjoyment to be cultivated as well as any other; for the pleasure of vengeance, considered abstractedly, is, like every other pleasure, only good in itself. It is innocent so long as it is confined within the limits of the laws; it becomes criminal at the moment it breaks them. It is not vengeance, which ought to be regarded as the most malignant and most dangerous passion of the human heart; it is antipathy, it is intolerance: these are the enmities of pride, of prejudice, of religion, and of politics. In a word, that enmity is not dangerous which has foundation, but that which is without a legitimate cause.

Useful to the individual, this motive is also useful to the public, or, to speak more correctly, necessary. It is this vindictive satisfaction which often unties the tongue of the witnesses; it is this which generally animates the breast of the accuser, and engages him in the service of justice, notwithstanding the trouble, the expenses, the enmities, to which it exposes him; it is this which overcomes the public pity in the punishment of the guilty. Take away this spring, the machinery of the laws will no longer move, or at least the tribunals will only obtain services for money — a means which is not only burthensome to society, but also exposed to very strong objections.

Some commonplace moralists, always the dupes of words, cannot understand this truth. The desire of vengeance is odious; all satisfaction drawn from this source is vicious; forgiveness of injuries is the noblest of virtues. Doubtless, implacable characters, whom no satisfaction can soften, are hateful, and ought to be so. The forgiveness of injuries is a virtue necessary to humanity; but it is only a virtue when justice has done its work, when it has furnished or refused a satisfaction. Before this, to forgive injuries is to invite their perpetration — is to be, not the friend, but the enemy of society. What could wickedness desire more, than an arrangement by which offences should be always followed by pardon?

What, then, ought to be done, with the intention of yielding this vindictive satisfaction? It is proper to do every thing which justice requires to answer the ends of the other satisfactions, and for the punishment of the offence: nothing more is required. The least excess set apart for this object would be an evil in pure waste. Inflict the punishment which is deserved, and the injured party may draw from it the degree of enjoyment which his situation yields, and of which his nature is susceptible.

However, without adding any thing to the gravity of the punishment on this particular account, certain modifications may be given to it, in accordance with what may be supposed the feelings of the injured party, regard being had to his situation and the species of offence. Examples of this kind have been exhibited in the preceding chapter; others will be shown in connexion with the choice of punishments.

CHAPTER XVII.

OF SUBSTITUTIVE SATISFACTION, OR AT THE EXPENSE OF A THIRD PARTY.

In the most common case, it is upon the author of the evil that the expense of satisfaction ought to be fixed. Why? because, when fixed in this manner, it tends, in quality of punishment, to prevent the evil, by diminishing the frequency of the offence: fixed upon another individual, it would not have this effect.

Does this reason no longer exist with regard to the first respondent? does it apply to another in default of the first? The law of responsibility ought to be modified in consequence; or, in other terms, a third person ought to be called upon to pay, instead of the author of the mischief, when he cannot furnish the satisfaction, and when the obligation imposed upon this third party tends to prevent the offence.

This may happen in the following cases: —

1. Responsibility of a master for his servant.
2. ..... a guardian for his ward.
3. ..... a father for his children.
4. ..... a mother for her children, in quality of tutor.
5. ..... a husband for his wife.
6. ..... an innocent person, who profits by the offence.

1. *Responsibility of a Master for his Servant.*

This responsibility is founded upon two reasons; the one of security, the other of equality. The obligation imposed upon the master acts as a punishment, and diminishes the chance of similar misfortunes. He is interested in knowing the character and watching over the conduct of those for whom he is answerable. The law makes him an inspector of police, a domestic magistrate, by rendering him answerable for their imprudence.

Besides, the condition of master almost necessarily supposes a certain fortune; the circumstance of being the party injured, the

object of the misfortune, supposes no such thing: when there is an inevitable evil to be borne by one of two persons, it is most desirable that its weight should be thrown upon him who is best able to bear it.

This responsibility may have certain inconveniences; but if it did not exist, the inconveniences would be still greater. Did a master wish to commit waste on the lands of his neighbour, — to expose him to some accident, — to wreak his vengeance on him, — to make him live in continual uneasiness, he need only choose some vicious servants, whom he might instigate to serve his passions and his enmities, without commanding any thing, without being their accomplice, or without it being possible to find proofs of it; always ready to urge them on, or to disavow them, he might make them the instruments of his designs, and run no risk himself.* By showing them a little more than ordinary confidence— by taking advantage of their attachment and devotedness, of their servile vanity, there is nothing which he may not obtain by general instigations, without exposing himself to the danger of directing any thing in particular; and he would rejoice with impunity over the evil which he had done by the hand of others. "Unhappy that I am!" cried Henry the Second, one day, vexed with the haughtiness of an insolent prelate: "what! so many servants who boast of their zeal, and not one who will avenge me?" The effect of this imprudent or criminal apostrophe was the murder of the archbishop.

But that which essentially diminishes for the master the danger of his responsibility, is the responsibility of the servant. The real author of the mischief, according to circumstances, ought to be the first to bear its disagreeable consequences, as far as he is able, that the negligent or vicious servant may not be able coolly to say, when doing mischief, "It is my master's affair, and not mine."

Besides, the responsibility of the master is not always the same: it ought to vary according to many circumstances, which ought to be examined with attention.

The first thing to be considered is the degree of connexion which subsists between the master and the servant. Is he a day-labourer, or a man engaged by the year? — a workman out of doors, or one dwelling in the house? — an apprentice or a slave? It is clear, that the stronger the connexion is, the more his responsibility ought to be increased. An agent is less dependent upon his principal than a lackey upon his master.

The second thing to be considered is the nature of the work on which the servant is employed. The presumptions against the master are less strong, with regard to work in which his interest would be liable to suffer from the fault of his agents, and they would be stronger in the contrary case. In the first case, the master has already a sufficient motive for exercising his superintendence: in the second, he cannot have this motive; the law must supply it.

3. The responsibility of the master is much greater, if the mischief have happened on account of his service, or during such service; because it is to be presumed that he may have directed it, that he ought to have foreseen the event, and that he might have watched over his servants at this time, more easily than during the hours of their liberty.

There is one case which seems exceedingly to reduce, even if it does not altogether destroy, the strongest reason for responsibility, when the mischief has for its cause a serious offence, accompanied consequently by a proportional punishment. If my servant, for example, having a personal quarrel with my neighbour, set fire to his granaries, ought I to be answerable for a damage that I could not hinder? If the madman do not dread being hanged, will he dread being driven from my service?

Such are the presumptions which serve as a foundation for responsibility: presumption of negligence on the part of the master, presumption of superior wealth on the part of the master above the party injured, &c.; but it ought not to be forgotten, that these presumptions are nothing, when they are contradicted by facts. An accident, for example, has happened by the overturning of a carriage. Nothing is known of the party injured. It is presumed that he is in a situation to receive an indemnity from its owner, who, it is presumed, is in a condition to bear the loss. But what becomes of this presumption, when it is known that this owner is a poor farmer, and the party injured a wealthy noble? that the first would be ruined if he had to pay the indemnity, which is of little consequence to the other. Hence presumptions ought to guide, but they ought never to enslave. The legislator ought to consult them in establishing general rules, but he ought to allow the judge to modify their application according to individual cases.

The general rule establishes the responsibility of the master; but the judge, according to the nature of the circumstances, should change this arrangement, and cause the weight of the loss to fall upon the true author of the evil.

By leaving to the judge the greatest lati-

* There are many methods of doing evil by means of another, without any trace of complicity. I have heard it said by a French counsellor, that when the parliaments wished to save a guilty person, they designedly chose some unskilful person as a reporter, hoping that his unskilfulness would give birth to some means of nullity. This was truly employing ingenuity in the service of prevarication.

tude with respect to this reparation, the greatest abuse which can result will be the occasional introduction of the inconvenience which the general rule would necessarily produce, on whichever side it may be fixed. If the judge favour the author of the mischief on one occasion, and the master on another, he who is improperly treated by the free choice of the judge, is not worse off than if he had been thus improperly treated by the inflexible choice of the law.

In our systems of jurisprudence, these modifications have not been observed. The burden of the entire loss is thrown sometimes upon the servant, sometimes upon the master; from which it results, that sometimes security, and at other times equality, have been neglected, whilst the one or the other ought to have been preferred, according to the nature of the case.

2. *Responsibility of a Guardian for his Ward.*

The ward is not among the number of the goods of the guardian: he is, on the contrary, among the number of his charges. Has the pupil sufficient fortune to furnish the satisfaction? it is not necessary that another should pay it for him. Has he not the means? the guardianship is in this case too weighty a burthen to be surcharged with factitious responsibility. All that ought to be done is to attach to the negligence of the guardian, proved or even presumed, a fine, larger or smaller according to the nature of the proofs, but which ought not to exceed the expense of satisfaction to the party injured.

3. *Responsibility of a Father for his Children.*

If a master ought to be responsible for the faults of his servants, much more ought a father to be so for the faults of his children. Is it possible, and ought the master to watch over those who depend upon him? It is a much more pressing duty upon a father, and much more easy to be fulfilled: he exercises over them, not only the authority of a domestic magistrate, but he possesses all the ascendancy of affection: he is not only the guardian of their physical existence; he may command all the sentiments of their souls. The master may not have been able to restrain or to watch a servant who announces dangerous dispositions; but the father, who might have fashioned at his own will the character and the habits of his children, may be considered the author of all the dispositions which they manifest. Are they depraved? it is almost always the effect of his negligence or of his vices. He ought, therefore, to bear the consequences of an evil which he ought to have prevented.

If it be necessary to add a new reason after so strong a one, it may be said that the children, with the exception of the rights which belong to them as sentient beings, are part of a man's property, and ought to be considered as such. He who enjoys the advantages of the possession, ought to bear its inconveniences: the good much more than compensates for the evil. It would be very singular, if the loss or destruction occasioned by children should be borne by an individual who knows nothing of them, but their malice or their imprudence, rather than by him who finds in them the greatest source of his happiness, and may indemnify himself by a thousand hopes for the actual cares of their education.*

But this responsibility has a natural limit. The majority of a son, or the marriage of a daughter, putting an end to the authority of the father, causes the responsibility which the law throws upon a father to cease. He ought no longer to bear the punishment of an action which he has no longer the power to hinder.

To perpetuate during his whole life the responsibility of a father, as the author of the vicious dispositions of his children, would be cruel and unjust. For, in the first place, it is not true that all the vices of an adult may be attributed to the defects of his education: different causes of corruption, after the period of independence, may triumph over the most virtuous education; and besides this, the condition of a father is sufficiently unhappy, when the evil dispositions of a child, arrived at the age of manhood, have broken out into crime. After all that he has already suffered in the bosom of his family, the pain which he experiences from the misconduct or dishonour of his child, is a species of punishment which nature itself inflicts upon him, and which it is not necessary that the law should aggravate. This would be to spread poison over his wounds, without hope either of repairing the past, or guarding against the future. Those who would justify this barbarous jurisprudence by the example of the Chinese, have not recollected that the authority of the father in that country ceases only with his life, and that it is just that his responsibility should continue as long as his power.

4. *Responsibility of the Mother for her Child.*

The obligation of the mother, in similar cases, is naturally regulated by the rights she possesses.

Is the father still alive? the responsibility of the mother, as well as her power, remain absorbed in that of her husband. Is he deceased? as she takes in hand the reins of domestic government, she becomes responsible for those who are subject to her empire.

* It was a maxim of the Roman law — *Qui sentit commodum sentire debet et onus.*

5. *Responsibility of the Husband for his Wife.*

This case is as simple as the preceding. The obligation of the husband depends on his rights; the administration of their goods belongs to him alone: unless the husband were responsible, the party injured would be without remedy.

As to the rest, the order generally established is supposed here: that order so necessary to the peace of families, the education of children, and the maintenance of manners; that order, so ancient and so universal, which places the wife under the authority of the husband. As he is her head and guardian, he answers for her before the law: he is even charged with a more delicate responsibility before the tribunal of public opinion; but this observation does not belong to our present subject.

6. *Responsibility of an innocent Person who has profitted by the Offence.*

It often happens that a person, without having had any share in an offence, derives from it a sensible profit. Is it not proper that this person should be called upon to indemnify the party injured, if the guilty party cannot be found, or if he be not able to furnish an indemnity?

This proceeding would be conformable to the principles we have laid down, — in the first place, with regard to *security;* for he may have been an accomplice without its having been proved: also with regard to *equality;* for it is more desirable that one person should be simply deprived of a gain, rather than that another should suffer an equal loss.

A few examples will suffice to explain this subject.

By piercing a dike, the land of one party has been deprived of the benefit of the water which he formerly possessed, and it has been given to another. He who comes into the enjoyment of this unexpected advantage, owes at least a part of his gain to him who has suffered loss.

A tenant in possession, whose estate passes to a stranger by entail, has been killed, and has left a family in want. The tenant in tail, who thus comes into a premature enjoyment of the estate, ought to be accountable for a certain satisfaction to the family of the deceased.

A benefice has become vacant, because its possessor has been killed, it matters not how. If he have left a wife and children in poverty, the successor owes them an indemnity proportioned to their necessity, and the enjoyment they had anticipated.*

* It is a common maxim — *Neminem oportet alterius incommodo locupletiorem fieri.*

CHAPTER XVIII.

OF SUBSIDIARY SATISFACTION AT THE EXPENSE OF THE PUBLIC TREASURE.

THE best source from which satisfaction can be taken, is the property of the delinquent, because it fulfils, as we have seen, with a superior degree of suitableness, the functions of a punishment.

But if the delinquent have no fortune, ought the injured individual to remain without satisfaction? No: for the reasons which we have already set down, satisfaction is almost as necessary as punishment. It ought to be made at the expense of the public treasure, because it is an object of public benefit; the security of all is concerned. The obligation upon the public treasure to provide satisfaction, is founded upon a reason which has the clearness of an axiom. A pecuniary burthen, divided among the whole number of individuals, is nothing for each one in comparison with what it would be for each one or a small number.

Is insurance useful in commercial enterprises? it would be no less so in the great social enterprise, where the associates find themselves united by a train of chances, without knowing each other, without choice, without the power of avoiding it, or guarding themselves by their prudence against the multitude of snares which they may mutually prepare. Calamities which arise from crimes, are not less real evils than those which arise from natural causes. If the sleep of the master be sweeter in a house insured against fire, it would be still more so if he were insured against theft. Abstraction made of its abuses, too great extent could hardly be given to a method so perfectible and so ingenious, which renders real losses so light, and which gives so much security against eventual evils.

However, all insurances are exposed to great abuses from fraud or negligence: fraud on the part of those who, in order to obtain unlawful indemnities, feign or exaggerate their losses; negligence, whether on the part of the assurers, who do not take all necessary precautions, or on the part of the assured, who use less vigilance in guarding against losses which are not to be borne by them.

In a system of satisfactions at the expense of the public treasure, there is reason to fear —

1. A secret connivance between the party pretending to be hurt, and the pretended author of the offence, in order to obtain an undue indemnity.

2. Too great security on the part of individuals, who, having no longer to fear the same consequences of crimes, would not make the same efforts to prevent them.

This second danger is little to be dreaded. No one would neglect his actual possessions, a good certain and present, with the hope of recovering, in case of loss, only an equivalent for the thing lost, and even at the most an equivalent. To this let it be added, that this recovery would not be obtained without care and expense; that there must be a transient privation; that he must bear the burthen of prosecution, and act the always disagreeable part of an accuser; and that, after all, under the best system of procedure, success is still doubtful.

There would remain, therefore, sufficient motives for each individual to watch his property, and not to encourage offences by his negligence.

On the side of fraud, the danger is much greater. It cannot be prevented but by detailed precautions, which will be explained elsewhere. As examples, it will be sufficient to point out two opposite cases; one in which the utility of the remedy exceeds the danger of the abuse, the other in which the danger of the abuse exceeds the utility of the remedy.

When the damage is occasioned by an offence, the punishment of which is weighty, and its author is judicially convicted of the crime, it seems that fraud is very difficult. All that the impostor, who pretends to have been hurt, can do to procure an accomplice, is to give him a part of the profits of the fraud: but unless the clearest principles of proportion between crimes and punishments have been neglected, the punishment which the accomplice will have to undergo, would be more than an equivalent to the total profit of the fraud.

Observe, the offender ought to be convicted before the satisfaction is awarded: without this precaution, the public treasure would be pillaged. Nothing would be more common than the tale of imaginary thefts; of pretended robberies committed in a clandestine manner, or during the darkness of the night, or by unknown persons who have escaped. But when it is necessary to have apprehended the guilty, complicity is not easy. The part which it would be necessary to act, is not one of those which is easily performed, in as much as, besides the certainty of punishment for the individual charged with the pretended offence, there would also be a particular punishment in case the imposture should be detected—a punishment to be shared by the two accomplices; and if it be considered how difficult it is to invent a plausible story of an offence altogether imaginary, it may be believed that such frauds would be very rare, if they ever happened.

The danger most to be apprehended is the exaggeration of a loss resulting from a real offence. But it is necessary that the offence should be susceptible of this species of falsehood, and this is a case sufficiently rare.

It appears, therefore, that it may be laid down as a maxim, that in all cases in which the punishment of an offence is weighty, it need not be feared that an imaginary offender will be willing to charge himself with an offence for a doubtful profit.

But, for the opposite reason, when the mischief results from an offence of which the punishment is slight or none, the danger of abuse would be at its height if the public treasure were responsible for it. The insolvability of a debtor is an example. Where is the beggar who would not be trusted, if the public were security for him? what treasury would be able to pay every creditor whose debtors did not actually pay them? and how many false debts would it not be possible easily to suppose?

This indemnification would not only be abusive: it is unnecessary; since, in the transactions of commerce, the risk of loss enters into the price of merchandise, or the interest of money: if the merchant were sure never to lose, he would sell at a lower price; hence, to seek from the public an indemnification for a loss which had been compensated for beforehand, would be to seek to be paid twice over.*

There are other cases in which satisfaction ought to be made at the public expense.

1. Cases of physical calamity, such as inundations, fires, &c. Aids granted by the state in such cases, are not only founded upon the principle, that the weight of the evil, divided among all, becomes more light; they rest also upon this other, that the state, as protector of the national wealth, is interested in preventing the deterioration of the national domain, and ought to re-establish the means of re-production in those parts which have suffered. Such were what have been called the liberalities of Frederick the Great to those provinces which had been desolated by certain calamities: they were acts of prudence and preservation.

2. Losses and misfortunes, the consequences of hostilities. Those who have been exposed to the invasions of the enemy have a right so much the more particular to a public indemnification, as they may be considered as having sustained the attack which threatened all parties, as being, by their situation, the point the most exposed for the common defence.

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* A voluntary subscription, a bank of insurance destined to reimburse losing creditors, might be advantageous, without its being proper for the administrators of the public funds to institute such an establishment. The public funds being the product of constraint, ought to be managed with the greatest economy.

3. Evils resulting from unblameable errors of the ministers of justice. An error in justice is already, by itself, a subject of grief; but that this error, once known, should not be repaired by proportional indemnification, is an overturning of the social order. Ought not the public to follow the rules of equity which are imposed on individuals? is it not shameful that it should employ its power in severely exacting what is due to itself, and should refuse to restore what it owes? But this obligation is so evident, that it becomes obscure by endeavouring to prove it.

4. Responsibility of a community for an offence of violence, committed in a public place in its territory. It is not properly the public treasure which ought to be employed in this case; it is the funds of the district or province, which ought to be taxed for the reparation of a negligence of police.

In case of competition, the interests of an individual ought to have place before those of the revenue: what is due to the injured party, on account of satisfaction, ought to be paid in preference to what is due to the public treasure on account of fine. Ordinary jurisprudence does not decide thus, but it is thus that reason decides. The loss suffered by an individual is an evil felt; the profit to the revenue is a good not felt by any person. What is paid by the offender as a fine, is a punishment, and nothing more; what he pays as a satisfaction is also a punishment, and a punishment even more than ordinarily strong, besides this, it is a satisfaction for the party injured; that is to say, a good. When I pay to the revenue, a creature of reason with whom I have no quarrel, I feel only the same regret for the loss as I should do had I dropt the sum into a well: when I pay it to my adversary, when I am thus obliged to confer a benefit on him whom I wished to injure, there is connected with the payment a degree of humiliation, which gives to the punishment thus inflicted the most desirable character.

PART II.—RATIONALE OF PUNISHMENT.

ADVERTISEMENT.

THE following account is given by M. Dumont of his labours with respect to the two volumes published by him at Paris in 1811, under the title of *Théorie des Peines et des Récompenses*. Of this work, three editions have been printed in France, and one in England.

"When I published in Paris, in 1802, *Les Traités de Legislation Civile et Pénale*, in three volumes, I announced other works of the same kind, which I had, in the same manner, extracted from the manuscripts of Mr. Bentham, but which were not then ready for the press.

"Success has encouraged my labours: three thousand copies were distributed more rapidly than I had dared to hope would be the case with the first work of a foreign author, but little known upon the continent. I have reason also to think that all recent as this work is, it has not been without its influence, since it has been frequently quoted in many official compositions relating to civil or criminal codes.

"But circumstances, which prevented these new volumes from entering upon the same course of circulation as the preceding, have sometimes cooled my zeal, and I should willingly have resigned the task I had imposed upon myself, if the author would have undertaken it himself. Unhappily, he is as little disposed so to do as ever; and if these works do not appear in the French dress which I have given them, it is most probable that they will remain shut up in his cabinet.

"They have lain there thirty years: the manuscripts from which I have extracted *La Théorie des Peines*, were written in 1775. Those which have supplied me with *La Théorie des Récompenses*, are a little later: they were not thrown aside as useless, but laid aside as rough-hewn materials, which might at a future day be polished, and form part of a general system of legislation—or as studies which the author had made for his own use.

"These manuscripts, though much more voluminous than the work I have presented to the public, are very incomplete. They offered to me often different essays upon the same subject, of which it was necessary to take the substance and unite them into one. In some chapters I had nothing but marginal notes to direct me. For the fourth book of *La Théorie des Peines*, I was obliged to col-

* In preparing the *Rationale of Punishment* for its appearance before the English public, the Editor has taken the volume entitled Théorie des Peines, published by M. Dumont, as the groundwork of his labours; but having availed himself, wherever he could, of the original manuscripts, his will in many instances not be found a literal translation of M. Dumont's work.

lect and prepare a variety of fragments. The discussion upon the punishment of death was unfinished. At one time, the author intended to treat of this subject anew, but this intention has not been carried into effect. He had prepared nothing upon transportation — nothing upon Penitentiaries. The idea of the Panopticon was as yet unformed. I have derived the foundations of these two important chapters from a work of Mr. Bentham's, since published (*Letters to Lord Pelham, &c. &c.*) I have taken all that suited my general method of treating the subject, by separating it from all controversy.

" After these explanations, it will not be matter of surprise, if the facts and allusions do not always accord with the date of the original manuscripts. I have freely used the rights of an Editor: according to the nature of the text, and the occasion, I have translated, commented, abridged, or supplied, but it need hardly be repeated, after what was said in the preliminary discourse to the former publication, that this co-operation on my part has had reference to the details only, and ought not to diminish the confidence of the readers; it is not my work that I present to them: it is, as faithfully as the nature of things will permit, the work of Mr. Bentham.

" It has been said, that these additions, these changes, should bear some distinctive mark; but though this species of fidelity is desirable, it is impossible. It is only necessary to imagine what is the labour of finishing a first sketch — of completing unfinished and unreviewed manuscripts, sometimes consisting of fragments and simple notes, in order to comprehend, that it required a continued freedom, a species of imperceptible infusion, if I may so speak, which it is scarcely possible for the individual himself to remember. This is, however, of no importance. It may be believed that the author has not found his ideas disfigured or falsified, since he has continued to entrust me with his papers.

" I must, however, declare, that he has altogether refused to share my labour, and that he will not, in any manner, be responsible for it. As he has never been satisfied with a first attempt, and has never published anything which he has not written at least twice over, he has foreseen that the revision of so old an essay would lead him too far away from, and be incompatible with, his present engagements. In this manner he has justified his refusal; but he has authorised me to add, that any change which he might make would bear only upon the *form;* as respects the *principles*, his opinions have not changed: on the contrary, time and reflection have given them additional strength.

" That Mr. Bentham, who is too particular about his productions, should not deem these worthy of the public notice, will not astonish those who know all that he requires of himself, and the ideas which he has formed for himself of a complete work.

" A perfect book would be that which should render useless all which had been written in time past, or that could be written in future time, upon the same subject. With respect to the second condition, it is not possible to decide when it is accomplished, without pretending to measure the power of the human mind; with respect to the first, we can more easily decide by a comparison with the works which have gone before.

" This comparison has supported me against a just distrust of my own powers. After the author had refused me all assistance, and had expressed his doubts upon the merit of his own work, I was led to reperuse and reconsider the most celebrated works upon this subject, and even those which had been less distinguished; and then I could hesitate no longer.

" I was tempted, at one time, to collect every thing dispersed through *L'Esprit des Lois* upon the subject of Rewards and Punishments. This collection would have been contained in ten or a dozen pages. By thus collecting the whole together, it would have been possible to judge of the correctness of that expression of D'Alembert, so often repeated in France, that *Montesquieu had said all, that he had abridged all, because he had seen all.* Among a multitude of vague and undefined thoughts upon these subjects, of which some are erroneous, there are certainly some which are judicious and profound, as in every thing we possess of this illustrious writer. But he has not developed the Rationale of Rewards and Punishments, — indeed, this was not his design, and nothing would be more unjust than to criticise him for not having done what he did not intend to perform.

" Beccaria has done more: he first examined the efficacy of punishments, by considering their effect upon the human heart; by calculating the force of the motives by which individuals are impelled to the commission of crimes; and of those opposite motives which the law ought to present. This species of analytical merit was, however, less the cause of his great success, than the courage with which he attacked established errors, and that eloquent humanity which spreads so lively an interest over his work; but after this, I scruple not to say, that he is destitute of method, that he is not directed by any general principle, that he only glances at the most important questions, that he carefully shuns all practical discussions in which it would have been evident that he was unacquainted with the science of Jurisprudence. He announces

two distinct objects — crimes and punishments; he adds to these, occasionally, Procedure; and these three vast subjects with difficulty furnish out matter for one little volume.

"After Montesquieu and Beccaria, we may leave in peace a whole library of books, more or less valuable, but which are not distinguished by any great character of originality; not but that we should find in them correct and judicious views, interesting facts, valuable criticisms upon laws, many of which no longer exist, and to the disappearance of which these works have contributed. I intend not here to enter in detail either upon their criticism or eulogium. It is enough for me to observe, that none have laid down the Rationale of Rewards and Punishments, or could be employed as a general guide.

"In the volumes formerly published, the Rationale of Punishment was only sketched out — a general map only was given of the department of Criminal Law, of which this work exhibits the topography.

"To prevent frequent reference, and to render this work complete in itself, I have borrowed some chapters from the preceding work, making considerable additions to them, and giving them a different form.

"At the risk, however, of inspiring my readers with a prejudice unfavourable to my work, I must acknowledge that its object, how important soever it may be in relation to its consequences, is any thing but interesting in its nature. I have been sensible of this during the progress of my labour, and I have not completed it without having often to conquer myself. A philosophical interest alone must suffice; the descriptions of punishments, and the examination of punishments, which follow each other without cessation in a didactic order, do not allow of a variety of style, do not present any pictures upon which the imagination can repose with pleasure.

"'Felices ditant hæc ornamenta libellos,
Non est conveniens luctibus ille color.'

"Happily, the subject of Rewards, by its novelty, and by the ideas of virtues, talents, and services, which it causes to pass in review, will conduct the readers by more agreeable routes. The Tartarus and Elysium o legislation, so to speak, are here disclosed; but in entering into this Tartarus, it is only to lighten its torments, and we are careful not to engrave upon its portal the terrible inscription of the poet,

"'*Lasciate speranza, voi ch' entrate.*'"

BOOK I.

GENERAL PRINCIPLES.

CHAPTER I.

DEFINITIONS AND DISTINCTIONS.

To afford a clear apprehension of the subject of the following work, which subject is Punishment, it is necessary that what punishment *is*, and what punishment *is not*, should be clearly understood. For this purpose it will be proper to distinguish it from those objects with which it is in danger of being confounded, and also to point out the different shapes which it may assume.

Punishment, whatever shape it may assume, is an evil. The matter of *evil*, therefore, is the sort of matter here in question: the matter of evil in almost all the shapes of which it is susceptible. In considering this matter, two objects, constant accompaniments one to the other, will require to be distinguished, viz. 1. The act by which the evil is considered as being produced; and, 2. What is considered as being the result of that same act, the evil itself which is thus produced.

The English language affords but one single-worded appellative in common use for designating both these objects, viz. *Punishment*.*

Punishment may be defined — an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done, or omitted. The propriety of this definition will appear, and its use be manifested, by taking it to pieces, and examining its several constituent parts.

Punishment, then, is an *evil* — that is, a physical evil; either a pain, or a loss of plea-

* In the French, there exists for the designation of the act one name, viz. *punition — acte de punition;* and for the designation of the evil, the result or produce of that act, another name, viz. *peine.*

But though exempt from the ambiguity by which, as above, the English language is deteriorated, the French labours under another. By the word *peine*, the result is indeed secured against being confounded with the act that caused it. But, on the other hand, the use of this word is not confined to the case in which the object designated by it is the result of an act emanating from the will of a sentient being; it is at least as frequently employed to designate the object itself, without regard to the cause by which it has been produced.

Besides being too broad in one direction, the import of it is too narrow in another. It is synonymous to, and not more than co-extensive with, *douleur:* it fails of including that modification of evil which is of the purely negative cast, consisting of the absence, certain, or more or less probable, of this or that modification of pleasure.

sure, or else of that situation or condition of the party affected, which is the immediate cause of such pain or loss of pleasure. It is an evil resulting from the *direct* intention of another. It is not punishment, if it be obliquely intentional on the part of the person from whose agency it results, but an evil of some other nature, but which, however, is not in all cases distinguished by a specific name.

It is an evil resulting to a person from the direct intention of another, *on account of* some act that has been done or omitted. An evil resulting to an individual, although it be from the direct intention of another, if it be not on account of some act that has been done or omitted, is not a punishment. If, out of *wantonness*, for the sake of *sport*, or out of *ill-will*, resulting from an *antipathy* you entertain against a man's person, without having any particular act of his to ground it upon, you do him a mischief, the evil produced in this case is what nobody would understand to come under the name of punishment.

But so it be on account of some act that has been done, it matters not by whom the act was done. The most common case is for the act to have been done by the same person by whom the evil is suffered. But the evil may light upon a different person, and still bear the name of punishment. In such case it may be styled punishment *in alienam personam*, in contradistinction to the more common case in which it may be styled punishment *in propriam personam*. Whether the act be ultimately or only mediately intentional, it may, consistently enough with common usage, bear the name of punishment; though, according as it was in the one or other way that the intention happened to regard it, the act will assume a different name, as we shall have occasion to mention presently.

It must be on account of some act that at least *appears* to have been done; but whether such an act as appears to have been done, or any act actually was done, is not material.

By the denomination thus given to the act, by the word punishment, taken by itself, no limitation is put to the description of the person of the agent; but on the occasion of the present work, this person is all along considered as a person invested for this purpose with the authority of the state; a legislator appointing the species of evil to be inflicted in a species of case; or a judge appointing the individual lot of evil to be inflicted in this or that individual case.

Vengeance, antipathy, amendment, disablement, determent, self-defence, self-preservation, safe custody, restraint, compulsion, torture, compensation in the sense in which it means a particular mode of satisfaction for injury or damage — burthen in any such phrase as that of imposition of a burthen, and taxation: by all these several words, ideas are presented which will require in each instance to be compared, and in most instances to be distinguished from the ideas presented by the word *punishment*.

Take whatever portion of the matter of evil is upon the carpet: whether the term punishment shall or shall not with propriety be applied, depends upon the position in which the actual result stands with reference to the time in which the *will* or intention of the agent acts.

Intention or unintentional: if intentional, directly or indirectly, or, to use another word, collaterally intentional; if directly, ultimately, or but mediately intentional; such are the modifications which the matter of evil may be considered as receiving, when considered in the character of an object to which the will or intention turns itself.

In some cases, the man in power, or some person or persons, having, as he supposes, received, at the hands of some person or other, evil in some shape or other, the object which he has in view, in the affliction of the evil in question, is an enjoyment of a certain kind, which he derives, or expects to derive, from the contemplation of the evil thus sustained. In this case, the act in question is termed an act of *vengeance*.

So far as this, and this alone, is his object, this evil thus produced is not only directly but ultimately intentional.

Whether in the character of a sole object, a result of this nature be a fit object for the man in power to propose to himself, is indeed a very important question, but one which has no place here: punishment, by being misapplied, is not the less punishment.

Laying out of the above case the supposed antecedent evil, you have no longer an act of vengeance, but an act performed for the mere gratification of *antipathy*. But by the supposition having for its author or agent the legislator or the judge, it is still not the less an act of punishment.

Of the cases in which the act productive of the evil, intentionally produced by the hand of power, is termed an act of punishment, the most common class is that which is composed of those in which, on the part of the agent, the evil thus produced is, though intentional, and even directly intentional, yet not ultimately, but only mediately intentional.

In this case, the ultimately intentional object — the object in relation to which the act of punishment is intended to minister in the character of a means to an end — may be either an act of the negative or the positive* cast.

When the act to which the punishment is

* To him who would understand what he hears or what he says, positive and negative are adjuncts; the use of which is not more necessary in electricity and galvanism than in law, and especially in penal law.

annexed is of the positive cast, the ultimately intentional object aimed at by the act of punishment is of the opposite cast; and so, when the offence is negative, the result, the production of which is aimed at by the punishment, is positive.

If the offence be of the positive cast, then come the following string of appellatives, expressive of the results, the production of which is in different ways aimed at, viz. 1. Amendment or reformation; 2. Disablement; 3. Determent; 4. Self-defence; 5. Self-preservation; 6. Safe custody; and 7. Restraint.

If the offence be of the negative cast, then comes another string of appellatives, expressive, as above, of the results aimed at, viz. 1. Compulsion or restraint; 2. Torture; 3. Compensation, in the sense in which it is equivalent to *satisfaction*, rendered in consideration of injury resulting from an offence, or in consideration of damage produced without intentional injury; 4. Taxation.

Whether the result aimed at be of the negative or positive cast, the terms, coercion, obligation, burthen, or the phrase *imposition* of a burthen, are competent to the designation of it.

Amendment, or reformation, and *disablement*, are words expressive of the result aimed at, in so far as the conduct of the supposed delinquent is concerned. In the case of *amendment* or *reformation*, the obnoxious act is regarded as being of such a nature, that by a single instance of its being committed, such a degree of disorder in the moral constitution is indicated, as requires a general change to remove it, and bring the patient to a state of ordinary purity.

Few, if any, offences of the negative class being to be found which exhibit any such degree of malignity, — the use of the terms amendment and reformation is nearly confined to the case when the obnoxious act, the prevention of which is the ultimate end of the punishment, is of the positive kind.

Disablement is a term for which, with reference to an act of the negative kind, a place is hardly to be found. Doing nothing is a sort of offence to which every man is so competent, that all endeavours on the part of government to disable a man from committing it may be set at defiance.

Determent is a result equally applicable to the case either of a positive or negative offence. It is moreover equally applicable to the situation of the already-punished delinquent, and that of other persons at large; nor does it involve, on the part of the punished delinquent, the supposition of any such general disorder as is implied by the words *amendment* or *reformation*.

When the ultimately intentional result is amendment or reformation, it is by the impression made by the action of the evil on the will of the offender that, in so far as it is produced, the result is considered as being produced. In this case, the *act of punishment* is also termed an act of *correction*.

When the ultimately intentional result is disablement, it is by depriving the offender of the power of committing obnoxious acts of the like description, that, in so far as it is produced, the result is considered as being produced. In this case, the course taken to produce the result may either be such the nature of which is to produce it only for a time, as is done by temporary imprisonment, confinement, or deportation; or for ever, as would in some cases be done by mutilation.

In so far as by the act of punishment exercised on the delinquent, other persons at large are considered as deterred from the commission of acts of the like obnoxious description, and the act of punishment is in consequence considered as endued with the quality of *determent;* it is by the impression made on the will of those persons, an impression made in this case not by the act itself, but by the idea of it, accompanied with the eventual expectation of a similar *evil*, as about to be eventually produced in their own instances, that the ultimately intentional result is considered as produced; and in this case it is also said to be produced by the *example*, or by the force of *example*.

Between self-defence and punishment, the relation is of this sort, viz. that to the same act which ministers to the one of those purposes, it may happen to minister to the other. This coincidence may have place in either of two ways: an act which has self-defence for its direct object and result, may have punishment for its collateral result; or an act which has punishment for its direct object and result, may have self-defence for its collateral result.

In repelling a personal assault, it may happen to an individual, intentionally or unintentionally, to inflict on the assailant a suffering by any amount greater than that of any which, by the assault, was inflicted on himself: if unintentionally, self-defence was not only the sole ultimately intentional, but the sole intentional result: but the suffering of the assailant, though not the collaterally intentional, was not in effect less truly the collateral result.

On the other hand, in inflicting punishment on a delinquent, it may happen to the *man in authority* to be exercising on his own behalf an act of *self-defence;* in regard to all offences, such as *rebellion* and *treason*, which have for their object or their effect the subversion of the government, or the weakening of its powers. But it is only in reference to such offences that an act of punishment can, with reference to the constituted authorities, be with propriety called an act of self-defence.

But if in lieu of the constituted authorities,

the members of the community at large be considered as the persons by whom the punishment is inflicted; then is all punishment an act of *self-defence*, in relation to the particular species of evil with which the offence thus punished is pregnant: an act tending to defend the community against offences of the sort in question, with their attendant evils, viz. by means of reformation, disablement, and determent, one or more of them as above.

In the signification of the word *self-defence*, it is implied that the evil against which the party is endeavouring to guard himself has, for its cause, an act done by some sentient being, with the intention of producing that same evil.

The word self-preservation is alike applicable, whatsoever be the source or quarter from which the evil is considered as about to come. In so far, therefore, as the act of punishment is with propriety capable of being termed an act of self-defence, it is, with the same propriety, capable of being termed an act of *self-preservation*.

Between safe custody and punishment, the relation is of this sort: — To one and the same operation, or factitious state of things, it may happen to be productive of both of these effects. But in the instance of the same individual, it is only to a limited degree that there can be a sufficient reason for making provision for both at the same time.

To a considerable extent, imprisonment with propriety may be, and every where is applied, under the name and to the purpose of punishment. In this case, safe custody is in part the same thing with the intended punishment itself; in part, a concomitant necessary to the existence and continuance of whatsoever inflictions it may be deemed proper to add to those which are inseparable from the safe custody itself.

But in another case, imprisonment, or an infliction of the same name, at least, as that which is employed as above, for the purpose of punishment, is to a great extent administered ultimately for the purpose of eventual forthcomingness, and mediately for the purpose of safe custody, though no such thing as punishment is, or, at least, ought to be intended, because no ground for punishment has as yet been, and perhaps never may be, established.

Between restraint and punishment, the relation is of this sort. In some shape or other, restraint is the *directly* intentional result of every prohibitive law. The evil, whatever it be, that constitutes an inseparable accompaniment of the state thus denominated, is a collaterally intentional result of that same law. The evil of the restraint may be very moderate; but still, by every general prohibitive law, evil in some shape or other, in some quantity or other, must come.

At the same time, restraint is, in a great variety of shapes, capable of being employed in the character of a punishment. As a punishment, restraint is not incapable of being employed for the purpose of securing submission to restraint. But in this case, the coincidence is but verbal, and arises from the generality of the word restraint. In the character of a punishment, we cannot employ the restraint collaterally resulting from the negative act, the production of which is the object of the prohibition in the character of the eventual punishment, to secure obedience to that same prohibitive law. To prevent a man from stealing, a law threatening to prevent him from stealing, would be but an indifferent resource. To secure, by means of eventual punishment, restraint in this shape, you must employ restraint in some other shape; for example, the restraint attached to imprisonment.

Between compulsion and punishment, the relation is of this sort. In the case of compulsion, as in the case of restraint, the act in question is the act which is regarded as the efficient cause of the evil, the prevention of which is the ultimate object of the act of punishment. What *restraint* is, in the case when the act in question is of the positive cast, *compulsion* is, in the case when the act is of the negative cast.

Between torture and punishment, the relation is of this sort. The term torture is employed, and perhaps with nearly equal frequency, in two different senses. In its most extended sense, it is employed to designate pain, especially pain of body, when considered as being intense in its degree, and this without reference to the cause by which it is produced.

In its more restricted sense, being that in which it is most apt to be employed, when considered as the result of law, it is employed to signify pain of body in its degree intense as above, employed in due course of law, or, at any rate, by the hand of power, in the character of an instrument of compulsion.

But the account given of it, when employed in this sense, wants much, as yet, of being complete. The compulsion, or constraint, may be produced by the mere apprehension of the punishment which is denounced.

By this circumstance, torture stands distinguished not only from compulsion itself, but from any lot of punishment considered as applied to the purpose of compulsion in the ordinary mode.

The notion of torture is not included in a punishment attached to an act of disobedience, of which no remission is allowed; but suppose the same lot of pain attached to the same offence, with power to remit any part of it, in case of, and immediately upon compliance with the requisition of the law, and

here the punishment comes under the notion and denomination of torture.

Between compensation, or satisfaction and punishment, the relation is of this sort: in all cases, if compensation be the end in view, so far as concerns pecuniary compensation, by whatsoever is done for the purpose of compensation, the effect of pecuniary punishment is produced likewise. More suffering, however, will in general be produced by what is taken for the purpose of compensation, than if the same amount were taken for the purpose of punishment: it will be accompanied by the regret produced by the idea of the advantage not only reaped by an adversary, but reaped at one's own expense.

On the other hand, by the contemplation of the suffering inflicted by punishment on the delinquents, good in the shape of compensation, or say vindictive satisfaction, is administered to the party injured.

Between taxation and punishment of the pecuniary kind, for it is only in this form that they can be compared, the relation is of this sort; they both consist in the application of compulsion to the extracting out of the pocket in question a certain sum; the difference between them consists in the end in view. In the case of taxation, the object is the obtainment of a certain sum; in the case of punishment, the object is the prevention of the obnoxious act, to the commission of which the obligation of paying the money is attached in the character of a punishment. In the case of taxation, the wish of the legislator is, that the money may be paid; and, consequently, if it be to the performance of a certain act that the obligation of paying the money is annexed, his wish is that the act may be performed.

As in the two cases the result intended is opposite, the actual results are accordingly incompatible, in so far as either result is obtained, the other is missed. Whether the effect of any given law shall be taxation, or effectual prohibition, depends, in the instance of each individual, upon the value, which, in the case in question, he is called upon to pay, compared with the value in his estimation of the advantage which stands annexed to the exercise of the act; if the advantage appear the greater, he pays the money and exercises the act; if the value of the money to be eventually paid appear the greater, he obeys the prohibitory law, and abstains from the performance of the act.

When the face assumed by any law is that of a prohibition, if the penalty be nothing but pecuniary and the amount is fixed, while the profits of the offence are variable, the probability is, that in many instances the penalty, even if levied, which could not be without detection, prosecution, and conviction, would but operate as a taxed licence.

This circumstance is so obvious, that one would have thought it could not have been overlooked; had it, however, been observed with any tolerable steadiness in England, the law of that country would wear a face widely different from that which it wears at present.

In relation to all these several results or concomitants* of punishment, one observation useful to be borne in mind, that it may

* The distinctions between these several objects may be illustrated by an example.

In 1769, a jury gave a verdict of £4,000 damages against the Earl of Halifax, for the wrongful imprisonment of John Wilkes, Esq. on suspicion of being the author of a state libel. It may be inquired, what sort of act did the jury perform, when by giving this verdict they appointed the sum in question to be paid by the one person to the other?

It was intended to be an act of punishment. If any juryman being angry with Lord Halifax also intended to produce pain in him, on account of the pleasure he took in thinking of that pain; in the case of such juryman it was an act of vengeance; being done, however, on account of an act that had been done, viz. the imprisonment of Mr. Wilkes, it was not an act of antipathy.

If any juryman did it with a view of deterring Lord Halifax, or any one who might occupy that nobleman's place in future, from doing acts of the like kind, and of preventing the mischief apprehended from such acts, it was in him an act for amendment and determent. It could not, however, operate for the purpose of disablement, the paying of a sum of money, having no tendency to disable Lord Halifax, or those holding the same office, from imprisoning others who might become the objects of their dislike.

It was not an act of immediate self-defence, for self-defence implies attack, that is, implies that there is some person who is actually using his endeavours to do mischief to the party defending himself. If, however, any juryman, thinking himself in danger of suffering in the like, or any other manner from Lord H., and persons liable to act as he did, joined in the verdict with the view of preserving himself from such suffering, to wit, by means of the restraint which the fear of similar punishment might be expected to impose on Lord Halifax and such other persons, on the part of such juryman it was an act of self-preservation.

The payment of the fine imposed could contribute nothing to the purposes of safe custody or physical restraint, neither was it an act of compulsion, for it was not designed as a means of compelling him to do anything.

It was not an act of torture; the penalty, if paid, was paid instantaneously; the act of paying ceasing of itself, and not being capable of being protracted so as to be made to cease only at a future given instance.

If any juryman did it with the view of making Mr. Wilkes amends for the pain he had suffered by the supposed injury in question, in such juryman it was an act of compensation; and if the juryman who intended to make compensation to Mr. Wilkes also thought that it was right to tax Lord Halifax to the amount of the compensation proper to be given to Mr. Wilkes, it was an act of taxation.

operate as a preservative against much error, is — that it is but in very few, if any of these instances, that from the name by which the object is here designated, any true judgment can be formed on any such question as whether and how far the object is a fit object of pursuit or aim in the character of an end.

Take any one of them for example, — if taken by itself that object be of the nature of good, yet, in the first place, that good may be in any degree minute; in the next place, to the quantity of evil with which it may happen to it to be followed, there are no limits: and thus it is that false must be that proposition, which, without leaving room for exceptions, should pronounce the attainment of that object to be universally an end fit to be aimed at, whether through the intervention of punishment, or any other means; and conversely.

Of the distinctions here pointed out between punishment and the several objects that are of kin to it, five distinguishable practical uses may be made.

1. They may serve as a memento to the legislator, to see on every occasion, that for the several objects which may have place, and present a demand for legislative provision, due and adequate provision is accordingly made.

2. To preserve him from the delusion which would have place, wheresoever it happens that by one and the same lot of evil, due and adequate provision may be made for two or more of these purposes, if by the difference of their respective denominations, he were led to give birth to two or more lots of evil for the purpose of effecting the good, for the effectuation of which one of them would suffice.

3. That in each instance, in comparing the end he has in view with the means which he proposes to employ for the attainment of it, the view he takes of such proposed means may be sufficiently clear, correct, and complete, to enable him to form a correct judgment of the mode and degree in which they promise to be conducive to the attainment of the end.

4. That he may be upon his guard against that sort of rhetorical artifice which operates by substituting for the proper name of the object or result in question, according to the purpose in view, the name of some other object or result, the name of which is either more or less popular than the proper one.

5. That while in pursuit of any one of these objects, in the character of an *end*, he employs such means as to his conception appear conducive to that end, he may be correctly and completely aware of any tendency which such arrangements may have to be conducive or obstructive, with reference to any other of these same ends.

CHAPTER II.

CLASSIFICATION.

In a former work it has been shown,* that offences against individuals may be ranged under four principal heads; offences against the *person*, *property*, *reputation*, and *condition*. The same division may be applied to punishments; an individual can only be punished by affecting his person, his property, his reputation, or his condition.

The circumstance which renders these two classifications similar is this — punishments and offences are both evils caused by the free agency of man. In as many points as we are liable to be injured by the hand of an offender, in so many points is the offender himself exposed to the sword of justice. The difference between punishments and offences is not, then, in their nature, which is, or may be, the same; but in the legality of the one, and the illegality of the other, offences are prohibited, punishments are instituted by the laws. Their effects also are diametrically opposite. An offence produces an evil both of the *first* and *second order*;† it causes suffering in an individual which he was unable to avoid, and it spreads an alarm more or less general. A punishment produces an *evil* of the *first order*, and a *good* of the *second order*. It inflicts suffering upon an individual who has incurred it voluntarily, and in its secondary effects it produces only good: it intimidates the ill-disposed, it reassures the innocent, and becomes the safeguard of society.

Those punishments which immediately affect the person in its active or passive powers, constitute the class of corporal punishments: they may be divided into the following different kinds: —

1. Simply afflictive punishments.
2. Complexly afflictive punishments.
3. Restrictive punishments.
4. Active or laborious punishments.
5. Capital punishments.

Punishments which affect property, repu-

* *Introduction to Principles of Morals and Legislation.*

† See *Principles of Morals and Legislation*, ch. 12, page 69, 'Of the consequences of a Mischievous Act.' — "The mischief of an offence may frequently be distinguished, as it were, into two shares or parcels; the one containing what may be called the primary; the other what may be called the secondary. That share may be termed *primary* which is sustained by an assignable individual, or a multitude of assignable individuals. That share may be termed secondary, which, taking its origin from the former, extends itself rather over the whole community, or over some other multitude of unassignable individuals."

For the full developement of this subject, reference may be made to the chapter indicated.

tation, or condition, possess this quality in common, they deprive the individual of some advantage which he before enjoyed; such are *privative* punishments, *losses*, and *forfeitures*. The punishments of this class are very various; they extend to every possible kind of possession.

Hence we perceive that all punishments may be reduced to two classes.

1. Corporal punishments.
2. Privative punishments, or punishments by loss or forfeiture.

CHAPTER III.

OF THE ENDS OF PUNISHMENT.

WHEN any act has been committed which is followed, or threatens to be followed, by such effects as a provident legislator would be anxious to prevent, two wishes naturally and immediately suggest themselves to his mind: first, to obviate the danger of the like mischief in future: secondly, to compensate the mischief that has already been done.

The mischief likely to ensue from acts of the like kind may arise from either of two sources, — either the conduct of the party himself who has been the author of the mischief already done, or the conduct of such other persons as may have adequate motives and sufficient opportunities to do the like.

Hence the prevention of offences divides itself into two branches: *Particular prevention*, which applies to the delinquent himself; and *general prevention*, which is applicable to all the members of the community without exception.

Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the apparent magnitude, or rather value* of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed, will also by that means be prevented.

With respect to a given individual, the recurrence of an offence may be provided against in three ways: —

1. By taking from him the physical power of offending.
2. By taking away the desire of offending.
3. By making him afraid of offending.

In the first case, the individual can no more commit the offence; in the second, he no longer desires to commit it; in the third, he may still wish to commit it, but he no longer dares to do it. In the first case, there is a physical incapacity; in the second, a moral reformation; in the third, there is intimidation or terror of the law.

General prevention is effected by the denunciation of punishment, and by its application, which, according to the common expression, *serves for an example*. The punishment suffered by the offender presents to every one an example of what he himself will have to suffer, if he is guilty of the same offence.

General prevention ought to be the chief end of punishment, as it is its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all. That punishment which, considered in itself, appeared base and repugnant to all generous sentiments, is elevated to the first rank of benefits, when it is regarded not as an act of wrath or of vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.

With respect to any particular delinquent, we have seen that punishment has three objects: incapacitation, reformation, and intimidation. If the crime he has committed is of a kind calculated to inspire great alarm, as manifesting a very mischievous disposition, it becomes necessary to take from him the power of committing it again. But if the crime, being less dangerous, only justifies a transient punishment, and it is possible for the delinquent to return to society, it is proper that the punishment should possess qualities calculated to reform or to intimidate him.

After having provided for the prevention of future crimes, reparation still remains to be made, as far as possible, for those which are passed, by bestowing a compensation on the party injured; that is to say, bestowing a good equal to the evil suffered.

This compensation, founded upon reasons which have been elsewhere developed,† does not at first view appear to belong to the sub-

* I say *value*, in order to include the circumstances of *intensity*, *proximity*, *certainty*, and *duration*; which magnitude, properly speaking, does not. This may serve to obviate the objections made by Locke (book II. ch. 21) against the proposition, that man is determined by the greater apparent good.

† Traités, &c. tom. ii. p. 310.

ject of punishments, because it concerns another individual than the delinquent. But these two ends have a real connexion. There are punishments which have the double effect of affording compensation to the party injured, and of inflicting a proportionate suffering on the delinquent; so that these two ends may be effected by a single operation. This is, in certain cases, the peculiar advantage of pecuniary punishments.

CHAPTER IV.

CASES UNMEET FOR PUNISHMENT.

All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.

It is plain, therefore, that in the following cases punishment ought not to be inflicted:— 1. Where it is *groundless:* 2. Where it must be *inefficacious;* because it cannot act so as to prevent the mischief: 3. Where it is *unprofitable* or too *expensive:* 4. Where it is *needless;* because the mischief may be prevented or cease of itself without it.

I. *Cases in which Punishment is groundless.*

1. Where there has never been any mischief, as in the case of consent: such consent, provided it be free and fairly given, being the best proof that can be obtained, that at least no immediate mischief upon the whole has been done to the party who gives it.

2. Where the mischief is *outweighed* by the production of a benefit of greater value, as in precautions against instant calamity, and the exercise of domestic, judicial, military, and supreme powers.

II. *Cases in which Punishment must be inefficacious.*

These are, 1. Where the penal provision is *not established* until after the act is done. Such are the cases of an *ex post facto* law, and of a sentence beyond the law. 2. Where the penal provision, though established, is *not conveyed* to the notice of the person on whom it is intended to operate, as from want of due promulgation. 3. Where the penal provision, though it were conveyed to the individual's notice, *could produce no effect* with respect to preventing his engaging in the act prohibited; as in the cases of extreme *infancy*, *insanity*, and *intoxication*. 4. Where the penal provision, though present to the party's notice, does not produce its effect, because he knows not the act he is about to engage in is of the number of those to which the penal provision relates. 5. Where, though the penal clause might exert a full and prevailing influence were it to act alone, yet by the *predominant* influence of some opposite cause upon the will, such as physical danger or threatened mischief, it must necessarily be ineffectual. 6. Where, though the penal clause may exert a full and prevailing influence over the *will* of the party, yet his *physical faculties* (owing to the predominant influence of some physical cause) are not in a condition to follow the determination of his will: insomuch that the act is absolutely involuntary, as through *compulsion* or *restraint*.

III. *Cases where Punishment is unprofitable.*

If the evil of the punishment exceed the evil of the offence, the punishment will be unprofitable: the legislator will have produced more suffering than he has prevented; he will have purchased exemption from one evil at the expense of a greater.

The evil resulting from punishment divides itself into four branches:— 1. The evil of *coercion* or *restraint*, or the pain which it gives a man not to be able to do the act, whatever it be, which, by the apprehension of the punishment, he is deterred from doing. 2. The evil of *apprehension*, or the pain which a man, who has exposed himself to punishment, feels at the thoughts of undergoing it. 3. The evils of *sufferance*, or the pain which a man feels, in virtue of the punishment itself, from the time when he begins to undergo it. 4. The pain of sympathy, and the other *derivative* evils resulting to the persons who are in *connexion* with those who suffer from the preceding causes.

IV. *Cases where Punishment is needless.*

A punishment is needless, where the purpose of putting an end to the practice may be attained as effectually at a cheaper rate, by instruction, for instance, as well as by terror; by informing the understanding, as well as by exercising an immediate influence on the will. This seems to be the case with respect to all those offences which consist in the disseminating pernicious principles in matters of *duty*, of whatever kind the duty may be, whether political, moral, or religious: and this, whether such principles be disseminated *under*, or even *without* a sincere persuasion of their being beneficial. I say even *without;* for though, in such a case, it is not instruction that can prevent the individual from endeavouring to inculcate his principles, yet it may prevent others from adopting them: without which, the endeavours to inculcate them will do no harm. In such a case, the sovereign will commonly have little occasion to take an active part: if it be the interest of *one* individual to inculcate opinions that are pernicious, it will surely be the interest of other individuals to expose them. But if the sovereign must needs take a part in the controversy, the pen is the proper weapon wherewith to combat error, and not the sword.

On the other hand, as to the evil of the

offence, this will, of course, be greater or less according to the nature of each offence. The proportion between the one evil and the other will therefore be different in the case of each particular offence. The cases, therefore, where punishment is unprofitable on this ground, can by no other means be discovered, than by an examination of each particular offence.

These considerations ought at all times to be present to the mind of the legislator, whenever he establishes any punishment. It is from them that he will derive his principal reasons for general amnesties, on account of the multitude of delinquents; for the preservation of a delinquent, whose talents could not be replaced, or whose punishment would excite the public displeasure, or the displeasure of foreign powers.

CHAPTER V.

EXPENSE OF PUNISHMENT.

Expense of Punishment. — This expression, which has not yet been introduced into common use, may at first sight be accused of singularity and pedantry. It has, however, been chosen upon reflection, as the only one which conveys the desired idea, without conveying at the same time an anticipated judgment of approbation or disapprobation. The pain produced by punishments, is as it were a capital hazarded in expectation of profit. This profit is the prevention of crimes. In this operation, every thing ought to be taken into the calculation of profit and loss; and when we estimate the profit, we must subtract the loss, from which it evidently results, that the diminution of the expense, or the increase of the profit, equally tend to the production of a favourable balance.

The term *expense*, once admitted, naturally introduces that of *economy* or *frugality*. The mildness or the rigour of punishments is commonly spoken of: these terms include a prejudice in the one case of favour, in the other of disfavour, which prevents impartiality in their examination. But to say that a punishment is economic, is to use the language of reason and calculation.

We should say, then, that a punishment is *economic*, when the desired effect is produced by the employment of the least possible suffering. We should say that it is too *expensive*, when it produces more evil than good; or when it is possible to obtain the same good by means of a less punishment.

In this place, distinction should be made between the *real* and the *apparent* value of a punishment.

By the real value, I mean that which it would be found to have by one who, like the legislator, is in a condition accurately to trace and coolly to estimate it through all its parts, exempt from the delusions which are seen to govern the uninformed and unthinking part of mankind; knowing, beforehand, upon general principles, what the delinquent will know afterwards by particular experience.

By the apparent value of a punishment, I mean that which it appears to a delinquent to have at any time previous to that in which he comes to experience it; or to a person under temptation to become a delinquent previous to the time at which, were he to become so, he would experience it.

The real value of the punishment constitutes the expense. The apparent value influences the conduct of individuals. It is the real punishment that is the expense — the apparent punishment that gives the profit.

The profit of punishments has reference to the interests of two parties — the public, and the party injured. The expense of the punishment adds to this number a third interest, that of the delinquent.

It ought not to be forgotten, although it has been too frequently forgotten, that the delinquent is a member of the community, as well as any other individual — as well as the party injured himself; and that there is just as much reason for consulting his interest as that of any other. His welfare is proportionably the welfare of the community — his suffering the suffering of the community. It may be right that the interest of the delinquent should in part be sacrificed to that of the rest of the community; but it never can be right that it should be totally disregarded. It may be prudent to hazard a great punishment for the chance of obtaining a great good: it would be absurd to hazard the same punishment where the chance is much weaker, and the advantage much less. Such are the principles which direct men in their private speculations: why should they not guide the legislator?

Ought any real punishments to be inflicted? most certainly. Why? for the sake of producing the *appearance* of it. Upon the principle of utility, except as to so much as is necessary for reformation and compensation, for this reason, and for no other whatever. Every particle of real punishment that is produced, more than what is necessary for the production of the requisite quantity of apparent punishment, is just so much misery run to waste. Hence the real punishment ought to be as small, and the apparent punishment as great as possible. If hanging a man *in effigy* would produce the same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man *in person*.*

* At the Cape of Good Hope, the Dutch made use of a stratagem which could only succeed

If delinquents were constantly punished for their offences, and nobody else knew of it, it is evident that, excepting the inconsiderable benefit which might result in the way of disablement, or reformation, there would be a great deal of mischief done, and not the least particle of good. The *real* punishment would be as great as ever, and the *apparent* would be nothing. The punishment would befal every offender as an unforeseen evil. It would never have been present to his mind to deter him from the commission of crime. It would serve as an example to no one.

Delinquents may happen to know nothing of the punishment provided for them in either of two cases:—1. When it is inflicted without having been previously made known; 2. When, though promulgated, it has not been made known to the individual. The latter of these cases may be the case where the punishment is appointed by *statute*, or, as it is called, *written* law. The former must happen in all new cases where the punishment is appointed in the way of *common* or *unwritten* law.

The punishment appointed by the law, may be presented to the mind in two ways:—1. By its legal denunciation and description; 2. By its public execution, when it is inflicted with suitable notoriety.

The notion entertained of a punishment ought to be exact, or, as the logicians would say, adequate; that is, it should present to the mind not only a part, but the whole of the sufferings it includes. The denunciation of a punishment ought therefore to include all the items of which it is composed, since that which is not known cannot operate as a motive.

Hence we may deduce three important maxims:—

1. That a punishment that is more easily learnt, is better than one that is less easily learnt.

2. That a punishment that is more easily remembered, is better than one that is less easily remembered.

3. That a punishment that appears of greater magnitude, in comparison of what it really is, is better than one that appears of less magnitude.

among Hottentots. One of their officers having killed an individual of this inoffensive tribe, the whole nation took up the matter, and became furious and implacable. It was necessary to make an example to pacify them. The delinquent was therefore brought before them in irons, as a malefactor: he was tried with great form, and was condemned to swallow a goblet of ignited brandy. The man played his part;—he feigned himself dead, and fell motionless. His friends covered him with a cloak, and bore him away. The Hottentots declared themselves satisfied. "The worst we should have done with the man," said they, "would have been to throw him into the fire; but the Dutch have done better—they have put the fire into the man." — *Lloyd's Evening Post*, for August or September 1776.

CHAPTER VI.

MEASURE OF PUNISHMENT.

" . . . . Adsit
Regula, peccatis quæ pœnas irroget æquas.
Ne scutica dignum, horribili sectere flagello."
Hor. *L.* I. *Sat.* iii.

Establish a proportion between crimes and punishments, has been said by Montesquieu, Beccaria, and many others. The maxim is, without doubt, a good one; but whilst it is thus confined to general terms, it must be confessed it is more oracular than instructive. Nothing has been accomplished, till wherein this proportion consists has been explained, and the rules have been laid down by which it may be determined that a certain measure of punishment ought to be applied to a certain crime.

Punishments may be too small or too great; and there are reasons for not making them too small, as well as for not making them too great. The terms *minimum* and *maximum* may serve to mark the two extremes of this question, which require equal attention.

With a view of marking out the limits of punishment on the side of the first of these extremes, we may lay it down as a rule—

I. That the value of the punishment must not be less, in any case, than what is sufficient to outweigh that of the profit of the offence.

By the profit of the crime, must be understood not only pecuniary profit, but every advantage, real or apparent, which has operated as a motive to the commission of the crime.

The profit of the crime is the force which urges a man to delinquency: the pain of the punishment is the force employed to restrain him from it. If the first of these forces be the greater, the crime will be committed;* if the second, the crime will not be committed. If, then, a man, having reaped the profit of a crime, and undergone the punishment, finds the former more than equivalent to the latter, he will go on offending for ever; there is nothing to restrain him. If those, also, who behold him, reckon that the balance of gain is in favour of the delinquent, the punishment will be useless for the purposes of example.

The Anglo-Saxon laws, which fixed a price upon the lives of men—200 shillings for the murder of a peasant, six times as much for that of a nobleman, and thirty-six times as

* That is to say, committed by those who are only restrained by the laws, and not by any other tutelary motives, such as benevolence, religion, or honour.

much for that of the king — evidently transgressed against this rule. In a great number of cases, the punishment would appear nothing, compared with the profit of the crime.

The same error is committed whenever a punishment is established which reaches only to a certain fixed point, which the advantage of the crime may surpass.

Authors of celebrity have been found desirous of establishing a rule precisely the reverse: they have said, that the greatness of temptation is a reason for lessening the punishment; because it lessens the fault; because the more powerful the seduction, the less reason is there for concluding that the offender is depraved. Those, therefore, who are overcome, in this case, naturally inspire us with commiseration.*

This may all be very true, and yet afford no reason for departing from the rule. That it may prove effectual, the punishment must be more dreaded than the profit of the crime desired. Besides, an inefficacious punishment is doubly mischievous; — mischievous to the public, since it permits the crime to be committed, — mischievous to the delinquent, since the punishment inflicted upon him is just so much misery in waste. What should we say to the surgeon, who, that he might save his patient a small degree of pain, should only half cure him? What should we think of his humanity, if he should add to his disease the torment of a useless operation?

It is therefore desirable that punishment should correspond to every degree of temptation; at the same time, the power of mitigation might be reserved in those cases where the nature of the temptation itself indicates the absence of confirmed depravity, or the possession of benevolence — as might be the case should a father commit a theft that he might supply his starving family with bread.†

Rule II. — *The greater the mischief of the offence, the greater is the expense it may be worth while to be at, in the way of punishment.*

This rule is so obvious in itself, that to say any thing in proof of it would be needless; but how few are the instances in which it has been observed? It is not long since that women were condemned to be burnt alive for uttering bad money. The punishment of death is still lavished on a multitude of offences of the least mischievous description. The punishment of burning is still in use in many countries for offences which might safely be left to the restraint of the moral sanction. If it can be worth while to be at the expense of so terrible a punishment as that of burning alive, it ought to be reserved for murder or incendiarism.

It will be said, perhaps, that the intention of legislators has always been to follow this rule, but that their opinions, as well as those of the people, have fluctuated respecting the relative magnitude and nature of crimes. At one period, witchcraft was regarded as the most mischievous offence. Sorcerers, who sold their souls to the devil, were objects of abhorrence. A heretic, the enemy of the Almighty, drew down divine wrath upon a whole kingdom. To steal property consecrated to divine uses was an offence of a more malignant nature than ordinary theft, the crime being directed against the Divinity. A false estimate being made of these crimes, an undue measure of punishment was applied to them.

Rule III. — *When two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.*

Two offences may be said to be in competition, when it is in the power of an individual to commit both. When thieves break into a house, they may execute their purpose in different manners: by simply stealing, by theft accompanied with bodily injury, or murder, or incendiarism. If the punishment is the same for simple theft, as for theft and murder, you give the thieves a motive for committing murder, because this crime adds to the facility of committing the former, and the chance of impunity when it is committed.

The great inconvenience resulting from the infliction of great punishments for small offences, is, that the power of increasing them in proportion to the magnitude of the offence is thereby lost.‡

* One is astonished that a writer of such consummate genius as Adam Smith should have fallen into this mistake. Speaking of smuggling, he says: "The law, contrary to all the ordinary principles of justice, first creates the temptation, and then punishes those who yield to it; and it commonly enhances the punishment, too, in proportion to the very circumstance which ought certainly to alleviate it — the temptation to commit the crime." — *Wealth of Nations*, b. v. ch. 2.

† It is easy to estimate the profit of a crime in cases of rapacity, but how are we to ascertain it in those of malice and enmity?

The profit may be estimated by the nature of the mischief that the offender has done to his adversary. Has his conduct been more offensive than painful? The profit is the degree of humiliation that he believes his adversary to have undergone. Has he mutilated or wounded him? The profit is the degree of suffering he has inflicted.

In this, in his own opinion, consists the profit of his offence: if, then, he is punished in an analogous manner, he is struck in the most sensible part, which has, so to speak, been pointed out by himself; for it is not possible but that the mischief which he has chosen as the instrument of his vengeance, must appear hurtful to himself.

‡ Montesquieu, after having recommended this rule of proportion, adds, "Quand il n'y a point de difference dans la peine, il faut en met-

Rule IV. — *The punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.*

Thus, for example, in adjusting the punishment for stealing a sum of money, let the magnitude of the punishment be determined by the amount of the sum stolen. If for stealing ten shillings an offender is punished no more than for stealing five, the stealing of the remaining five of those ten shillings is an offence for which there is no punishment at all.

The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible; therefore —

Rule V. — *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*

Rule VI. — *That the quantity of punishment actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into the account.*

The same *nominal* punishment is not, for different individuals, the same *real* punishment. Let the punishment in question be a fine: the sum that would not be felt by a rich man, would be ruin to a poor one. The same ignominious punishment that would fix an indelible stigma upon a man of a certain rank, would not affect a man of a lower rank. The same imprisonment that would be ruin to a man of business, death to an old man, and destruction of reputation to a woman, would be as nothing, or next to nothing, to persons placed in other circumstances.

The law may, by anticipation, provide that such or such a degree of mitigation shall be made in the amount of the punishment, in consideration of such or such circumstances influencing the sensibility of the patient; such as age, sex, rank, &c. But in these cases, considerable latitude must be left to the judge.*

Of the above rules of proportion, the four first may serve to mark out the limits on the minimum side — the limits *below* which a punishment ought not to be diminished; the fifth will mark out the limits on the maximum side — the limits above which it ought not to be increased.

The minimum of punishment is more clearly marked than its maximum. What is *too little* is more clearly observed than what is *too much*. What is not sufficient is easily seen, but it is not possible so exactly to distinguish an excess: an approximation only can be attained. The irregularities in the force of temptations compel the legislator to increase his punishments, till they are not merely sufficient to restrain the ordinary desires of men, but also the violence of their desires when unusually excited.

The greatest danger lies in an error on the minimum side, because in this case the punishment is inefficacious; but this error is least likely to occur, a slight degree of attention sufficing for its escape; and when it does exist, it is at the same time clear and manifest, and easy to be remedied. An error on the maximum side, on the contrary, is that to which legislators and men in general are naturally inclined: antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side, therefore, that we should take the most precautions, as on this side there has been shown the greatest disposition to err.

By way of supplement and explanation to the first rule, and to make sure of giving to the punishment the superiority over the offence, the three following rules may be laid down:—

Rule VII. — *That the value of the punishment may outweigh the profit of the offence, it must be increased in point of magnitude, in proportion as it falls short in point of certainty.*

Rule VIII. — *Punishment must be further increased in point of magnitude, in proportion as it falls short in point of proximity.*

The profit of a crime is commonly more certain than its punishment; or, what amounts to the same thing, appears so to the offender. It is generally more immediate: the temptation to offend is present; the punishment is at a distance. Hence there are two circumstances which weaken the effect of punishment, its *uncertainty* and its *distance*.

Suppose the profit of a crime equal to £10 sterling; suppose the chance of punishment as one to two. It is clear, that if the punishment, supposing that it were to take place, is not more than £10 sterling, its effect upon a man's mind whilst it continues uncertain, is not equal to a certain loss of £10 sterling: it is only equal to a certain loss of £5 sterling. That it may be rendered equal to the profit of the crime, it must be raised to £20.

Unless men are hurried on by outrageous

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tre, dans l'esperance de la grâce; en Angleterre, on n'assassine point (il auroit du dire *peu*), parce que les voleurs peuvent esperer d'être transportés dans les colonies, non pas les assassines." — *Esprit des Lois*, lib. vi. ch. 16.

This expectation of favour, no doubt, contributes to the effect of which he speaks; but why should this manifest imperfection in the laws remain, that it may be corrected by an arbitrary act of the sovereign? If an uncertain advantage produces this measure of good, a certain advantage would operate more surely.

* See Introduction to Morals and Legislation — Circumstances influencing Sensibility.

passion, they do not engage in the career of crime without the hope of impunity. If a punishment were to consist only in taking from an offender the fruit of his crime, and this punishment were infallible, there would be no more such crimes committed; for what man would be so insensate as to take the trouble of committing a crime with the certainty of not enjoying its fruits, and the shame of having attempted it? But as there are always some chances of escape, it is necessary to increase the value of the punishment, to counterbalance these chances of impunity.

It is therefore true, that the more the certainty of punishment can be augmented, the more it may be diminished in amount. This is one advantage resulting from simplicity of legislation, and excellence of legal procedure.

For the same reason, it is necessary that the punishment should be as near, in point of time, to the crime, as possible; because its impression upon the minds of men is weakened by distance; and because this distance adds to the uncertainty of its infliction, by affording fresh chances of escape.

Rule IX.—*When the act is conclusively indicative of a habit, such an increase must be given to the punishment as may enable it to outweigh the profit, not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.*

Severe as this conjectural calculation may appear, it is absolutely necessary in some cases. Of this kind are fraudulent crimes; using false weights or measures, and issuing base coin. If the coiner was only punished according to the value of the single crime of which he is convicted, his fraudulent practice would, upon the whole, be a lucrative one. Punishment would therefore be inefficacious, if did not bear a proportion to the total gain which may be supposed to have been derived, not from one particular act, but from a train of actions of the same kind.

There may be a few other circumstances or considerations which may influence, in some small degree, the demand for punishment; but as the propriety of these is either not so demonstrable, or not so constant, or the application of them not so determinate, as that of the foregoing, it may be doubted whether they are worth putting on a level with the others.

Rule X.—*When a punishment, which in point of quality is particularly well calculated to answer its intention, cannot exist in less than a certain quantity, it may sometimes be of use, for the sake of employing it, to stretch a little beyond that quantity which, on other accounts, would be strictly necessary.*

Rule XI.—*In particular, this may be the case where the punishment proposed is of such a nature as to be particularly well calculated to answer the purpose of a moral lesson.*

Rule XII.—*In adjusting the quantum of punishment, the circumstances by which all punishment may be rendered unprofitable ought to be attended to.*

And lastly, as too great a nicety in establishing proportions between punishment and crime would tend to defeat its own object, by rendering the whole matter too complex, we may add—

Rule XIII.—*Among provisions designed to perfect the proportion between punishments and offences, if any occur which by their own particular good effects would not make up for the harm they would do by adding to the intricacy of the code, they should be omitted.*

The observation of rules of proportion between crimes and punishments has been objected to as useless, because they seem to suppose, that a spirit of calculation has place among the passions of men, who, it is said, never calculate. But dogmatic as this proposition is, it is altogether false. In matters of importance, every one calculates. Each individual calculates with more or less correctness, according to the degrees of his information, and the power of the motives which actuate him; but all calculate. It would be hard to say that a madman does not calculate. Happily, the passion of cupidity, which on account of its power, its constancy, and its extent, is most formidable to society, is the passion which is most given to calculation. This, therefore, will be more successfully combated, the more carefully the law turns the balance of profit against it.

CHAPTER VII.

OF THE PROPERTIES TO BE GIVEN TO A LOT OF PUNISHMENT.

It has been shown what rules ought to be observed in adjusting the proportion between punishment and offences. The properties to be given to a lot of punishment in every instance will of course be such as it stands in need of, in order to be capable of being applied in conformity to those rules: the *quality* will be regulated by the *quantity*.

I. *Variability.*

The first quality desirable in a lot of punishment is *variability;* that it be susceptible of degrees both of intensity and duration.

An *invariable* punishment cannot be made to correspond to the different degrees of the scale of punishment; it will be liable to err either by excess or defect: in the first case, it would be too expensive; in the second, inefficacious.

Acute corporeal punishments are extremely

variable in respect of intensity, but not of duration. Penal labour is variable in both respects, in nearly equal degrees.

Chronic punishments, such as banishment and imprisonment, may be easily divided as to their duration: they may also be varied as to their intensity. A prison may be more or less severe. banishment may be directed to a genial or ungenial clime.

II. *Equability.*

A second property, intimately connected with the former, may be styled *equability*. It will avail but little, that a mode of punishment (proper in all other respects) has been established by the legislature, and that capable of being screwed up or let down to any degree that can be required, if, after all, whatever degree of it be pitched upon, that same degree shall be liable, according to circumstances, to produce a very heavy degree of pain, or a very slight one, or even none at all. An equable punishment is free from this irregularity: an unequable one is liable to it.

Banishment is unequable: it may either prove a punishment or not, according to the temper, the age, the rank, or the fortune of the individuals. This is also the case with *pecuniary* or *quasi pecuniary* punishment, when it respects some particular species of property which the offender may or may not possess. By the English law, there are several offences which are punished by a total forfeiture of moveables, not extending to immoveables. In some cases, this is the principal punishment: in others, even the only one. The consequence is, that if a man's fortune happen to consist in moveables, he is ruined; if in immoveables, he suffers nothing.

In the absence of other punishment, it may be proper to admit an unequable punishment. The chance of punishing some delinquents is preferable to universal impunity.

One mode of obviating the evil of inequality consists in the providing of two different species of punishment, not to be used together, but that the one may be substituted for, and supply the defects of the other: for example, corporeal may be substituted for pecuniary punishment, when the poverty of the individual prevents the application of the latter.

An uncertain punishment is unequable. Complete certainty supposes complete equability; that is to say, that the same punishment shall produce in every case the same degree of suffering. Such accuracy is, however, evidently unattainable, the circumstances and sensibility of individuals being so variable and so unequal. All that can be accomplished is to avoid striking and manifest inequality. In the preparation of a penal code, it ought constantly to be kept in view, that according to circumstances, of condition, fortune, age, sex, &c. the same nominal is not the same real punishment. A fixed fine is always an unequable punishment; and the same remark is applicable to corporeal punishments. Whipping is not the same punishment when applied to all ages and ranks of persons. In China, indeed, every one is submitted to the bamboo, from the water-carrier to the mandarin; but this only proves, that among the Chinese the sentiments of honour are unknown.

III. *Commensurability.*

Punishments are commensurable, when the penal effects of each can be measured, and a distinct conception formed, of how much the suffering produced by the one falls short of or exceeds that produced by another. Suppose a man placed in a situation to choose between several crimes:—he can obtain a sum of money by theft, by murder, or by arson: the law ought to give him a motive to abstain from the greatest crime; he will have that motive, if he see that the greatest crime draws after it the greatest punishment: he ought, therefore, to be able to compare these punishments among themselves, and measure their different degrees.

If the same punishment of death is denounced for these three crimes, there is nothing to compare; the individual is left free to choose that crime which appears most easy of execution, and least liable to be detected.

Punishments may be made commensurable in two ways: 1. By adding to a certain punishment another quantity of the same kind; for example, to five years of imprisonment for a certain crime, two more years for a certain aggravation: 2. By adding a punishment of a different kind; for example, to five years of imprisonment for a certain crime, a mark of disgrace for a certain aggravation.

IV. *Characteristicalness.*

Punishment can act as a preventative only when the idea of it, and of its connexion with the crime, is present to the mind. Now, to be present, it must be remembered; and to be remembered, it must have been learnt. But of all punishments that can be imagined, there are none of which the connexion with the offence is either so easily learnt, or so efficaciously remembered, as those of which the idea is already in part associated with some part of the offence, which is the case when the one and the other have some circumstance that belongs to them in common.

The law of retaliation is admirable in this respect. *An eye for an eye, and a tooth for a tooth.* The most imperfect intelligence can connect these ideas. This rule of retaliation is, however, rarely practicable: it is too un-

equable and too expensive; recourse must therefore be had to other sources of analogy. We shall therefore recur to this subject in the next chapter.

V. *Exemplarity.*

A mode of punishment is exemplary in proportion to its *apparent*, not to its *real* magnitude. It is the apparent punishment that does all the service in the way of example. A real punishment, which should produce no visible effects, might serve to intimidate or reform the offender subjected to it; but its use, as an example to the public, would be lost.

The object of the legislator ought therefore to be, so far as it may be safely practicable, to select such modes of punishment as, at the expense of the least *real*, shall produce the greatest *apparent* suffering; and to accompany each particular mode of punishment with such *solemnities* as may be best calculated to further this object.

In this point of view, the *auto-da-fés* would furnish most useful models for acts of justice. What is a public execution? It is a solemn tragedy, which the legislator presents before an assembled people — a tragedy truly important, truly pathetic, by the sad reality of its catastrophe, and the grandeur of its object. The preparation for it, the place of exhibition, and the attendant circumstances, cannot be too carefully selected, as upon these the principal effect depends. The tribunal, the scaffold, the dresses of the officers of justice, the religious service, the procession, every kind of accompaniment, ought to bear a grave and melancholy character. The executioners might be veiled in black, that the terror of the scene might be heightened, and these useful servants of the state screened from the hatred of the people.

Care must however be taken lest punishment become unpopular and odious through a false appearance of rigour.

VI. *Frugality.*

If any mode of punishment is more apt than another to produce superfluous and needless pain, it may be styled *unfrugal;* if less, it may be styled *frugal.* The perfection of frugality in a mode of punishment, is where not only no superfluous pain is produced on the part of the person punished, but even that same operation, by which he is subjected to pain, is made to answer the purpose of producing pleasure on the part of some other person.

Pecuniary punishments possess this quality in an eminent degree: nearly all the evil felt by the party paying, turns to the advantage of him who receives.

There are some punishments which, with reference to the public expense, are particularly unfrugal: for example, mutilations, applied to offences of frequent occurrence, such as smuggling. When an individual is rendered unable to work, he must be supported by the state, or rendered dependent upon public charity, and thus fixed as a burthen upon the most benevolent.

If the statement of Filangieri is correct, there were constantly in the state-prisons of Naples more than forty thousand idle prisoners. What an immense loss of productive power! The largest manufacturing town in England scarcely employs a greater number of workmen.

By the military laws of most countries, deserters are still condemned to death. It costs little to shoot a man; but every thing which he might be made to produce, is lost; and to supply his place, a productive labourer must be converted into an unproductive one.

VII. *Subserviency to Reformation.*

All punishment has a certain tendency to deter from the commission of offences; but if the delinquent, after he has been punished, is only deterred by fear from the repetition of his offence, he is not reformed. Reformation implies a change of character and moral dispositions.

Hence those punishments which are calculated to weaken the seductive, and to strengthen the preserving motives, have an advantage over all others with respect to those offences to which they can be applied.

There are other punishments which have an opposite tendency, and which serve to render those who undergo them still more vicious. Punishments which are considered infamous, are extremely dangerous in this respect, particularly when applied to slight offences and juvenile offenders. *Diligentius enim vivit, cui aliquid integri superest. Nemo dignitati perditæ parcit. Impunitatis genus est jam non habere pœnæ locum.*[*]

Of this nature also, in a high degree, is the punishment of imprisonment, when care is not taken to prevent the indiscriminate association of prisoners, but the juvenile and the hoary delinquents are allowed to meet and to live together. Such prisons, instead of places for reform, are schools of crime.

VIII. *Efficacy with respect to Disablement.*

A punishment which takes away the power of repeating the crime must be very desirable, if not too costly. Imprisonment, whilst it continues, has this effect in a great measure. Mutilation sometimes reduces the power of committing crimes almost to nothing, and death destroys it altogether. It will, however, be perceived, that whilst a man is disabled from doing mischief, he is also in great

[*] Senec. de Clem. chap. xxii.

measure disabled from doing good to himself or others.

In some extraordinary cases, the power of doing mischief can only be destroyed by death: as, for example, the case of civil war, when the mere existence of the head of a party is sufficient to keep alive the hopes and exertions of his partisans. In such a case, however, the guilt of the parties is often problematic, and the punishment of death savours more of vengeance than of law.

There are, however, cases in which the ability to do mischief may be taken away with great economy of suffering. Has the offence consisted in an abuse of power — in an unfaithful discharge of duty? it is sufficient to depose the delinquent, to remove him from the employment, the administration, the guardianship, the trust he has abused. This remedy may equally be employed in domestic and political government.

IX. *Subserviency to Compensation.*

A further property desirable in a lot of punishment is, that it may be convertible to profit.

When a crime is committed, and afterwards punished, there have existed two lots of evil — the evil of the offence, and the evil of the punishment. Whenever, then, the evil of the offence falls upon a specific person, if the punishment yield a profit, let the profit arising from it be given to that person. The evil of the offence will be removed, and there will then only exist one lot of evil, instead of two. When there is no specific party injured, as when the mischief of the crime consists in alarm or danger, there will be no specific injury to be compensated; still, if the punishment yield a profit, there is a clear balance of good gained.

This property is possessed in a more eminent degree by pecuniary than by any other mode of punishment.

X. *Popularity.*

In the rear of all these properties may be introduced that of *popularity* — a very fleeting and indeterminate kind of property, which may belong to a lot of punishment one moment, and be lost by it the next. This property, in strictness of speech, ought rather to be called *absence of unpopularity;* for it cannot be expected, in regard to such a matter as punishment, that any species or lot of it should be positively acceptable and grateful to the people: it is sufficient, for the most part, if they have no decided aversion to the thoughts of it.

The use of inserting this property in the catalogue is, that it may serve as a memento to the legislator not to introduce, without a cogent necessity, any mode or lot of punishment towards which any violent aversion is entertained by the body of the people, since it would be productive of useless suffering, — suffering borne not by the guilty, but the innocent; and among the innocent, by the most amiable, by those whose sensibility would be shocked, whose opinions would be outraged, by the punishment which would appear to them violent and tyrannical. The effect of such injudicious conduct on the part of a legislator would be to turn the tide of popular opinion against himself: he would lose the assistance which individuals voluntarily lend to the execution of the laws which they approve: the people would not be his allies, but his enemies. Some would favour the escape of the delinquent; the injured would hesitate to prosecute, and witnesses to bear testimony against him. By degrees, a stigma would attach to those who assisted in the execution of the laws. Public dissatisfaction would not always stop here: it would sometimes break out into open resistance to the officers of justice and the execution of such laws. Successful resistance would be considered a victory, and the unpunished delinquent would rejoice over the weakness of the laws disgraced by his triumph.

The unpopularity of particular punishments almost always depends upon their improper selection. The more completely the penal code shall become conformed to the rules here laid down, the more completely will it merit the enlightened approbation of the wise, and the sentimental approval of the multitude.

XI. *Simplicity of Description.*

A mode of punishment ought also to be as simple as possible in its description: it ought to be entirely intelligible; and that not only to the enlightened, but to the most unenlightened and ignorant.

It will not always be proper, however, to confine punishments to those of a simple description: there are many offences in which it will be proper that the punishment should be composed of many parts; as of pecuniary fine, corporal suffering, and imprisonment. The rule of *simplicity* must give way to superior considerations: it has been placed here, that it may not be lost sight of. The more complex punishment is, the greater reason is there to fear that it will not be present as a whole to the mind of an individual in the time of temptation: of its different parts he may never have known some — he may have forgotten others. All the parts will be found in the *real* punishment, but they have not been perceived in the *apparent*.

The name of a punishment is an important object. Enigmatical names spread a cloud over the mass of punishments, which the mind cannot dissipate. The English laws

are frequently defective in this respect. A *capital felony* includes different lots of punishment, the greater part unknown, and consequently inefficacious. A *felony with benefit of clergy* is equally obscure: the threatening of the law does not convey any distinct idea to the mind; — the first idea which the term would offer to an uninstructed person would be, that it had some reference to a reward. A *præmunire* is not more intelligible; even those who understand the Latin word are far from comprehending the nature of the punishment which it denounces.

Riddles of this kind resemble those of the sphynx: those are punished who do not decypher them.

XII. *Remissibility*

Remissibility is the last of all the properties that seem to be requisite in a lot of punishment. The general presumption is, that when punishment is applied, punishment is needful; that it ought to be applied, and therefore cannot be remitted But in very particular, and those very deplorable cases, it may by accident happen otherwise. Punishment may have been inflicted upon an individual whose innocence is afterwards discovered. The punishment which he has suffered cannot, it is true, be remitted, but he may be freed from as much of it as is yet to come. There is, however, little chance of there being any yet to come, unless it be so much as consists of *chronical* punishment; such as imprisonment, banishment, penal labour, and the like. So much as consists in *acute* punishment, where the penal process itself is over presently, however permanent the punishment may be in its effects, may be considered as irremissible. This is the case, for example, with whipping, branding, mutilation, and capital punishment. The most perfectly irremissible of any is capital punishment. In all other cases, means of compensation may be found for the sufferings of the unfortunate victim, but not in this.

The foregoing catalogue of properties desirable in a lot of punishment, is far from unnecessary. On every occasion, before a right judgment can be formed, it is necessary to form an abstract idea of all the properties the object ought to possess. Unless this is done, every expression of approbation or disapprobation can arise only from a confused feeling of sympathy or antipathy. We now possess clear and distinct reasons for determining our choice of punishments. It remains only to observe in what proportion a particular punishment possesses these different qualities.

If a conclusion is drawn from one of these qualities alone, it may be subject to error: attention ought to be paid, not to one quality alone, but to the whole together.

There is no one lot of punishment which unites all these desirable qualities; but, according to the nature of the offences, one set of qualities is more important than another.

For great crimes, it is desirable that punishments should be exemplary and analogous. For lesser crimes, the punishments should be inflicted with a greater attention to their frugality, and their tendency to moral reformation. As to crimes against property, those punishments which are convertible to profit are to be preferred, since they may be rendered subservient to compensation for the party injured.

Note by Dumont.

I subjoin to this chapter an example of the progressive march of thought, and of the utility of these enumerations to which every new observation may be referred, so that nothing may be lost.

I have sought out from the works of Montesquieu all the qualities which he appears to have regarded as necessary in a lot of punishment. I have found only four, and these are either expressed by indefinite terms, or periphrasis: —

1. He says, that *Punishments should be drawn from the nature of the crimes;* and he appears to mean, that they should be characteristic.

2. That they should be *moderate;* an expression which is indeterminate, and does not yield any point of comparison.

3. That they should be *proportional to the crime.* This proportion has reference, however, rather to the quantity of the punishment than to its quality. He has neither explained in what it consists, nor given any rule respecting it.

4. That they should be *modest.*

Beccaria has mentioned *four* qualities: —

1. He requires that punishments should be *analogous to the crimes;* but he does not enter into any detail upon this analogy.

2. That they should be *public;* and he means by that, *exemplary.*

3. That they be *gentle;* an improper and unsignificant term; whilst his observations upon the danger of excess in punishment are very judicious.

4. That they should be *proportional;* but he gives no rule for this proportion.

He requires, besides this, that they should be *certain*, *prompt*, and *inevitable;* but these circumstances depend upon the forms of procedure in the application of punishment, and not upon its qualities.

In his commentary upon Beccaria, Voltaire often recurs to the idea of rendering punisnments profitable: — "A dead man is good for nothing."

One of the heroes of humanity, the good and amiable Howard, had continually in view the amendment of delinquents.

Confining our attention to those who are considered as oracles in this branch of science, we cannot but observe, that between these scattered ideas, and vague conceptions, which have not yet received a name, and a regular catalogue in which these qualities are distinctly presented to us, with names and definitions, there is a wide interval. By thus placing them under one point of view, another advantage is gained: their true worth and comparative importance is determined.

CHAPTER VIII.

OF ANALOGY BETWEEN CRIMES AND PUNISHMENTS.

Analogy is that relation, connexion, or tie, between two objects, whereby the one being present to the mind, the idea of the other is naturally excited.

Likeness is one source of analogy, contrast another.* That a punishment may be analogous to an offence, it is necessary that the crime should be attended with some striking characteristic circumstances, capable of being transferred upon the punishment.

These characteristic circumstances will be different in different crimes. In some cases they may arise from the instrument whereby the mischief has been done; in others, from the object to which the mischief is done; in others, from the means employed to prevent detection.

The examples which follow are only intended clearly to explain this idea of analogy. I shall point out the analogy between certain crimes and certain punishments, without absolutely recommending the employment of those punishments in all cases. It is not a sufficient reason for the adoption of a punishment, that it is analogous: other considerations ought to be always regarded.

Montesquieu was dazzled by the merit of analogy in a punishment, and has attributed to it wonderful effects which it does not possess. — *Esprit des Lois*, xii. 4.

These considerations appear to afford a sufficient answer to the objection often raised against the methodic forms employed by Mr. Bentham. I refer to his divisions, tables, and classifications, which have been called his *logical apparatus*. All this, it has been said, is only the scaffold, which ought to be taken down when the building is erected. But why deprive his readers of the instruments which the author has employed? why hide from them his analytical labours and process of invention? These tables form a machine for thought — *organum cogitativum*. The author discloses his secret; he associates his readers with him in his labour; he gives them the clue which has guided him in his researches, and enables them to verify his results. The singularity is this — the extent of the service diminishes its value.

I am sensible, that by employing these logical methods as a secret — by not exhibiting, so to speak, the skeleton, the muscles, the nerves, much would be gained in elegance and interest. By using the method of analysis, everything is announced beforehand — there is nothing unexpected; — the whole is clear; and there are no points of surprise — no flashes of genius to dazzle for a moment, and then leave you in darkness. It requires courage to follow up so severe a method, but it is the only method which can completely satisfy the mind.

* Thus from the idea of a giant, the mind passes on to every thing that is great. The Liliputians called Gulliver the Man-mountain. Or, from the idea of a giant the mind may pass to that of a dwarf.

§ 1. *First Source of Analogy.*

The same Instrument used in the Crime as in the Punishment. — Incendiarism, inundation, poisoning: in these crimes, the instrument employed is the first circumstance which strikes the mind. In their punishment, the same instrument may be employed.

With respect to incendiarism, we may observe, that this crime should be considered as limited to those cases in which some individual has perished by fire: if no life has been lost, nor any personal injury been suffered, the offence ought to be treated as an ordinary waste; whether an article of property has been destroyed by fire, or any other agent, does not make any difference. The amount of the damage ought to be the measure of the crime. Does a man set fire to a solitary and uninhabited house? this would be an act of destruction, and ought not to be ranked under the definition of incendiarism.†

If the punishment of fire had been reserved for incendiaries, the law would have had in its favour both reason and analogy; but in the legislation of barbarous times, it has been generally employed throughout Europe, for the crimes of magic and heresy: the first, an offence purely imaginary; the second, a simple difference of religious opinion, perfectly innocent, often useful, and with respect to which, the only effect of punishment is to produce insincerity.

Fire may be employed as an instrument of punishment, without occasioning death. This punishment is variable in its nature through all the degrees of severity of which there can be any need. It would be necessary carefully to determine in the text of the law, the part of the body which ought to be exposed to the action of the fire; the intensity of the fire; the time during which it is to be applied, and the paraphernalia to be employed to increase the terror of the punishment. In order to render the description more striking, a print might be annexed, in which the operation should be represented.

Inundation is an offence less common than incendiarism: in some countries it is altogether unexampled; it can only be perpetrated in countries that are intersected by water confined by artificial banks. It is susceptible of every degree of aggravation, from the highest to the lowest. If the offence consist merely in inundation, in effect it amounts only to a simple destruction of property. It is by the destruction of life that this crime is raised to that degree of atrocity which requires severe punishment.

A most evident analogy points out the means of punishment; that is, the drowning

† The employment of this means of destruction ought, however, to be considered as aggravation, if there has been any danger of the fire communicating to contiguous objects.

of the criminal, with such accompanying circumstances as will add to the terror of the punishment. In a penal code which should not admit the punishment of death, the offender might be drowned and then restored to life. This might be made a part of the punishment.

It may be asked, ought poison to be employed as a means of punishment for a poisoner?

In some respects there is no punishment more suitable. Poisoning is distinguished from other murders, by the secrecy with which it may be perpetrated, and the cool determination which it supposes. Of these two circumstances, the first increases the force of temptation and the evil of the crime; the second proves that the criminal, attentive to his own interest, is capable of serious reflection upon the nature of the punishment. The idea of perishing by the same kind of death which he prepares, is the more frightful for him: in every step of his preparations, his imagination will represent to him his own lot. In this point of view, the analogy would produce its full effect.

There are, however, many difficulties. Poisons are uncertain in their operation: it would be necessary, therefore, to fix a time after which the punishment should be abridged by strangulation. If the effect of the poison should be to produce sleep, the punishment may not be sufficiently exemplary: if it produce convulsions and distortions, it may prove hateful.

If the poison administered by the criminal has not proved fatal, he may be made to take an antidote before the penal poison has produced death. The dose and the time may be fixed by the Judges, according to the report of skilful physicians.

The horror attached to this crime would most probably render this punishment popular. And if there is one country in which this crime is more common than others, it is there that this punishment, which possesses so striking an analogy with the crime, would be most suitable.

§ 2. *Second Source of Analogy.*

For a Corporal Injury, a similar Corporal Injury. — "An eye for an eye, a tooth for a tooth." In crimes producing irreparable bodily injuries, the part of the body injured will afford the characteristic circumstance. The analogy will consist in making the offender suffer an evil similar to that which he has maliciously and wilfully inflicted.

It will, however, be necessary to provide for two cases: that in which the offender does not possess the member of which he has deprived the party he has attacked, and that in which the loss of the member would be more or less prejudicial to him than to the party injured.

If the injury has been of an ignominious nature, without permanent mischief, similar ignominy may be employed in the punishment, when the rank of the party and other circumstances permit.

§ 3. *Third Source of Analogy*

Punishment of the Offending Member. — In crimes of deceit, the tongue and the hand are the usual instruments. An exact analogy in the punishment may be drawn from this circumstance.

In punishing the crime of forgery, the hand of the offender may be transfixed by an iron instrument fashioned like a pen; and in this condition he may be exhibited to the public, previously to undergoing the punishment of imprisonment.

In the utterance of calumny, and the dissemination of false reports, the tongue is the instrument employed. The offender might in the same manner be publicly exposed with his tongue pierced.

These punishments may be made more formidable in appearance than in reality, by dividing the instruments in two parts, so that the part which should pierce the offending member need not be thicker than a pin, whilst the other part of the instrument may be much thicker, and appear to penetrate with all its thickness.

Punishments of this kind may appear ridiculous; but the ridicule which attaches to them enhances their merit. This ridicule will be directed against the cheat, whom it will render more despicable, whilst it will increase the respect due to upright dealing.

§ 4. *Fourth Source of Analogy.*

Imposition of Disguise Assumed. — Some offences are characterized by the assumption of a disguise to facilitate their commission: a mask, or crape over the face, has commonly been used. This circumstance constitutes an aggravation of the offence: it increases the alarm produced, and diminishes the probability of detection; and hence arises the propriety of additional punishment. Analogy would recommend the imprinting on the offender a representation of the disguise assumed. This impression might be made either evanescent or indelible, according as the imprisonment by which it may be accompanied, is to be either temporary or otherwise. If evanescent, it might be produced by the use of a black wash: if indelible, by tatooing. The utility of this punishment would be most particularly felt in cases of premeditated murder, rape, irreparable personal injury, and theft, when accompanied with violence and alarm.

§ 5. *Other Sources of Analogy.*

There are other characteristic circumstances, which do not, like the foregoing, fall

into classes; which may, however, according to the nature of the different offences, be employed as a foundation for analogy.

In the fabrication of base coin, the art of the delinquent may furnish an analogous source of punishment. He has made an impression upon the metal he has employed; — a like impression may be made on some conspicuous part of his face. This mark may be either evanescent or indelible, according as the imprisonment by which it is to be accompanied is either temporary or perpetual.

At Amsterdam, vagabonds and idle persons are committed to the House of Correction, called the Rasp House. It is said, that among other species of forced labour in which such characters are employed, there is one reserved for those who are incorrigible by other means: which consists in keeping a leaky vessel, in which the idle prisoner is placed, dry, by means of a pump at which he must work, if he would keep himself from being drowned. Whether this punishment is in use or not, it is an example of an analogous punishment carried to the highest degree of rigour. If such a method of punishment is adopted, it ought to be accompanied with precise regulations for adjusting the punishment to the strength of the individual undergoing it.

The place in which a crime has been committed may furnish a species of analogy. Catherine II. condemned a man who had committed some knavish trick at the Exchange, to sweep it out every day that it was used, during six months.

Note by Dumont.

I am not aware of any objection having been urged against the utility of analogy in punishments: whilst it is spoken of only in general terms, everybody acknowledges its propriety; when we proceed to apply the principle, the imagination being the chief judge of the propriety of its application, the diversity of opinion is infinite. Hence some persons have been struck with extreme repugnance in contemplating the analogous punishments proposed by Mr. Bentham,[a] whilst others have considered them only as fit subjects for ridicule and caricature.

Success depends upon the choice of the means employed. Those sources of analogy ought therefore to be avoided which are not of a sufficiently grave character to be used as punishments; but it may be observed, that with relation to certain offences, those, for instance, which are accompanied by insolence and insult, that an analogous punishment which excites ridicule, is well calculated to humble the pride of the offender, and gratify the offended party.

Every thing ought also to be avoided which has an appearance of great study and refinement. Punishment ought only to be inflicted of necessity, and with feelings of regret and repugnance. The multitude of instruments possessed by a surgeon, may be contemplated with satisfaction, as intended to promote the cure and lessen the weight of our sufferings. The same satisfaction will not, however, be felt in contemplating a variety of punishments, and they will most likely be considered as degrading to the character of the legislator.

With these precautions, analogy is calculated to produce only good effects. It puts us in the track of discovering the most economical and efficacious punishments. I cannot resist the pleasure of citing an example furnished me by a captain in the English navy: he had not studied the principles of Mr. Bentham, but he knew how to read the human heart.

The leave of absence generally granted to sailors, was for twenty-four hours: if they exceeded this time, the ordinary punishment was the cat-o'-nine-tails. The dread of this punishment was a frequent cause of desertions. Many captains, in order to prevent both these offences, refused all leave of absence to their sailors, so that they were kept on shipboard for years together. The individual to whom I refer, discovered a method of reconciling the granting of leave with the security of the service. He made a simple change in the punishment: — Every man who exceeded his prescribed time of leave, lost his right to a future leave, in proportion to his fault. If he remained on shore more than twenty-four hours, he lost one turn; if more than forty-eight hours, he lost two turns; and so of the rest. The experiment was perfectly successful. The fault became less frequent, and desertions were unknown.

[a] Traites de Legislation.

CHAPTER IX.

OF RETALIATION.

If the law of retaliation were admissible in all cases, it would very much abridge the labours of the legislators. It would make short work of the business of laying out a plan of punishment — a word would supply the place of a volume.*

Before we say any thing as to the advantage of the rule, it will be proper to state with precision what is meant by it. The idea given of it in Blackstone's Commentaries seems to be a correct one; — it is that rule which prescribes, in the way of punishment, the doing to a delinquent the same hurt he has done (one might perhaps add, or attempted to do) to another. If the injury were done to the person, the delinquent should be punished in his person: if to property, in his property: if to the reputation, in his reputation. This is the general scheme; but this, however, in itself, is not quite enough. To make the punishment come incontestibly under the law of retaliation, the identity between the subject of the offence and that of the punishment should be still more specific and

* The law of retaliation was often adopted in the early attempts at legislation. Among the laws of Alfred we find the following article: — "Si quis alterius occulum effoderit, compenset proprio, dentem pro dente, manum pro manu, pedem pro pede, adustionem pro adustione, vulnus pro vulnere, vimen pro vimine." — *Wilk. Ll. Ang. Sax.* p. 30. Art. 19.

determinate. If, for example, the injury were to a man's house—for instance, by the destruction of his house, then the delinquent should have his house destroyed; if to his reputation, by causing him to lose a certain rank, then the delinquent should be made to lose the same rank; if to the eyes, then the criminal should be made to lose his eyes; if to his lip, then to lose his lip: and, in short, the more specific and particular the resemblance between the subject of the offence and of the punishment, the more strictly and incontestibly it would appear to come under the rule. It is when the person is the subject of the injury, that the resemblance is capable of being rendered the most minute; for it is in this case, that by means of the strict identity of the part affected, "*the hurt*" is capable of being rendered the most accurately the "*same.*" *An eye for an eye, and a tooth for a tooth*, are the familiar instances that are put of the law of retaliation. In this case, too, the identity may be pushed still further, by affecting the same part in the same manner; the sameness of the hurt depending on the identity of the one circumstance as well as of the other. Thus, if the injury consisted in the burning out of an eye, the punishment will be more strictly the same, if it be effected by burning rather than cutting out the eye of the delinquent.

The great merit of the law of retaliation is its simplicity. If it were capable of universal adoption, the whole penal code would be contained in one law:—"Let every offender suffer an evil similar to that which he has inflicted."

No other imaginable plan can, for its extent, find so easy an entrance into the apprehension, or sit so easy on the memory. The rule is at once so short and so expressive, that he who has once heard it, is not likely to forget it, or ever to think of a crime, but he must think also of its punishment. The stronger the temptation to commit an offence, the more likely is its punishment to be an object of dread. Thus the defence is erected on the side of danger.

One advantage that cannot be denied to this mode of punishment, is its popularity; requiring little expense of thought, it will generally be found to possess the judgment of the multitude in its favour. Should they, in any instance, be disposed to quarrel with it, they will still be ready enough, probably, to own it to be consonant to justice: but that justice, they will say, is rigid justice, or, to vary the jargon, justice in the abstract. All this while, with these phrases on their lips, they would perhaps prefer a milder punishment, as being more consonant to mercy, and, upon the whole, more conducive to the general happiness—as if justice, and especially penal justice, were something distinct from, and adverse to, that happiness. When, however, it happens not to give disgust by its severity, nothing can be more popular than this mode of punishment. This may be seen in the case of murder, with respect to which the attachment to this mode of punishment is warm and general. Blood (as the phrase is) will have blood. Unless a murderer be punished with death, the multitude of speculators can seldom bring themselves to think that the rules of justice are pursued.

The law of retaliation is, however, liable to a variety of objections, one of which, so far as it applies, is conclusive against its adoption. In a great variety of cases, it is physically inapplicable. Without descending far into detail, a few instances may suffice as examples. In the first place, it can never be applied when the offence is merely of a public nature—the characteristic quality of such offences being, that no assignable individual is hurt by them. If a man has been guilty of high treason, or has engaged in criminal correspondence with an enemy, or has, from cowardice, abandoned the defence of a post entrusted to him; how would it be possible to make him suffer an evil similar to that of which he has been the cause?

It is equally inapplicable to offences of the semi-public class—to offences which affect a certain district, or particular class of the community. The mischief of these offences often consists in alarm and danger, which do not affect one individual alone, and therefore do not present any opportunity for the exercise of retaliation.

With respect to self-regarding offences, consisting of acts which offend against morality, the application of this law would be absurd. The individual has chosen to perform the act; to do the same thing to him, would not be to punish him.

In offences against reputation, consisting, for instance, in the propagation of false reports affecting the character, it would be useless as a punishment to direct a similar false report to be propagated affecting the character of the delinquent. The like evil would not result from the circulation of what was acknowledged to be false.

In offences against property, the punishment of retaliation would at all times be defective in point of exemplarity and efficacy, and, in many cases, altogether inapplicable; those who are most apt to injure others in this respect, being, by their poverty, unable to suffer in a similar manner.

For a similar reason, it cannot be constantly applied to offences affecting the civil condition of individuals, to say nothing of the reasons that might render it ineligible, if it were possible to be applied.

These exceptions reduce its possible field of action to a very small extent, the only

classes of offences to which it will be found applicable, with any degree of constancy, are those that affect the person; and even here must be assumed, what scarcely ever exists, a perfect identity of circumstances. Even in this very limited class of cases, it would be found to err on the side of excessive severity. Its radical defect is, its inflexibility. The law ought so to apportion the punishment as to meet the several circumstances of aggravation or extenuation that may be found in the offence: retaliation is altogether incompatible with any such apportionment.

The class of people among whom this mode of punishment is most likely to be popular, are those of a vindictive character. Mahomet found it established among the Arabians; and has adopted it in the Koran, with a degree of approbation, that marks the extent of his talent for legislation: — "O you who have a heart, you will find in the law of retaliation, and in the fear that accompanies it, universal security."— (Vol. I. ch. ii. *On the Law.*) Either from weakness or ignorance, he encouraged the prevailing vice, which he ought to have checked.

CHAPTER X.

OF POPULARITY.

To prove that an institution is agreeable to the principle of utility, is to prove, as far as can be proved, that the people *ought* to like it: but whether they *will* like it or no after all, is another question. They would like it if, in their judgments, they suffered themselves to be uniformly and exclusively governed by that principle. By this principle they do govern themselves in proportion as they are humanized and enlightened: accordingly, the deference they pay to its dictates is more uniform in this intelligent and favoured country than perhaps in any other. I speak here, taking the great mass of the people upon this occasion, as they ought to be taken upon every occasion, into the account, and not confining my views, as is too commonly the case, to men of rank and education.

Even in this country, however, their acquiescence is far from being as yet altogether uniform and undeviating: in some instances their judgments are still warped by antipathies or prejudices unconnected with the principle of utility, and therefore irreconcilable to reason. They are apt to bear antipathy to certain offences, without regard to even their imputed mischievousness, and to entertain a prejudice against certain punishments, without regard to their eligibility with respect to the ends of punishment.

The variety of capricious objections to which each particular mode of punishment is exposed, has no other limits than the fecundity of the imagination: with some slight exceptions, they may however be ranged under one or other of the following heads:— *Liberty — Decency — Religion — Humanity.* What I mean by a capricious objection, is an objection which derives the whole of its apparent value from the impression that is apt to be made by the use of those hallowed expressions: the caprice consists in employing them in a perverted sense.

1. *Liberty.* — Under this head there is little to be said. All punishment is an infringement on liberty: no one submits to it but from compulsion. Enthusiasts, however, are not wanting, who, without regarding this circumstance, condemn certain modes of punishment, as, for example, imprisonment accompanied with penal labour, as a violation of the natural rights of man. In a free country like this, say they, it ought not to be tolerated, that even malefactors should be reduced to a state of slavery: the precedent is dangerous and pernicious; none but men groaning under a despotic government can endure the sight of galley-slaves.

When the establishment of the penitentiary system was proposed, this objection was echoed and insisted on, in a variety of publications that appeared on that occasion. Examine this senseless clamour: it will resolve itself into a declaration, that liberty ought to be left to those that abuse it, and that the liberty of malefactors is an essential part of the liberty of honest men.

2. *Decency.* — Objections drawn from the topics of decency are confined to those punishments, of which the effect is to render those parts which it is inconsistent with decency to expose, the objects of sight or of conversation.

Who can doubt, that in all punishments, care should be taken that no offence be given to modesty. But modesty, like other virtues, is valuable only in proportion to its utility. When the punishment is the most appropriate, though not either in its description or its execution altogether reconcilcable with modesty, this circumstance ought not, as it appears to me, to stand in the way of the attainment of any object of greater utility. Castration, for example, seems the most appropriate punishment in the case of rape; that is to say, the best adapted to produce a strong impression on the mind at the moment of temptation. Is it expedient, then, on account of such scruples of modesty, that another punishment, as, for example, death, should be employed, which is less exemplary, and, consequently, less efficacious?*

* It is said, that in one of the cities of Greece, among the young women, instigated by I know not what disease of the imagination, the practice of suicide was for a time extremely prevalent. The

3. *Religion*— Among Christians there are some sects who conceive that the punishment of death is unlawful: life, say they, is the gift of God, and man is forbidden to take it away.

We shall find in the next book, that very cogent reasons are not wanting for altogether abolishing capital punishment, or, at most, for confining it to extraordinary cases. But this pretence of unlawfulness is a reason drawn from false principles.

Unlawful means *contrary to some law.* Those who, upon the occasion in question, apply this expression to the punishment of death, believe themselves, or endeavour to make others believe, that it is contrary to some divine law: this divine law is either revealed or unrevealed; if it be revealed, it must be to be found in the texts of those books which are understood to contain the expressions of God's will; but as there exists no such text in the New Testament, and as the Jewish law expressly ordains capital punishment, the partisans of this opinion must have recourse to some divine law not revealed —to a natural law; that is to say, to a law deduced from the supposed will of God.

But if we presume that God wills anything, we must suppose that he has a reason for so doing, a reason worthy of himself, which can only be the greatest happiness of his creatures. In this point of view, therefore, the divine will cannot require anything inconsistent with general utility.

If it can be pretended that God can have any will not consistent with utility, his will becomes a fantastic and delusive principle, in which the ravings of enthusiasm, and the extravagancies of superstition, will find sanction and authority.

In many cases, religion has been to such a degree perverted, as to become a bar to the execution of penal laws; as in the case of sanctuaries opened for criminals, in the Romish churches.

Theodosius I. forbade all criminal proceedings during Lent, alleging, as a reason, that the judges ought not to punish the crimes of others whilst they were imploring the divine forgiveness for their own transgressions. Valentinian I. directed that at Easter all prisoners should be discharged, except those that were accused of the most malignant offences.

Constantine prohibited, by law, the branding criminals on the face, alleging, that it is a violation of the law of nature to disfigure the majesty of the human face—the majesty of the face of a scoundrel!

The Inquisition, says Bayle, that it might not violate the maxim, *Ecclesia non novit sanguinem*, condemned its victims to be burnt alive. Religion has had its quibbles as well as the law.

4. *Humanity.*— Attend not to the sophistries of reason, which often deceive, but be governed by your hearts, which will always lead you to right. I reject, without hesitation, the punishment you propose: it violates natural feelings, it harrows up the susceptible mind, it is tyrannical and cruel. Such is the language of your sentimental orators.

But abolish any one penal law, merely because it is repugnant to the feelings of a humane heart, and, if consistent, you abolish the whole penal code: there is not one of its provisions that does not, in a more or less painful degree, wound the sensibility.

All punishment is in itself necessarily odious: if it were not dreaded, it would not effect its purpose; it can never be contemplated with approbation, but when considered in connexion with the prevention of the crime against which it is denounced.

I reject sentiment as an absolute judge, but under the control of reason it may not be a useless monitor. When a penal dispensation is revolting to the public feeling, this is not of itself a sufficient reason for rejecting it, but it is a reason for subjecting it to a rigorous scrutiny. If it deserves the antipathy it excites, the causes of that antipathy may be easily detected. We shall find that the punishment in question is mis-seated, or superfluous, or disproportionate to the offence, or that it has a tendency to produce more mischief than it prevents. By this means we arrive at the seat of the error. Sentiment excites to reflection, and reflection detects the impropriety of the law.

The species of punishment that command the largest share of public approbation are such as are analogous to the offence. Punishments of this description are commonly considered just and equitable; but what is the foundation of this justice and equity I know not. The delinquent suffers the same evil he has caused: ought the law to imitate the example it condemns? ought the judge to imitate the malefactor in his wickedness? ought a solemn act of justice to be the same in kind as an act of criminality?

This circumstance satisfies the multitude: the mouth of the criminal is stopped, and he cannot accuse the law of severity, without at the same time being equally self-condemned.

Fortunately, the same bent of the imagination that renders this mode of punishment

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The magistrates, alarmed by its frequency, ordered that, as a sort of posthumous punishment, their bodies, in a state of nudity, should be drawn through the public places. Into the truth of the relation, it is needless to inquire: but the narrator adds, the offence thenceforth altogether ceased. Here, then, is an instance of the utility of a law offensive to modesty, proved by its efficacy: for what higher degree of perfection can be looked for in any penal law than that of preventing the offence?

popular, renders it at the same time appropriate. The analogy that presents itself to the people, presents itself at the moment of temptation to the delinquent, and renders it a peculiar object of dread.

It is of importance to detect and expose erroneous conceptions, even when they happen to accord with the principle of utility. The coincidence is a mere accident; and whoever on any one occasion forms his judgment, without reference to this principle, prepares himself upon any other to decide in contradiction to it. There will be no safe and steady guide for the understanding in its progress, till men shall have learnt to trust to this principle alone, to the exclusion of all others. When the judgment is to decide, the use of laudatory or vituperative expressions is the mere babbling of children: they ought to be avoided in all philosophical disquisitions, where the object ought to be to instruct and convince the understanding, and not to inflame the passions.

BOOK II.

OF CORPORAL PUNISHMENTS.

CHAPTER I.

SIMPLE AFFLICTIVE* PUNISHMENTS.

A PUNISHMENT is simply afflictive when the object aimed at is to produce immediate temporary suffering, and is so called to distinguish it from other classes of corporeal punishments, in which the suffering produced is designed to be more permanent. Simple afflictive punishments are distinguished from one another by three principal circumstances: the part affected, the nature of the instrument, and the manner of its application.

To enumerate all the varieties of punishment which might be produced by the combination of these different circumstances, would be an useless, as well as an endless task. To enumerate the several parts of a man's body in which he is liable to be made to suffer, would be to give a complete body of anatomy. To enumerate the several instruments by the application of which he might be made to suffer, would be to give a complete body of natural history. To attempt to enumerate the different manners in which those instruments may be applied to such a purpose, would be to attempt to exhaust the inexhaustible variety of motions and situations.

Among the indefinite multitude of punishments of this kind that might be imagined and described, it will answer every purpose if we mention some of those which have been in use in this and other countries.

The most obvious method of inflicting this species of punishment, and which has been most commonly used, consists in exposing the body to blows or stripes. When these are inflicted with a flexible instrument, the operation is called whipping: when a less flexible instrument is employed, the effects are different; but the operation is seldom distinguished by another name.

In Italy, and particularly in Naples, there is a method, not uncommon, of punishing pickpockets, called the *Strappado*. It consists in raising the offender by his arms, by means of an engine like a crane, to a certain height, and then letting him fall, but suddenly stopping his descent before he reaches the ground. The momentum which his body has acquired in the descent is thus made to bear upon his arms, and the consequence generally is, that they are dislocated at the shoulder: to prevent the permanent evil consequences, a surgeon is then employed to reset them.

There were formerly in England two kinds of punishment of this class, discarded now even from the military code, in which they were longest retained: the one called *Picketing*, which consisted in suspending the offender in such manner that the weight of his body was supported principally by a spike, on which he was made to stand with one foot: the other, the *Wooden Horse*, as it was called, was a narrow ledge or board, on which the individual was made to *sit* astride; and the inconvenience of which was increased by suspending weights to his legs.

Another species of punishment formerly practised in this country, but now rarely used, consisted in subjecting the patient to frequent immersions in water, called ducking. The individual was fastened to a chair or stool, called the ducking-stool, and plunged repeatedly. In this case, the punishment was not of the acute, but of the uneasy kind. The physical uneasiness arises partly from the cold, partly from the temporary stoppage of respiration. It has something of the ridi-

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* I am sensible how imperfectly the word *afflictive* is calculated to express the particular kind of punishment I have here employed it to express, in contradistinction to all others; but I could find no other word in the language that would do it better. It may be some reason for employing it thus, that in French it is employed in a sense nearly, if not altogether, as confined: [a] and the pains it is the nature of the punishments in question to produce, Cicero expresses by a word of the same root: — "*Adflictatio*," says that orator in his Tusculan Disputations, when he is defining and distinguishing the several sorts of pain, "*est ægritudo cum vexatione corporis.*" [b]

[a] Causes Celèbres, chap. iv. p. 229. — Ed. Amsterd. 1764.

[b] Lib. iv. c. 8.

culous mixed with it, and was most generally applied to scolding women, whose tongues disturbed their neighbours. It is a relic of the simplicity of the olden time. It is still occasionally resorted to, when the people take the administration of the laws into their own hands; and is not uncommonly the fate of the pickpocket who is detected at a fair or other place of promiscuous resort.

The powers of invention have been principally employed in devising instruments for the production of pain, by those tribunals which have sought to extort proofs of his criminality from the individual suspected. They have been prepared for all parts of the body, according as they have wished to stretch, to distort, or to dislocate them. Screws for compressing the thumbs; straight boots for compressing the shins, with wedges driven in by a mallet; the rack for either compressing or extending the limbs; all of which might be regulated so as to produce every possible degree of pain.

Suffocation was produced by drenching, and was practised by tying a wet linen cloth over the mouth and nostrils of the individual, and continually supplying it with water, in such manner, that every time the individual breathed, he was obliged to swallow a portion of water, till his stomach became visibly distended. In the infamous transactions of the Dutch at Amboyna, this species of torture was practised upon the English who fell into their power.

It would be useless to pursue this afflicting detail any further. How variously soever the causes may be diversified, the effect is still one and the same, viz. organical pain, whether of the acute or uneasy kind. This effect is common to all these modes of punishment. There are other points in which they may differ: — 1. One of them may carry the intensity of the pain to a higher or lower pitch than it could be carried by another. 2. One may be purer from consequences which, for the purpose in question, it may or may not be intended to produce.

These consequences may be — 1. The continuance of the organical pain itself beyond the time of applying the instrument; 2. The production of any of those other ill consequences which constitute the other kinds of corporeal punishment; 3. The subjecting the party to ignominy.

In the choice of punishment, these circumstances, how little soever they are attended to in practice, are of the highest importance.

It would be altogether useless, not to say mischievous, to introduce into the penal code a great variety of modes of inflicting this species of punishment. Whipping — the mode which has been most commonly in use — would, if proper care were taken to give to it every degree of intensity, be sufficient if it were the only one. Analogy, however, in certain cases, recommends the employment of other modes. The multiplication of the instruments of punishment, when not thus justified, tends only to render the laws odious.

Among other works undertaken by order of the Empress Maria Theresa for the amelioration of the laws, a description was compiled of the various methods of inflicting torture and punishment in the Austrian dominions. It formed a large folio volume, in which not only all the instruments were described, and represented by engravings, but a detailed account was given of the manipulations of the executioners. This book was only exposed for sale for a few days, Prince Kaunitz, the prime minister, having caused it to be suppressed. He was apprehensive, and certainly not without reason, that the sight of such a work would only inspire a horror of the laws. This objection fell with its whole force upon the instruments for the infliction of torture, which has since been abolished in all the Austrian dominions. It is highly probable that the publication of this work contributed to produce this happy event. If so, few books have done more good to the world, if compared with the time they continued in it.

A valuable service would be rendered to society by the individual who, being properly qualified for the task, should examine the effects produced by these different modes of punishment, and should point out the greater or smaller evil consequences resulting from contusions produced by blows with a rope, or lacerations by whips, &c. In Turkey, punishment is inflicted by beating the soles of the feet: whether the consequences are more or less severe, I know not. It is perhaps from some notion of modesty that the Turks have confined the application of punishment to this part of the human body.

If the suffering produced by a punishment of this class is rendered but little more than momentary, it will neither be sufficiently exemplary to affect the spectators, nor sufficiently efficacious to intimidate the offenders. There will be little in the chastisement but the ignominy attached to it; and this would have but little effect upon that class of delinquents upon whom such punishments are generally inflicted; the quantity of suffering ought, therefore, if possible, to be regulated by the laws.

Of all these different modes of punishment, whipping is the most frequently in use; but in whipping, not even the qualities of the instrument* are ascertained by written law:

* The Chinese, owing perhaps to the extensive use they make of this mode of punishment, have attempted, by fixing the length and breadth at the extremities, and weight of the bamboo, to render uniform the amount of the suffering pro-

while the quantity of force to be employed in its application is altogether entrusted to the caprice of the executioner. He may make the punishment as trifling or as severe as he pleases. He may derive from this power a source of revenue, so that the offender will be punished, not in proportion to his offence, but to his poverty. If he has been unfortunate, and not able to secure his plunder, or honest, and has voluntarily given it up, and thus has nothing left to make a sop for Cerberus, he suffers the rigour — perhaps more than the rigour — of the law. Good fortune, and perseverance in dishonesty, would have enabled him to buy indulgence.

The following contrivance would, in a measure, obviate this inconvenience: — A machine might be made, which should put in motion certain elastic rods of cane or whalebone, the number and size of which might be determined by the law: the body of the delinquent might be subjected to the strokes of these rods, and the force and rapidity with which they should be applied, might be prescribed by the judge: thus everything which is arbitrary might be removed. A public officer, of more responsible character than the common executioner, might preside over the infliction of the punishment; and when there were many delinquents to be punished, his time might be saved, and the terror of the scene heightened, without increasing the actual suffering, by increasing the number of the machines, and subjecting all the offenders to punishment at the same time.

§ 2. *Examination of Simple Afflictive Punishments.*

The examination of a punishment consists in comparing it successively with each of the qualities which have been pointed out as desirable in a lot of punishment, that it may be observed in what degree some are possessed and the others wanted; and whether those which it possesses are more important than those which it wants; that is to say, whether it is well adapted for the attainment of the desired end.

It will be remembered, that the several qualities desirable in a lot of punishment are — variability, equability, commensurability, characteristicalness, exemplarity, frugality, subserviency to reformation, efficiency with respect to disablement, subserviency to compensation, popularity, and remissibility.

That any species of punishment does not possess the whole of these qualities, is not a sufficient reason for its rejection: they are not all of equal importance, and indeed no one species of punishment will perhaps ever be found in which they are all united.

Simple afflictive punishments are capable of great variability: they may be moderated or increased at will. Their effects, however, are far from equable: the same punishment will not produce the same effects when applied to both sexes — when applied to a stout young man, and an infirm old man. These punishments are almost always attended with a portion of ignominy, and this does not always increase with the organic pain, but principally depends upon the condition of the offender. For this reason, there is scarcely a punishment of this description which would be esteemed slight, if inflicted upon a gentleman.

It was inattention to this circumstance that was one cause of the dissatisfaction occasioned by the Stat. 10 Geo. III., called the Dog Act, passed to restrain the stealing of dogs: among the punishments appointed was that of whipping. There is one thing in the nature of this species of property which renders the stealing of it less incompatible with the character of a gentleman than any other kind of theft. It is apt, therefore, to meet with indulgence from the moral sanction, for the same reason that enticing away a servant is not considered as a crime, on account of the rational qualities of the subject of property in these cases. An individual also may be innocent, notwithstanding appearances are against him. A dog is susceptible of volition, and even of strong social affections, and may have followed a new master without having been enticed.

The same inattention has been observed to be remarkably prevalent throughout the whole system of penal jurisprudence in Russia. In the reign which preceded that of the mild and intelligent Catherine II. neither rank nor sex bestowed an exemption from the punishment of whipping. The institutions of Poland were also chargeable with the same roughness; and it was no uncommon thing for the maid of honour of a Polish princess to be disciplined in public by the *Maître d' Hôtel.*

Nothing more completely proves the degradation of the Chinese than the whips which are constantly used by the police. The mandarins of the first class, the princes of the blood, are subjected to the bamboo, as well as the peasant.

The principal merit of simple afflictive punishments, is their exemplarity. All that is suffered by the delinquent during their infliction may be exhibited to the public, and the class of spectators which would be attracted by such exhibitions, consists, for the

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duced by this mode of punishment: but one material circumstance that they have omitted to regulate, and certainly the most difficult to regulate, is the degree of force with which the stroke is to be applied; an omission that leaves the uncertainty nearly in the same state as in this country. — See the *Penal Code of China*, translated by Sir G. T. Staunton, p. 24.

most part, of those upon whom the impression they are calculated to produce would be most salutary.

Such are the most striking points to be observed with respect to these punishments. There is little particular to be remarked under the other heads. They are of little efficiency as to intimidation or reformation, with the exception of one particular species —*penitential diet;* which, well managed, may possess great moral efficacy. But as this is naturally connected with the subject of imprisonment, the consideration of it is deferred for the present.

CHAPTER II.

OF COMPLEX AFFLICTIVE PUNISHMENTS.

UNDER the name of complex afflictive punishments, may be included those corporeal punishments, of which the principal effect consists in the distant and durable consequences of the act of punishment. They cannot be included under one title. They include three species, very different the one from the other in their nature and their importance.

The permanent consequences of an afflictive punishment may consist in the alteration, the destruction, or suspension of the properties of a part of the body.

The properties of a part of the body consist of its visible qualities, as of colour and figure, and its uses.

Of these three distinct kinds of punishments, the first affects the exterior of the person, its visible qualities: the second affects the use of the organic faculties, without destroying the organ itself; the third destroys the organ itself.*

§ 1. *Of Deformation, or Punishments which alter the Exterior of the Person.*

It was an ingenious idea in the first legislator who invented these external and permanently visible punishments, —punishments which are inflicted without destroying any organ — without mutilation — often without physical pain; in all cases, without any other pain than what is absolutely necessary, — which affect only the appearance of the criminal, and render that appearance less agreeable — which would not be punishments if they were not indications of his crimes.

The visible qualities of an object are its colour and figure; there are therefore two methods of altering them: 1. Discolouration; 2. Disfiguration.

1. Discolouration may be temporary or permanent. When temporary, it may be produced by vegetable or mineral dyes. I am not acquainted with an instance of its use as a punishment. It has always appeared to me, that it might be very usefully employed as a precaution to hinder the escape of certain offenders, whilst they are undergoing other punishments.

Permanent discolouration might be produced by tatooing; the only method at present in use is branding.†

Tatooing is performed by perforating the skin with a bundle of sharp-pointed instruments, and subsequently filling the punctures with coloured powder. Of all methods of discolouration, this is the most striking and the least painful. It was practised by the ancient Picts, and other savage nations, for the purpose of ornament.

Judicial branding is effected by the application of a hot iron, the end of which has the form which it is desired should be left imprinted on the skin. This punishment is appointed for many offences in England, and among other European nations. How far this mark is permanent and distinct, I know not; but every one must have observed that accidental burnings often leave only a slight cicatrix — a scarcely sensible alteration in the colour and texture of the skin.

If it is desired to produce deformity, a part of the body should be chosen which is exposed to view, as the hand or the face; but if the object of the punishment is only to mark a conviction of a first offence, and to render the individual recognisable in case of a relapse, it will be better that the mark should be impressed upon some part of the body less ordinarily in view, whereby he will be spared the torment of its infamy, without taking away his desire to avoid falling again into the hands of justice.

2. Disfigurement may in the same manner be either permanent or transient. It may be performed either on the person, or only on its dress.

When confined to the dress, it is not properly called disfigurement; but, by a natural association of ideas, it has the same effect. To this head may be referred the melancholy robes and frightful dresses made use of by the Inquisition, to give to those who suffer in public a hideous or terrible appearance. Some were clothed in cloaks painted to represent flames; others were covered with

* The first may be included under the general name of *Deformation;* the second under the name of *Dishabilitation:* they render the organ impotent and useless. The third has already a proper name — *Mutilation.*

† Scarification and corrosion might be employed for the same purpose. The first is attended with this inconvenience, — the form which the cicatrix will take cannot be determined beforehand; it may leave none, or an accidental incision may leave a similar one. Corrosion by chemical caustics may not be liable to the same inconvenience; but its effects have not been tried.

figures of demons, and different emblems of future torments.

Shaving the head has been a punishment formerly used. It was part of the penance imposed upon adulterous women by the ancient French laws.

The Chinese attach great importance to the length of their nails; cutting them might therefore be used as a penal disfigurement. Shaving the beard might be thus employed among the Russian peasants, or a part of the Jews.

The permanent means of disfigurement are more limited. The only ones which have been in use, and which may yet be employed in certain countries, were applied to certain parts of the head, which may be altered without destroying the functions which depend on those parts. The common law of England directs the nostrils to be slit, or the ears cut off, as the punishment for certain offences. The first of these punishments has fallen into disuse; the second has been rarely employed in the last century. In the works of Pope, and his contemporary writers, may be seen how far their malignity was pleased by allusions to this species of punishment, which had been applied to the author of a libel in their times.

The cutting off and slitting of the nose, the eyelids, and the ears, were once in common use in Russia, without distinction of sex or rank. They were the common accompaniments of the knout and exile: but it ought to be observed that the punishment of death was very rare.

§ 2. *Of Disablement, or Punishments consisting in disabling an Organ.*

To disable an organ is either to suspend or destroy its use, without destroying the organ itself.

It is not necessary here to enumerate all the organs, nor all the methods by which they may be rendered useless. We have already seen, that it would not be useful to have recourse to a great variety of afflictive punishments, and that there would be many inconveniences in so doing. If we were to follow the law of retaliation, the catalogue of possible punishments would be the same as that of the possible offences of this kind.

1. *The Visual Organ,* — the use of which may be suspended by chemical applications, or by mechanical means, as with a mask or bandage. The visual faculty may also be destroyed by chemical or mechanical means.

No jurisprudence in Europe has made use of this punishment. It has heretofore been employed at Constantinople, under the Greek emperors, less as a punishment, it is true, than as a politic method of rendering a prince incapable of reigning. The operation consisted in passing a red hot plate of metal before the eyes.

2. *The Organ of Hearing.* — This faculty may be destroyed by destroying the tympanum. A temporary deafness may be produced by filling the passage of the ears with wax. As a legal punishment, I know of no instance of its use.

3. *The Organ of Speech.* — Gagging has more often been employed as a means of precaution against certain delinquents, rather than as a method of punishment. General Lally was sent to his punishment with a gag in his mouth; and this odious precaution perhaps only served to turn public opinion against his judges, when his character was re-established. It has sometimes been employed in military prisons. It has the merit of analogy, when the offence consists in the abuse of the faculty of speech.

Gagging is sometimes performed by fixing a wedge between the jaws, which are rendered immoveable; sometimes by forcing a ball into the mouth, &c.

4. *The Hands and Feet.* — I shall not speak of the various methods by which these members may be rendered for ever useless. If it were necessary to be done, it would not be difficult to accomplish.

Handcuffs are rings of metal, into which the wrists are thrust, and which are connected together with a bar or chain. This apparatus completely hinders a certain number of movements, and might be employed so as to prevent them all.

Fetters are rings of metal, into which the legs are fixed, united in the same manner by a chain or bar, according to the species of restraint which it is desired to produce. Handcuffs and fetters are often employed conjointly. Universal use is made of these two methods, sometimes as a punishment, properly so called, but more frequently to prevent the escape of a prisoner.

The *pillory* is a plank fixed horizontally upon a pivot, on which it turns, and in which plank there are openings, into which the head and the hands of the individual are put, that he may be exposed to the multitude. I say to the gaze of the multitude — such is the intention of the law; but it not unfrequently happens, that persons so exposed are exposed to the outrages of the populace, to which they are thus delivered up without defence, and then the punishment changes its nature: — its severity depends upon the caprice of a crowd of butchers. The victim — for such he then becomes — covered with filth, his countenance bruised and bloody, his teeth broken, his eyes puffed up and closed, no longer can be recognised. The police, at least in England, used to see this disorder, nor seek to restrain it, and perhaps would have been unable to restrain it. A simple iron trellis, in

the form of a cage, placed around the pillory would, however, suffice for stopping at least all those missiles which might inflict any dangerous blows upon the body.

The *carcan*, a kind of portable pillory, is a species of punishment which has been used in many countries, and very frequently in China. It consists of a wooden collar, placed horizontally on the shoulders, which the delinquent is obliged to carry without relaxation for a longer or shorter time.

§ 3. *Of Mutilations.*

I understand by *mutilation*, the extirpation of an external part of the human body, endowed with a distinct power of movement, or a specific function, of which the loss is not necessarily followed by the loss of life, as the eyes, the tongue, the hands, &c.

The extirpation of the nose and of the ears is not properly called mutilation, because it is not upon the external part of these organs that the exercise of their functions depends; they protect and assist that exercise, but they do not exercise these functions. There is, therefore, a difference between that mutilation which causes a total loss of the organ, and that which only destroys its envelope. The latter is only a disfigurement, which may be partly repaired by art.

Every body knows how frequently mutilations were formerly employed in the greater number of penal systems. There is no species of them which has not been practised in England, even in times sufficiently modern. The punishment of death might be commuted for that of mutilation under the common law. By a statute passed under Henry VIII. the offence of maliciously drawing blood in the palace, where the king resided, was punished by the loss of the right hand. By a statute of Elizabeth, the exportation of sheep was punished by the amputation of the left hand. Since that time, however, all these punishments have fallen into disuse, and mutilations may now be considered as banished from the penal code of Great Britain.

Examination of Complex Afflictive Punishments.

The effects of simple afflictive punishments are easily estimated, because their consequences are all similar in quality, and immediately produced. The effects of all other punishments are not ascertained without great difficulties, because their consequences are greatly diversified, are liable to great uncertainty, and are often remote. Simple afflictive punishments must always be borne by the parties on whom they are inflicted: all other punishments are deficient in point of certainty: the more remote their consequences, the more these consequences escape the notice of those who are deficient in foresight and reflection.

Around a simple afflictive punishment a circle may be drawn, which shall inclose the whole mischief of the punishment: around all other punishments the mischief extends in circles, the extent of which is not, and cannot be marked out. It is mischief in the abstract, mischief uncertain and universal, which cannot be pointed out with precision. When the effects of punishments are thus uncertain, there is much less ground for choice; for the effects of one punishment may be the same with those of another, the same consequences often resulting from very different punishments. The choice must therefore be directed by probability, and be governed by the presumption that certain punishments will more probably produce certain penal consequences than any other.

Independently of the bodily sufferings resulting from them, punishments which affect the exterior of the person often produce two disadvantageous effects: the one physical — the individual may become an object of *disgust;* the other moral — he may become an object of *contempt:* they may produce a *loss of beauty or a loss of reputation.*

One of these punishments, which has a greater moral than physical effect, is a mark producing only a change of colour, and the impression of a character upon the skin; but this mark is an attestation that the individual has been guilty of some act to which contempt is attached, and the effect of contempt is to diminish good-will, the principle that produces all the free and gratuitous services that men render to one another: but in our present state of continual dependence upon each other, that which diminishes the good-will of others towards us, includes within itself an indefinite multitude of privations.*

When such a mark is inflicted on account of a crime, it is essential that a character should be given to it, which shall clearly announce the intention with which it was imposed, and which cannot be confounded with cicatrices of wounds or accidental marks.

* Stedman relates a fact which proves what has been above said of the indefinite consequences of these punishments. Speaking of a Frenchman, named *Destrades*, who had introduced the culture of indigo into Surinam, and who, during many years, had enjoyed general esteem in that colony, he states, that being at the house of one of his friends in Demerara, he became ill of an abscess, which formed in his shoulder. He would not suffer it to be examined: it became dangerously worse, but his resistance remained still the same: at last, not hoping for a cure, he put an end to his life with a pistol-ball, when the secret was revealed: it was found that his shoulder was marked with a letter *V*, or *Voleur.*— *Narrative of an Expedition against the Revolted Negroes of Surinam, by Major Stedman*, ch. 27.

A penal mark ought to have a determinate figure; and the most suitable, as well as the most common, is the initial letter of the name of the crime. Among the Romans, slanderers were marked on the forehead with the letter K. In England, for homicide, committed after provocation, offenders were marked in the hand with the letter M (for manslaughter), and thieves with the letter T. In France, the mark for galley-slaves was composed of the three letters GAL.

In Poland, it was the custom to add a symbolical expression: the initial letter of the crime was inclosed in the figure of a gallows. In India, among the Gentoos, a great number of burlesque symbolical figures are employed.

A more lenient method, which may be referred to the same head, is a practice too little used, of giving to offenders a particular dress, which serves as a livery of crime. At Hanau, in Germany, persons condemned to labour on the public works were distinguished by a black sleeve in a white coat. It is an expedient which has for its object the prevention of their escape; as a mark of infamy, it is an addition to the punishment.

On the score of frugality, deforming punishments are not liable to any objection; disablement and mutilation are. If the effect of either is to prevent a man getting his livelihood by his own labour, and he has no sufficient income of his own, he must either be left to perish, or be supplied with the means of subsistence: If he were left to perish, the punishment would not be mere disablement or mutilation, but death: if he be supported by the labour of others, that labour must either be bestowed gratis, as would be the case if he were supported on the charity of relations and friends; or paid for, at public cost: in either case, it is a charge upon the public. This consideration might of itself be considered a conclusive objection against the application of these modes of punishment for offences that are apt to be frequently committed, such as theft or smuggling; the objection applies, however, in its full force, to such of these modes of punishment only as have the effect of depriving the particular individual in question of the means of gaining his livelihood.

In respect of remissibility, they are also eminently defective — a consideration which affords an additional reason for making a very sparing use of them.

In respect also of *variability*, these punishments are scarcely in a less degree defective. The loss of the eyes, or of the hand, is not, to a man who can neither read or write, the same degree of punishment as it would be to a painter, or an author. Yet, however different in each instance may be the degree of suffering produced by the mass of evil to which the infliction of the punishment in question gives birth, all who are subject to it will find themselves more or less affected: of these inequalities, and therefore of the aggregate amount of the punishment in each particular instance, it is impossible to form any estimate; it depends on the sensibility of the delinquent, and other circumstances, which cannot be foreseen. By a slothful man, the loss of a hand might not be regarded as a very severe punishment: it has not been uncommon for men to mutilate or disable themselves to avoid serving in the army.

In point of variability, the several classes of punishment now before us, when considered all together, are not liable to much objection; there is a gradation from less to more, which runs through the whole of them. The loss of one finger is less painful than the loss of two, or of the whole hand; the loss of the hand is less than the loss of an arm. But when these punishments are considered singly, the gradation disappears. The particular mutilation directed by the law, can neither be increased or diminished, that it may be accommodated to the different circumstances of the crime or of the delinquent. This objection recurs again under the head of Equability. The same nominal punishment will not always be the same real punishment.

In respect of *exemplarity*, the punishments in question possess this property in a higher degree than simple afflictive punishments. This latter species of punishment not being naturally attended with any distant consequences (their infamy excepted), the whole quantity of pain it is calculated to produce is collected, as it were, into a point, and exposed at once to the eyes of the spectator; while of the other, on the contrary, the consequences are lasting, and are calculated perpetually to awaken in the minds of all, to whose eyes any person that has suffered this species of punishment may happen to present himself, the idea of the law itself, and of the sanction by which its observance is enforced. For this purpose it is necessary, however, as has been already observed, that the penal mark should be such as at first glance to be distinguished from any mark that may have been the result of accident — that misfortune may be protected from the imputation of guilt.

The next property to be desired in a mode of punishment, is subserviency to *reformation*. In this respect, the punishments under consideration, when temporary, have nothing in themselves that distinguishes them from any other mode of punishment: their subserviency to reformation is as their experienced magnitude. It is the infamy attendant on them that gives them those effects which are

apt in this respect to distinguish them to their disadvantage.

Infamy, when at an intense pitch, is apt to have this particular bad effect: it tends pretty strongly to force a man to persist in that depraved course of life by which the infamy was produced. When a man falls into any of those offences that the moral sanction is known to treat with extreme rigour, men are apt to suppose that the moral sanction has no hold upon him. His character, they say, is gone. They withdraw from him their confidence and good-will. He finds himself in a situation in which he has nothing to hope for from men, and for the same reason nothing to fear: he experiences the worst already. If, then, he depend upon his labour for subsistence, and his business is of such sort as requires confidence to be reposed in him, by losing that necessary portion of confidence he loses the means of providing himself with subsistence; his only remaining resources are then mendicity or depredation.

From these observations it follows, that mutilations ought to be reserved as punishments for the most mischievous offences, and as an accompaniment of perpetual imprisonment. An exception to this rule may perhaps be found in the case of rape, for which analogy most strongly recommends a punishment of this kind.

CHAPTER III.

OF RESTRICTIVE PUNISHMENTS — TERRITORIAL CONFINEMENT.

RESTRICTIVE punishments are those which restrain the faculties of the individual, by hindering him from receiving agreeable impressions, or from doing what he desires: they take from him his liberty with respect to certain enjoyments and certain acts.

Restrictive punishments are of two sorts, according to the method used in inflicting them. Some operate by moral restraint, others by physical restraint. Moral restraint takes place when the motive presented to the individual, to hinder him from doing the act which he wishes to perform, is only the fear of a superior punishment; for, in order to be efficacious, it is necessary that the punishment with which he is threatened must be greater than the simple pain of submitting to the restraint imposed upon him.

The punishment of restraint is applicable to all sorts of actions in general, but particularly to the faculty of *locomotion*. Everything which restrains the locomotive faculty, confines the individual; that is to say, shuts him up within certain limits, and may be called *territorial confinement*.

In this kind of punishment, the whole earth, in relation to the delinquent, is divided into two very unequal districts; the one of which is *open* to him, and the other *interdicted*.

If the place in which he is confined be a narrow space, surrounded with walls, and the doors of which are locked, it is imprisonment: if the district in which he be directed to remain is within the dominions of the state, the punishment may be called *relegation:* if it be without the dominions of the state, the punishment is called *banishment*.

The term *relegation* seems to imply, that the delinquent is sent out of the district in which he ordinarily resides. This punishment may consist in his confinement in that district where he ordinarily resides, and even in his own house. It may then be called *quasi imprisonment*.

If it refers to a particular district, which he is prohibited from entering, it is a sort of exclusion, which has not yet a proper name, but which may be called *local interdiction*.

Territorial confinement is the genus which includes five species: — imprisonment, quasi imprisonment, relegation, local interdiction, and banishment.

CHAPTER IV.

IMPRISONMENT.

IMPRISONMENT makes a much more extensive figure than any other kind of hardship that can be inflicted in the way of punishment. Every other kind of hardship (death alone excepted) may be inflicted for two purposes — *punishment* and *compulsion*. Imprisonment, besides these two purposes, may be employed for another — safe custody. When thus employed, it is not a punishment, properly so called; it is intended only to insure the forthcomingness of an individual suspected of having committed an offence, that he may be present to undergo the punishment appointed for that offence, if he be found guilty. When thus employed, it ought not to be more severe than is necessary to insure forthcomingness. Whatever exceeds this, is so much misery in waste.

When imprisonment is intended to operate as a punishment, it may be rendered more or less severe, according to the nature of the offence and the condition of the offender. It may be accompanied by forced labour, which may be imposed upon all; but it ought not to be so imposed without reference to the age, the rank, the sex, and the physical powers of the individuals. Other punishments, which may be employed in addition to hard labour, and of which we shall have occasion to speak in a future chapter, are — diet, solitude, and darkness.

When imprisonment is inflicted for the

purpose of *compulsion*, the severer it is the better, and that for various reasons.

When it is protracted, but slight, the danger is, that the prisoner may come by degrees to accommodate himself to it, till at last it ceases, in a manner, to operate upon him. This is found not uncommonly to be the case with insolvent debtors. In many of our gaols there are so many comforts to be had by those who have money to purchase them, that many a prisoner becomes in time tolerably well reconciled to his situation. When this is the case, the imprisonment can no longer be of use in any view.

The severer it is — I mean all along in point of intensity—the less of it, in point of magnitude, will be consumed upon the whole; that is, in point of intensity and duration taken together; the more favourable, in short, will it be to the sufferer: it will produce its effects at a cheaper rate. The same quantity of painful sensations, which, under the milder imprisonment, are diffused through a large mass of sensations, indifferent or pleasurable, being, in the severer imprisonment, brought together, will act with collected force, and produce a stronger impression: the same quantity of pain will therefore go farther this way than in any other. Add to this, that in this way the same quantity of suffering will not have so pernicious an influence on his future life. In the course of a tedious confinement, his mental faculties are debilitated, his habits of industry are weakened, his business runs into other channels, and many of those casual opportunities which might have afforded the means of improving his fortune, had he been at liberty to embrace them, are irrecoverably gone. These evils, which, though they may come eventually to be felt, are too distant and contingent to contribute anything beforehand to the impression it is intended to produce, are saved by placing the magnitude of the punishment in intensity rather than in duration.

By the fundamental constitution of man's nature, without anything being done by any one to produce a change in his situation, if left to himself, in a situation in which he is debarred from exercising the faculty of locomotion, he will in a short time become a prey to various evils, to the action of various causes producing various organical pains, which, sooner or later, are sure to end ultimately in death. If duration and neglect be added to imprisonment, it necessarily becomes a capital punishment. Since, therefore, it is followed by an infinite variety of evils which the individual is unable himself to guard against, and against which precautions must be taken by others to preserve him, it follows, that to form a just notion of imprisonment, it must be considered, not simply by itself, but in connexion with its different modes and consequences. We shall then see that, under the same name, very different punishments may be inflicted. Under a name which presents to the mind only the single circumstance of confinement in a particular place, imprisonment may include every possible evil; from those which necessarily follow in its train, rising from one degree of rigour to another, from one degree of atrocity to another, till it terminates in a most cruel death; and this without being intended by the legislator, but altogether arising from absolute negligence—negligence as easy to be explained, as it is difficult to be palliated.

We shall class under three heads the penal circumstances which result from this condition: — 1. *Necessary* inconveniences, which arise from the condition of a prisoner, and which form the essence of imprisonment: 2. *Accessory* inconveniences, which do not necessarily, but which very frequently follow in its train: 3. Inconveniences arising from *abuses*.

I. *Negative Evils, inseparable from Imprisonment.*

1. Privation of the pleasures which belong to the sight, arising from the diversity of objects in town and country.

2. Privation of the liberty of taking pleasurable exercises that require a large space, such as riding on horseback or in a carriage, hunting, shooting, &c.

3. Privation of those excursions which may be necessary even for health.

4. Privation of the liberty of partaking of public diversions.

5. Abridgment of the liberty of going out to enjoy agreeable society, as of relations, friends, or acquaintance, although they should be permitted to come to him.

6. Privation of the liberty, in some cases, of carrying on business for a livelihood, and abridgment of such liberty in all cases.

7. Privation of the liberty of exercising public offices of honour or trust.

8. Privation of accidental opportunities of advancing his fortune, obtaining patrons, forming friendships, obtaining a situation, or forming matrimonial alliances for himself or children.

Although these evils may in the first instance be purely negative, that is to say, privation of pleasures, it is evident that they bring in their train of consequences positive evils, such as the impairing of the health, and the impoverishment of the circumstances.

II. *Accessory Evils, commonly attendant on the Condition of a Prisoner.*

1. Confinement to disagreeable diet. The want of *sufficient* food for the purpose of nourishment, is a distinct mischief, which will come under another head.

2. Want of comfortable accommodations for repose — hard bedding, or straw, or nothing but the bare ground. This hardship alone has been thought to have been productive, in some instances, of disease, and even death.

3. Want of light — by the exclusion of the natural light of the sun by day, and the not furnishing or not permitting the introduction of any artificial means of producing light by night.

4. Total exclusion from society. This evil is carried to its height when a prisoner is not permitted to see his friends, his parents, his wife, or his children.

5. Forced obligation of mixing with a promiscuous assemblage of his fellow-prisoners.*

6. Privation of the implements of writing, for the purposes of correspondence: a useless severity, since everything which is written by a prisoner may be properly submitted to inspection. If ever this privation be justifiable, it is in cases of treason and other party crimes.

7. Forced idleness, by the refusal of all means of necessary occupation: as of the brushes of a painter, the tools of a watchmaker, or of books, &c. This has sometimes been carried to such a degree of rigour as to deprive prisoners of all amusement.

These different evils, which are so many positive evils in addition to the necessary evils of simple imprisonment, may be useful in penal and penitential imprisonment. We shall hereafter show in what manner they ought to be used. But with respect to the fifth evil, the forced obligation of mixing with a promiscuous assemblage of prisoners, it is always an evil, and an evil which cannot be obviated without a change in the system and construction of prisons.

We proceed to the consideration of evils purely abusive: of those which exist only by the negligence of the magistrates, but which necessarily exist, where precautions have not been taken to prevent their existence. We shall present two catalogues: one, of the evils; the other, of their remedies: —

EVILS.

1.

Pains of hunger and thirst: *general debility — death.*

2.

Sensation of cold in various degrees of intensity: *stoppage of the circulation — mortification of the extremities*† *— death.*

3.

Sensation of heat: *habitual debility — death.*

4.

Sensation of damp and wetness: *fevers and other disorders — death.*

5.

Noisome smells, collections of putrifiable matter: *habitual debility — falling off of the members by gangrene — gaol-fever — contagious diseases — death.*

6.

Pain or uneasiness resulting from the bites of vermin: *cutaneous diseases — want of sleep — debility — inflammation — fever — death.*

7.

Various diseases.

8.

Painful sensations arising from indelicate practices.

REMEDIES.

1.

Sufficient nourishment.

2.

Sufficient clothing, adapted to the climate and the season — fire.

3.

Shelter from the sun in hot weather — fresh air.

4.

The ground everywhere covered with boards, or bricks, or stone — fresh air — tubes for conveying heated air.

5.

Fresh air — change of clothes — water and other implements of washing — fumigations — whitewashing the walls — medicines and medical assistance.

6.

Chemical applications to destroy them — cleanliness — a person with proper implements for their destruction and removal.

7.

Medicines and medical advice.

8.

Partitions to keep the prisoners separate during the hour of rest, at least those of the one sex from those of the other.

* This inconvenience would be apt to be attended with effects of the most serious nature in the case of an Hindoo of any of the superior castes; an association, however involuntary, with persons of an inferior rank, or contaminated character, causing a forfeiture of caste, which, among the Hindoos, is productive of the same afflictions as excommunication at its first institution was intended to produce amongst Christians — extreme infamy, and an utter exclusion from all society but that of persons marked with the same stigma. It has been said, I hope without truth, that by some unhappy neglect, when the Rajah Nuncomar, a man of the first rank in Bengal, was in custody for the forgery for which he was afterwards tried under the laws of Great Britain, and executed, proper care was not taken to protect him from this ideal contamination. If this be true, before he was proved guilty he was made to suffer a punishment greater perhaps than that to which he was afterwards sentenced.

† Howard, p. 39.

EVILS.	REMEDIES.
9 Tumultuous noises — indecent practices — indelicate conversations.	9. Keepers to be directed to punish those guilty of such practices. The punishment to be made known to the prisoners by being fixed up in the prison.
10. Evils resulting from the religious sanction — from the non-exercise of the ceremonies prescribed by it.	10. In Protestant countries, a chaplain to perform divine service. In Roman Catholic countries, a priest to perform mass, and to confess the prisoners, &c.*

CHAPTER V.

IMPRISONMENT — FEES.

Another way in which a man is often made to suffer on the occasion of imprisonment, is the being made to pay money under the name of fees. This hardship, on the very first inspection, when deduced as a consequence from a sentence or warrant of imprisonment, can be classed under no other title than that of an abuse; for naturally it has just as much to do with imprisonment as hanging has.

This abuse is coeval with the first barbarous rudiments of our ancient jurisprudence; when the magistrate had little more idea of the ends of justice than the freebooter; and the evils he inflicted were little more than a compensation for the evils he repressed. In those times of universal depravity, when the magistrate reaped almost as much profit from the plunder of those who were, or were pretended to be, guilty, as from the contributions of those who were acknowledged innocent, no pretext was too shallow to cover the enterprises of rapacity under the mask of justice.

All the colour which this abuse is capable of receiving, seems to have been taken from a quibbling and inhuman sarcasm: "Since you have lodging found you," says the gaoler to the prisoner, "it is fit, like other lodgers, you should pay for it." Fit it certainly would be, if the lodger came there voluntarily — the only circumstance in the case which is wanting to make it a just demand, instead of a cruel insult.

But the gaoler, like every other servant of the state, it will be said, and with perfect truth, must be satisfied for his trouble; and who more fit than the person who occasions it? I answer, any person whatever — if, contrary to the most obvious principles of justice, some one person must bear the whole charge of an institution, which if beneficial to any, is beneficial to all. I say anybody; because there is no person whose clear benefit from the punishment of the criminal (I am speaking here of the judicial, appointed punishment, the imprisonment; and I mean clear benefit after inconvenience has been deducted) is not greater than the criminal's. This would hold good, were the peculiar circumstances of the criminal out of the question; but when these come to be considered, they add considerable force to the above conclusion. In the case of nineteen delinquents out of twenty, the utter want of all means of satisfying their lawful debts was the very cause and motive to the crime. Now then, whereas it is only possible in the case of a man taken at random that he has not wherewithal to pay, it is certain that, in nineteen cases out of twenty, the delinquent has not.

So powerful is the force of custom, that, for a long series of years, judges of the first rank, and country magistrates, none of whom but would have taken it ill enough to have had their wisdom or their humanity called in question, stand upon record as having given their allowance to this abuse. If any one of these magistrates had ever had the spirit to have refused this allowance, the gaoler would for a moment have remained unpaid, and from thenceforward the burthen would have been taken up by that public hand which, from the beginning, ought to have borne it.†

So far is this hardship from being justifiable on the score of punishment, that in most, if not in all our prisons, it is inflicted indiscriminately on all who enter, innocent or guilty. It is inflicted at all events, when it is not known but they may be innocent; for it is inflicted on them at first entrance, when committed only for safe custody. This is not all: it is inflicted on men after they have been proved to be innocent. Even this is not all: to fill up the measure of oppression, it is inflicted on them *because* they have been proved innocent. Prisoners, after they have

* It was mentioned as a circumstance of peculiar distress attending the fate of many of the numerous state prisoners confined in Portugal during the Marquis of Pombal's administration, their being denarred, during a course of years, the comforts of confession. When this circumstance was brought to light, it produced a considerable degree of public indignation.

† By the old law, when money was recovered against a Hundred, the Sheriff laid hold of the first Hundredor he met, and made him pay the whole. Even this was a better expedient for providing for the public burthen than the one in question.

been acquitted, are, as if to make them amends for the unmerited sufferings they have undergone, loaded with a heavy fine, professedly on the very ground of their having been acquitted. In some gaols, of a person acquitted of murder a sum of money is exacted, under the name of an acquittal, equal to what it costs an ordinary working man to maintain himself for a quarter of a year: a sum such as not one man in ten of that class, that is, of the class which includes a great majority of the whole people, is ever master of during the course of his whole life.

CHAPTER VI.

IMPRISONMENT EXAMINED.

We now proceed to examine the degree in which imprisonment possesses the several properties desirable in a lot of punishment.

1. Imprisonment possesses the property of *efficacy with respect to disablement* in great perfection. The most dangerous offender, so long as his confinement continues, is deprived of the power of doing mischief out of doors; his vicious propensities may continue at their highest pitch, but he will have no opportunity of exercising them.

2. Imprisonment is generally exceptionable on the score of frugality; none of the inconveniences resulting from it being convertible to profit. It is also generally accompanied with expense, on account of the maintenance of the persons confined. In these calculations of expense, that loss ought not to be forgotten which results from the suspension of the lucrative labours of the prisoner, a loss which is often continued beyond the period of his imprisonment, owing to the habits of idleness it has induced.*

3. Imprisonment is objectionable in respect of equality. If we recur to the catalogue of privations of which it consists, it will be seen that the inequality is extreme, when one prisoner is sickly, and the other healthy; when one is the father of a family, and the other has no relations; when the one is rich, and accustomed to all the enjoyments of society, and the other poor, and his usual condition is one of misery.

One party may be deprived of his means of subsistence; another may be scarcely affected in this respect. It may be said, is not this loss merely temporary? may it not be considered as a forfeiture which forms a part of the punishment? If the individual belong to a profession, the exercise of which cannot be interrupted without great risk of its total loss, the consequence may be his absolute ruin. This is one of those cases in which a latitude may properly be left to the judge, of commuting this punishment for another. A pecuniary punishment may frequently, with propriety, be substituted. The greater number of offenders, however, are not in a condition to furnish this equivalent. It would therefore be necessary to have recourse to simply afflictive punishments. The degree of infamy attached to these punishments would, however, not be an objection in case the offender consented to the exchange; and this consent might be made a necessary condition.

Among the inconveniences which may be attached to imprisonment, there is one which is particularly inequable. Take away paper and ink from an author by profession, and you take away his means of amusement and support: you would punish other individuals, more or less, according as a written correspondence happened to be more or less necessary for their business or pleasure. A privation so heavy for those whom it affects, and at the same time so trifling for the greater number of individuals, ought not to be admitted in quality of a punishment. Why should an individual, who has received instruction in writing, be punished more than another. This circumstance ought rather to be a reason for indulgence: his sensibility has been augmented by education; and the instructed and cultivated man will suffer more from imprisonment than the ignorant and the clownish.

On the other hand, though the punishment of imprisonment is inequable, it should be observed, that it naturally produces an effect upon every one. There is no individual insensible to the privation of liberty — to the interruption of all his habits, and especially of all his social habits.

4. Imprisonment is eminently *divisible*, with respect to its duration. It is also very susceptible of different degrees of severity.

5. Under the present system, the exemplarity of imprisonment is reduced to the lowest term. In the Panopticon, the facility afforded to the admission of the public, adds much to this branch of its utility.

However, if the prisoners are not seen, the prison is visible. The appearance of this habitation of penitence may strike the imagination, and awaken a salutary terror. Buildings employed for this purpose ought therefore to have a character of seclusion and restraint, which should take away all hope of escape, and should say, "This is the dwelling-place of crime."

6. *Simplicity of Description.* — Under this head there is nothing to be desired. This punishment is intelligible to all ages, and all capacities. Confinement is an evil of which every body can form an idea, and which all

* This objection to imprisonment is carefully removed in the plan of Panopticon Imprisonment, an account of which is given in Book V. ch. 3.

have, more or less, experienced. The name of a prison at once recalls the ideas of suffering as connected with it.

Let us here stop to examine three auxiliary punishments, that under special circumstances, and for a limited time only, may be usefully made to accompany afflictive imprisonment. These auxiliaries are *solitude*, *darkness*, and *hard diet*. Their distinguishing merit consists in their *subserviency to reformation*.

That the three hardships, thus named, have a peculiar tendency to dispose an offender to penitence, seems to be the general persuasion of mankind. The fact seems to be pretty generally acknowledged; but the reasons are not altogether obvious, nor do they seem to be very explicitly developed in the minds of those who show themselves strenuously convinced of the fact. An imperfect theory might naturally enough induce one to deny it. "What is it," it may be said, "that is to produce in the offender that aversion to his offence which is styled penitence? It is the pain which he experiences to be connected with it. The greater, then, that pain, the greater will be his aversion; but of what kind the pain be, or from what source it issues, are circumstances that make no difference. Solitude, darkness, and hard diet, in virtue of a certain quantity of pain thus produced, will produce a certain degree of aversion to the offence: be it so. But whipping, or any other mode of punishment that produced a greater pain, would produce a stronger aversion. Now, the pain of whipping may be carried to as high a pitch as the pain produced by this group of hardships altogether. In what respect, then, can these have a greater tendency to produce penitence, than whipping?"

The answer is, that the aversion to the offence depends, not merely upon the magnitude of the pain that is made to stand connected with it; but it depends likewise upon the strength of the connexion which is made to take place between those two incidents in the patient's mind. Now, that solitude, darkness, and hard diet, have a greater tendency than any other kind of hardship to strengthen this connexion, I think, may be satisfactorily made out.

Acute punishment, such as whipping, at the time it is inflicted, leaves no leisure for reflection. The present sensation, with the circumstances that accompany it, is such as engrosses the whole attention. If any mental emotion mix itself with the bodily sensation, it will rather be that of resentment against the executioner, the judge, the prosecutor, or any person whose share in the production of the suffering happens to strike the sufferer most, than any other. The anguish is soon over; and as soon as it is over, the mind of the patient is occupied in the eager pursuit of objects that shall obliterate the recollection of the pain that he has endured; while all the objects by which he is surrounded contribute to repel those salutary reflections upon which his reformation depends. Indeed, as soon as the anguish is over, a new emotion presents itself—an emotion of joy which the patient feels at the reflection that his suffering is over.

The gradual and protracted scene of suffering produced by the combination of punishments we are now considering, is much more favourable to the establishment of the wished-for effect. By solitude, a man is abstracted from those emotions of friendship or enmity which society inspires; from the ideas of the objects their conversation is apt to bring to view; from the apprehension of the disagreeable situations their activity threatens to expose him to, or the pleasures in which they solicit him to engage. By confinement, he is abstracted from all external impressions but such as can be afforded him by the few and uninviting objects that constitute the boundaries, or compose the furniture of a chamber in a prison; and from all ideas which, by virtue of the principle of association, any other impressions are calculated to suggest.

By darkness, the number of the impressions he is open to is still further reduced, by the striking off all those which even the few objects in question are calculated to produce upon the sense of sight. The mind of the patient is, by this means, reduced, as it were, to a gloomy void; leaving him destitute of all support but from his own internal resources, and producing the most lively impression of his own weakness.

In this void, the punishment of hard diet comes and implants the slow but incessant and corroding pain of hunger; while the debility that attends the first stages of it (for the phrensy that is apt to accompany the last stages is to be always guarded against,) banishes any propensity which the patient might have left, to try such few means of activity as he is left undeprived of, to furnish himself with any of the few impressions he is still open to receive. Meantime, that pain and this debility, however irksome, are by no means so acute as to occupy his mind entirely, and prevent altogether its wandering in search of other ideas. On the contrary, he will be forcibly solicited to pay attention to any ideas which, in that extreme vacancy of employment, are disposed to present themselves to his view.

The most natural of all will be to retrace the events of his past life; the bad advice he received; his first deviations from rectitude, which have led to the commission of the offence for which he is at the time undergoing punishment — a crime, all the pleasures derived from which have been already reaped,

and of which all that remains is the melancholy suffering that he endures. He will recall to his recollection those days of innocence and security which were formerly his lot, and which, contrasted with his present wretchedness, will present themselves to his imagination with an increased and factitious degree of splendour. His penitent reflections will naturally be directed to the errors of which he has been guilty: if he have a wife, or children, or near relations, the affection that he once entertained for them may be renewed by the recollection of the misery that he has occasioned them.

Another advantage attendant on this situation is, that it is peculiarly fitted to dispose a man to listen with attention and humility to the admonitions and exhortations of religion. Left in this state of destitution in respect of all external pleasures, religious instructions are calculated to take the stronger hold of his mind. Oppressed by the state of wretchedness in which he finds himself, and by the unlooked-for or unknown events that have led to the detection of his crime, the more he reflects upon them, the more firmly will he be convinced of the existence of a providence which has watched over his actions, and defeated his best concerted contrivances. The same God that punishes him, may also save him; and thenceforward the promises of eternal bliss or torment will more anxiously engage his attention — promises of happiness in another state of being, in case of repentance, and denunciations of torments prepared for the guilty in the regions of eternal night, of which his present situation seems a prelude and a foretaste, will fix his regard. In a frame of mind such as this, to turn a deaf ear to the admonitions and consolations afforded by religion, a man must be very different from the ordinary caste of men. Darkness, too, has, in circumstances like this, a peculiar tendency to dispose men to conceive, and in a manner to feel, the presence of invisible agents. Whatever may be the reason, the fact is notorious and undisputed. When the external senses are restrained from action, the imagination is more active, and produces a numerous race of ideal beings. In a state of solitude, infantine superstitions, ghosts, and spectres, recur to the imagination. This, of itself, forms a sufficient reason for not prolonging this species of punishment, which may overthrow the powers of the mind, and produce incurable melancholy. The first impressions will, however, always be beneficial.

If, at such a time, a minister of religion, qualified to avail himself of these impressions, be introduced to the offender thus humiliated and cast down, the success of his endeavours will be almost certain, because in this state of abandonment he will appear as the friend of the unfortunate, and as his peculiar benefactor.

This course of punishment, thus consisting of solitude, darkness, and hard diet, is, as has been observed, when embodied, a sort of discipline too violent to be employed, except for short periods: if greatly prolonged, it would scarcely fail of producing madness, despair, or more commonly a stupid apathy. This is not, however, the place for fixing the duration of the punishment proper for each species of offence: it ought to vary according to the nature of the offence, the degree of obstinacy evinced by the offender, and the symptoms of repentance which he exhibits. What has been already said, is sufficient to show that the mass of punishments in question may be employed with the greatest advantage simultaneously: they mutually aid each other. In order to produce the desired effect most speedily, even the sort of food allowed may be rendered unpalatable as well as scanty, otherwise there would be danger lest to a young and robust person the constantly recurring gratification afforded to the palate, might render him insensible to the loss of all other pleasures.

If any punishment can in itself be popular, this, I think, promises to be so. It bears a stronger resemblance than any other to domestic discipline. The tendency which it has to lead the offender to acknowledge the evil of his offence and the justice of his sentence, is the same which an indulgent father desires his punishments to possess, when he inflicts them upon his children; and there is no aspect which it is more desirable the law should assume than this.

The effects produced by solitary confinement are not matters of mere conjecture: they have been ascertained by experience, and are reported upon the best authorities.

Speaking of the cells in Newgate, "I was told," says Mr. Howard,* "by those who attended me, that criminals who had affected an air of boldness on their trial, and appeared quite unconcerned at the pronouncing sentence upon them, were struck with horror, and shed tears, when brought to these darksome, solitary abodes."

"I remember an instance," says Mr. Hanway,† "some years before the law for proceeding to sentence upon evidence, of a notorious malefactor, who would not plead. It was a question, whether he should be brought to the *press;* but the jailor privately recommended to the magistrates to try solitary confinement in prison. This produced the effect, for in less than twenty-four hours, the daring, artful felon chose to hold up his hand at the bar, and quietly submit to the laws, rather than remain in such a solitary state without hope."

* Page 152. † Page 75.

The same gentleman mentions* a set of cells, provided for the purpose of solitary confinement, in Clerkenwell Bridewell, by order of the Justices of the Peace for that division. One of those magistrates, he says, assured him, "That every person committed to those solitary apartments had been in a few days reformed to an amazing degree." The apartments, though solitary, were not dark, nor is any thing said about the circumstance of diet.

Directly opposed to solitary imprisonment is the promiscuous association of prisoners. The suffering which results from this circumstance, is not the result of direct intention on the part of the magistrate. It is an evil acknowledged, and yet suffered still to exist to a very considerable extent. It is evidently not so much inflicted, as admitted, from the supposed inability of government to exclude it; the great and only objection to its exclusion being the expense of the arrangement necessary to the accomplishment of that purpose. The advantage by which it is recommended, is that of frugality; it is less expensive to shut up prisoners in one room, than to provide separate apartments for each one, or even to keep them divided into classes.†

This promiscuous assemblage of prisoners, considered as part of the punishment, has no penal effect upon the most audacious and the most perverse. On the contrary, with reference to them, it renders imprisonment less painful: the tumult with which it surrounds them, diverts them from the misery of their situation, and from the reproaches of their consciences. It is therefore an evil most severe for the prisoner of refinement and sensibility. It is an addition to the punishment of imprisonment, evidently unequable, unexemplary, and unprofitable, producing a variety of unknown sufferings, such that those only who have experienced them can be fully acquainted with their extent.

But the great and decisive objection to the promiscuous association of prisoners, considered as a punishment, is, that it is directly opposed to their reformation. Instead of rendering a delinquent better, its evident tendency is to make him worse. The ill effect which, in the instance of indelible infamy, is only problematical, is, in the instance of this species of hardship, certain; it obliterates the sense of shame in the mind of the sufferer; in other words, it produces insensibility to the force of the moral sanction.

This ill effect of the promiscuous association of prisoners is too obvious not to strike even the most superficial spectator. Criminals, confined together, are corrupted, it is said, by the society of each other: there are a thousand ways of diversifying the expression, and it is generally set off with great exuberance of metaphor. The word *corruption*, and the greater part of the terms that compose the moral vocabulary, are not calculated, of themselves, to convey any precise import, but serve rather to express the disapprobation which he who uses them happens to entertain of the practices in question, than the tendency to produce mischief, which is, or at least ought to be, the ground of it. In order, then, to form a precise idea of the phenomena in which this corruption displays itself, let us examine the mischievous habits produced by this promiscuous intercourse, and the way in which it tends to produce mischief in society.

The ill consequences of the association in question, may be comprised under the following heads: —

1. It strengthens, in the minds of all parties concerned, the motives which prompt to the commission of all sorts of crimes.

2. It diminishes the force of the considerations which tend to restrain them.

3. It increases their *skill*, and by that means the *power*, of carrying their obnoxious propensities into practice.

Crimes are the sort of acts here in question. Now, the names of crimes are words, for which precise ideas have, or might at least be found: they are evils of a certain description. The names of the motives that prompt a man to the commission of a crime, are also the names of pains and pleasures. In examining, therefore, the consequences of the association of delinquents, under the foregoing heads, we tread upon clear and palpable ground, unobscured by metaphor and declamation.

1. As to the motives by which men are prompted to the commission of crimes: These are the expectation of the pleasures which are the fruit of them. By far the greater number of the offences which bring men to a prison, are the offspring of *rapacity*. Crimes issuing from any other motive are so few as scarcely to demand in this view any separate notice. The bulk of offenders will be of the poorer sort; among them, the produce of a little plunder will go in the purchase of pleasure much beyond that which the ordinary produce of their labour would enable them to purchase; such as more food, more delicate liquors, in greater plenty and more delicious, — finer clothes, and more expensive pleasures. These things naturally form the subject of conversation among the prisoners, and an inexhaustible subject of boasting on the part of those who by their skill or good fortune have acquired the means of enjoying them. These recitals give a sort of superiority which those who possess it are fond

* Page 74.

† It must be acknowleged that this difficulty was very great before the invention of the plan of central inspection.

from a principle of vanity, to display and magnify to the humble and admiring crowd of their less fortunate associates. They inflame the imagination of the hearers; and, in a word, their propensity to gratify their rapacity by all sorts of crimes, is increased by the prospect of the pleasures of which the means are furnished by these crimes. The more numerous the association, the more varied the exploits to be recounted; and what subject more naturally the subject of conversation, than the circumstances which have brought them together?

2. While, on the one hand, as has been just observed, all the vicious propensities are nourished and invigorated, — on the other hand, all considerations tending to restrain the commission of offences are repelled and enfeebled. These considerations belong to the one or the other of the three sanctions — the political, the moral, or the religious.

Those derived from the *political sanction* are the various punishments appointed by law: amongst these, that which they are actually undergoing, have undergone, or are about to undergo. Of these sufferings it will naturally be the study of them all to make as light as possible; to which end, the society of each other will afford them many powerful assistances. From pride, each man will endeavour to make his own sense of his own sufferings appear to others as slight as possible: he will undervalue the afflicting circumstances of his situation; he will magnify any little comforts which may attend it, and, as the common phrase is, will put as good a face upon the matter as he can. Thus the most intrepid and proud becomes a patron for all the others. The sensibilities of all are gradually elevated to the same pitch: it would be matter of shame to them not to bear their misfortunes with equanimity. Even from mere sympathy, many will derive a powerful motive to soothe the sufferings of their partners in affliction — to congratulate them on the termination of such as are past, to relieve them under such as are present, and to fortify them against such as may be to come. It may possibly be observed, that to ascribe to persons of the class in question any such benevolent affections, is to attribute to them virtues to which they are altogether strangers. But to suppose that men consist only of two classes, the altogether good, and the altogether bad, is a vulgar prejudice. The crime which subjects a man to the lash of the law may leave him possessed of a thousand good qualities, and more especially of sympathy for the misfortunes of others. Daily experience may convince us of this, and lead us to believe that the criminal are not always altogether vicious.

The considerations derived from the *moral sanction* are the various evils, positive and negative, apprehended from the ill-will of such persons with whom the person in question is in society. Whilst a man remains in general society, though his character may be the subject of general suspicion, he will be obliged to keep a guard upon his actions, that he may not too strongly confirm these suspicions and render himself altogether despicable. But in a prison the society is unmixed, having interests of its own, opposite to the former, governed by habits and principles opposite to those which are approved in general society. The habits and practices which were odious there, because they were mischievous there, — not being mischievous, are not odious here. Theft is not odious among thieves, who have nothing to be stolen. It is in vain for them to make pretensions to probity; they agree, therefore, by a tacit convention, to undervalue this virtue. The mixed qualities of patience, intrepidity, activity, ingenuity, and fidelity, which are beneficial or not according as they are subservient to the other, will be magnified, to the prejudice of the former. A man will be applauded for his patience, though it were exerted in lying in wait for a booty; for his intrepidity, though manifested in attacking the dwelling of a peaceable householder, or in defending himself against the ministers of justice; for his activity, though employed in seizing the unwary traveller; for his ingenuity, though displayed in working upon the sympathetic feelings of some deluded, compassionate benefactor; for his fidelity, though employed in screening his associates in some enterprise of mischief from the pursuit of the injured. These are qualities which enjoy the highest estimation in such society; and by their possession, that thirst for sympathy and applause is gratified, of which every man, in whatever situation he is placed, is desirous.

The probity which is held in honour, in such society, is not intended to be useful to mankind at large: its rules may be strictly observed in the society in which it is established, and disregarded to the prejudice of all persons not connected with that society. The Arabs, who live by plunder, are remarkable for their honesty towards the members of their own tribe. Thus also, that there is *honour among thieves*, has become proverbial.*

* The influence of a man's conduct on the happiness of the whole race of sensitive beings, must be taken into the account, before it can with propriety be termed virtuous or vicious, simply and without addition. The same conduct which is pernicious, and on that account is or ought to be disreputable in society at large, is beneficial to, and on that account held in honour by, a smaller society included within the former. The member of parliament who solicits or defends for his borough a privilege detrimental to

The considerations derived from the *religious sanction*, are the sufferings apprehended from the immediate will of the Deity, in some degree perhaps in the present, but chiefly in a future life. This displeasure is, under the Christian religion, and particularly the Protestant, invariably believed to be annexed, with few or no exceptions, to all those malpractices which bring men into prisons. The considerations, therefore, which that sanction affords, are to be numbered among the considerations which tend to restrain men from committing crimes. Now the force of this sanction, acting in opposition to that of the local moral sanction, which is generated and governs in a prison, will naturally have the whole force of this latter exerted against it to overthrow it. Not that a prison is the region of acute and scrupulous philosophy: the arguments there made use of, will be addressed to the passions, rather than the judgment. The being of a God, the authority of Revelation, will not be combated by reason. The force of this sanction will be eluded rather than opposed; the attention will be diverted from the idea of God's displeasure, to the improbability of its being manifested. The authority of revelation will be combated by satires upon its ministers; and that man will be pronounced brave, who shall dare to deny the one, and despise the other. And arguments of this kind will be found to have most influence upon the members of such societies.

3. The third and last of the ways in which the association of malefactors in prisons contributes to corrupt them, is by increasing their skill, and by that means their power of carrying their mischievous propensities, whatever they may be, into practice.

That their conversation will naturally turn upon their criminal exploits, has been already observed. Each malefactor will naturally give a detail of the several feats of ingenuity which, in the course of those exploits, the occasion led him to practise. These facts will naturally be noted down, were it only on the score of curiosity. But as means of gratifying those propensities, which the situation in question has a strong tendency to strengthen and confirm, they will make a much more forcible impression. An ample mass of observations will be soon collected, drawn from the experience of the whole society, and each particular member of it will soon be wise with the wisdom of the whole. Prisons, therefore, have commonly and very properly been styled *schools of vice*. In these schools, however, the scholar has more powerful motives for, and more effectual means of, acquiring the sort of knowledge that is to be learnt there, than he has of acquiring the sort of knowledge that is taught in more professed schools. In the professed school, he is stimulated only by fear; he strives against his inclination: in these schools of vice, he is stimulated by hope, acting in concert with his natural inclination. In the first, the knowledge imparted is dispensed only by one person; the stock of knowledge proceeds from one person: in the others, each one contributes to the instruction of all the others. The stock of knowledge is the united contribution of all. In professed schools, the scholar has amusements more inviting to him than the professed occupations of the school: in these, he has no such amusements; the occupation in question is the chief of the few pleasures of which his situation admits.

To the most corrupt, this promiscuous association is mischievous. To those committed for a first offence, who have yielded to the temptations of indigence, or have been misled by evil example; who are yet young, and not hacknied in crimes; punishment, properly applied, might work reformation. This association can only render such more vicious; they will pass from pilfering to greater thefts, till they are guilty of highway robbery and murder. Such is the education yielded by promiscuous association of criminals in prison.

CHAPTER VII.

GENERAL SCHEME OF IMPRISONMENT.

Let there be three kinds of imprisonment, differing one from another in the degree of their severity.

The first for insolvents: in case of rashness or extravagance, in lieu of satisfaction. The second for malefactors whose imprisonment is to be temporary: these may be styled second-rate malefactors. The third for malefactors whose imprisonment is perpetual: These may be styled first-rate malefactors.

1*st*. Let all insolvents be upon the footing of bankrupts; compellable to discover, under pain of death, or other heavy penalty; on discovery not liable to imprisonment of course, but liable in case of rashness or extravagance: or else let rashness or extravagance be presumed in the first instance; and let it lie upon the insolvent to exculpate himself. To the same prison let such persons be committed as are arrested upon *mesne* process. On persons of this class, the imprisonment comes in before judgment, to enforce—after judgment, to stand in lieu of satisfaction. Here let there be no mark of infamy; nor let there be here any rigour, either real or apparent.

the nation, is called a patriot in his borough. The man who devised the oath by which the candidates for degrees were to engage not to propagate, elsewhere than at Oxford and Cambridge, the seeds of what was thought useful learning, was probably thought a man of great merit in those Universities.

The second kind of imprisonment is designed for correction as well as for example. The real, therefore, and the apparent punishment, ought to be upon a par. Here let labour be added to imprisonment, and for the last week, or fortnight, or month, solitude, darkness, and spare diet. Here let a stigma be inflicted; but let that stigma be a temporary one. It will answer two purposes: first, that of example, as increasing the apparent punishment; second, that of security, by preventing escape.

The third kind of imprisonment is destined for example only. The end of correction is precluded; since the delinquent is never to mix with society again. Here, too, for the same purposes as in the former case, let a stigma be inflicted; and let that stigma be perpetual. Here let the apparent condition of the delinquent be as miserable, and the real as comfortable, as may be. Let the gentleman occupy himself as he pleases: let the yeoman, who has an art, exercise his art, and let him be a sharer in the profits. Let the labour of the yeoman who knows no art be more moderate than in the temporary prison.

The diet in many prisons is in part provided for by private benefactions. Such benefactions are of use only upon supposition of that gross negligence on the part of government, of which they are a pregnant testimony. The demand a man in the situation in question has for food, is not at all varied by the happening or not happening of a casual act of humanity by a chance individual. Whatever be the proper allowance, he ought to have as much, although no private benefaction were given for that purpose; he ought not to have more, were the amount of such benefactions ever so considerable. If ever the legislature should fulfil this obvious and necessary duty, all such private benefactions should be taken into the hands of the public. Such resumption, far from being a violation of the wills of the benefactors, would be a more complete execution of them than any they could have hoped for.

For the same reason, all casual benefactions of particular persons, to particular delinquents, should be prevented. The way to do this is not to prevent the money's being given, but to prevent its being spent, at least in food and liquors: the introduction of money could not be prevented, without establishing a search too troublesome and humiliating to be executed with the strictness requisite to answer the purpose; but articles so bulky as those of food and liquors might easily be excluded. Such an institute would tend in no inconsiderable degree to promote restitution. At present, in all offences of rapacity, that is, in nineteen out of twenty of the crimes that are committed,* the greater a man's guilt has been — the more mischief he has done, the better he fares while he is in prison. It is seldom that the whole produce of the crime is found upon the delinquent at the time of his being apprehended; and though it be found on him, if it consist in money, it is seldom that it can be identified in such manner as to warrant the restitution of it against the consent of the delinquent. Commonly, if it be not spent, it is in the hands of some friend of the delinquent; an associate in iniquity, a wife or mistress. Thus secured, it is disposed of at his direction, and either lavished in debauchery, or in feeing lawyers to obstruct the course of justice.

When, therefore, the plunder is of no use to him, it will require a much less effort on his part, to restore it to the right owner. The workings of conscience will be powerfully seconded by such an institution.

Whatever, therefore, is found upon the person, or in the possession of any one who, by virtue of a charge upon oath, is apprehended for a felony, should be impounded in the hands of the officer. As much of it as consists in money, or other articles that include a considerable value in a small compass, should be sealed up with the seal of the magistrate; who should have it in his option to keep it in his own custody, or commit it to that of the ministerial officer, giving, in either case, a receipt to the suspected felon.

An objection to imprisonment, when all are upon an equal footing with respect to entertainment, is, that the punishment is apt to be disproportionate. The rich are punished more than the poor; or, in other words, those who have been accustomed to good living, more than those who have been accustomed to hard living. On the other hand, to allow those who are committed for crimes of rapacity to give in to any expense, while any part of the booty they may have made remains unrestored, is to allow them to enjoy the profit of their crimes; to give the criminal an indulgence at the expense of those whom he has injured.

Here, then, arises a difference in the treatment proper to be given in this respect to different crimes. Persons committed for crimes of rapacity should, in the case where the profit of the crime has been reaped, be debarred, until complete restitution shall have been made, of the liberty of procuring themselves those indulgences that are to be had for money. Persons committed for any other crimes may be allowed it.

With respect to restitution, a further caution is to be observed. It will happen very frequently, that a person apprehended for one offence has been guilty of many others. For this reason, it is not the restitution of the booty gained by the first offence for which

* See Howard's Tables.

the malefactor is apprehended, that ought to be deemed sufficient to entitle him to the liberty of purchasing indulgences. A time ought to be limited (suppose a month or six weeks,) and notice given for any persons who, within a certain time (suppose a year,) have been sufferers by him, to come in and oppose the allowance of such liberty. Very light proof in such case ought to be held sufficient.

Let us return for a moment to the different kinds of prisons. The different purposes for which they are destined ought to be very decidedly marked in their external appearance, in their internal arrangements, and in their denomination.

The walls of the first sort ought to be white — of the second, grey — of the third, black.

On the outside of the two last kinds of prisons may be represented various figures, emblematical of the supposed dispositions of the persons confined in them. A monkey, a fox, and a tiger, representing mischief, cunning, and rapacity, the sources of all crimes, would certainly form more appropriate decorations for a prison than the two statues of melancholy and raving madness, formerly standing before Bedlam. In the interior, let two skeletons be placed, one on each side of an iron door: the occasional aspect of such objects is calculated to suggest to the imagination the most salutary terrors. A prison would thus represent the abode of death, and no youth that had once visited a place so decorated, could fail of receiving a most salutary and indelible impression. I am fully aware, that to the man of wit these emblematical figures may serve as matter for ridicule: he admires them in poetry; he despises them when embodied in reality. Fortunately, however, they are more assailable by ridicule than by reason.*

Distinguishing the several species of prisons by characteristic denominations, is far from being a useless idea. Justice and humanity to insolvent debtors, and to persons detained upon suspicion, require that they ought to be screened even from the apprehension of being confounded with delinquents, a risk to which they are naturally exposed, where all places of confinement bear the same appellation. If no such sentiment were found to be already in existence, the legislator ought to make it his business to create it: but the truth is, that it does exist, and it is the most valuable classes of the community that are most severely wounded by this want of discrimination.

A difference in the situation and name affords another means of aggravating one of the most important parts of the punishment — the apparent punishment.

The first sort of prison may be called the *House for Safe Custody* — the second, the *Penitentiary House* — the third, the *Black Prison.*

The first of these names does not convey any idea of misconduct; the second does, but at the same time presents the idea of reformation; the third is calculated to inspire terror and aversion.

With a view to reformation in the case of offences punished by temporary imprisonment, part of the punishment may consist in learning by heart a certain part of the criminal code, including that part which relates to the offence for which the party is punished. It might be digested into the form of a catechism.

In second-rate felonies and misdemeanors, where, after being punished, the offender is returned into society, it is of importance to lighten as much as possible the load of infamy he has been made to bear. The business is to render infamous, not the offender, but the offence. The punishment undergone, upon the presumption of his being reclaimed, he ought not, if he is returned into society, to have his reputation irretrievably destroyed. The business is, then, for the sake of general prevention, to render the offence infamous, and, at the same time, for the sake of reformation, to spare the shame of the offender as much as possible. These two purposes appear, at first, to be repugnant: how can they be reconciled? The difficulty, perhaps, is not so great as it at first appears. Let the offender, while produced for the purpose of punishment, be made to wear a mask, with such other contrivances upon occasion as may serve to conceal any peculiarities of person. This contrivance will have a farther good effect in point of exemplarity. Without adding anything to the force of the *real* punishment — on the contrary, serving even to diminish it, it promises to add considerably to the force of the *apparent.* The masks may be made more or less tragical, in proportion to the enormity of the crimes of those who wear them. The air of mystery which such a contrivance will throw over the scene. will contribute in a great degree to fix the attention, by the curiosity it will excite, and the terror it will inspire.

CHAPTER VIII.

OF OTHER SPECIES OF TERRITORIAL CONFINEMENT — QUASI IMPRISONMENT — RELEGATION — BANISHMENT.

Quasi Imprisonment consists in the confinement of an individual to the district in which his ordinary place of residence is situated.

* Of the importance of symbols, and the uses that have been made of them, by the Catholic clergy, after the example of ancient Rome, see *Emile*, tom iv.

Relegation consists in the banishment of an individual from the district in which his ordinary place of residence is situated, and his confinement to some other district of the state.

Banishment consists in the expulsion of a man from the country in which he has usually resided, and the prohibition of his return to it.

These three species of punishment may be either temporary or perpetual.

Relegation and banishment are punishments unknown to the English law. Transportation, as we shall presently have occasion to observe, is in its nature totally different. The exclusion of Papists from a certain district about the court is to be considered rather as a measure of precaution than of punishment.

It is true, that the condition of persons living within the rules of a prison corresponds pretty accurately with the idea of territorial confinement. But this kind of territorial confinement is not inflicted in a direct way as a punishment. The punishment inflicted by the law is that of imprisonment, which the prisoner is allowed to commute upon paying for it. A man is not committed to the rules: he is committed to the prison, and upon paying what the jailor chooses, or is permitted to demand, he has the liberty of the rules; that is, of being in any part of a certain district round about the jail.*

The several inhabitable districts which are privileged from arrest, may be considered as scenes of territorial confinement with respect to offenders, who resort to them to escape being arrested and sent to prison. A man in such cases voluntarily changes the severer species of restraint into a milder.

In France, instances of relegation were not unfrequent. Under the old regime, a man was ordered to confine himself to his estate, or to quit his estate and go and live at another place. A punishment, however, of this sort, almost always fell upon a man of rank, and generally was rather an arbitrary expression of the personal displeasure of the sovereign, than a regular punishment inflicted in the ordinary course of justice. The person on whom it fell was commonly a disgraced minister, or a member of parliament. It has repeatedly happened, that a whole parliament has been relegated for refusing to register a particular edict. In these cases, however, it was often employed, not so much as a punishment, as a means of prevention — to prevent what were called intrigues. The exercise of such an act of authority was a symptom of apprehension and weakness on the part of the minister.

When a man is banished from all the dominions of his own state, he has either the whole world besides left for him to range in, or he is confined to a particular part of it. In the first case, it may be said to be indefinite, with respect to the *locus ad quem*; in the other, definite.†

It might seem at first sight as if the defining the *locus ad quem* in banishment would be an operation nugatory and impracticable. For banishment is one of those punishments that are to be carried into effect, if at all, only by the terror of ulterior punishment. Now to be liable to ulterior punishment at the hands of his own state, a man must be still in the power of that state; which, by the supposition, it would appear as if he could not be. There are three cases, however, in which he may be so still: — 1. Where the banishment is only temporary; 2. Where, though his person is out of the dominions of his own state, his property, or some other possession of his, is still within its power; 3. Where the foreign state to which he is exiled is disposed on any account to cooperate with his own, and either to punish, or give up to punishment, such persons as the latter shall deem delinquents.

The inconveniences of territorial confinement, whether by relegation or banishment, are for the most part of the same description as those of simple imprisonment; they are apt in some respects to be greater, in others less severe than simple imprisonment.

Territorial confinement is, however, susceptible of such infinite diversity, arising from the nature of the place — the extent of the district — the circumstances of the delinquent — that nothing like uniformity can be met with,

* It appears from Mr. Howard, that in England there are six prisons that have *Rules* belonging to them. In London, two, the Fleet (p. 156,) and the King's Bench (p. 196:) in Carmarthen, two (pp. 422, 468;) one in the Cornish borough of Lostwithiel (p. 386;) and one in Newcastle-upon-Tyne (p. 422.)

† Instances of definite banishment are what one would not expect to find frequent in any system of legislation. In banishment, the object in general is to get rid of the malefactor; and what becomes of him afterwards is not minded. If it were an object of choice with the government, what country the delinquent should betake himself to, the circumstances that could not but serve to determine such a choice would naturally be such as were of a temporary nature. This, accordingly, was the case with an act of the British Parliament, which furnishes the only instance that occurs to me of a punishment of this nature. By statute 20 Geo. II. c. 46, the king is empowered to commute the punishment incurred by persons engaged in the late rebellion, into transportation to America; and the persons thus dealt with are made subject to the pains of capital felony, not only as usual in case of their returning to any part of Great Britain or Ireland, but besides that, in case of their going into any part of the dominions of France or Spain, nations with whom Britain was then at war.

and scarce any proposition can be laid down respecting it, that shall be generally true.

In case of relegation, the liberty of beholding the beauties of nature and of the arts, of enjoying the company of one's friends and relations, of serving them and advancing one's own fortune, is liable to be more or less abridged.

The liberty of exercising any public power, and of taking journies for the sake of health or of pleasure, are subject to be entirely taken away.

The liberty of carrying on business for a livelihood will be subject to be more or less abridged, according to its nature; and in respect of some particular species of business or trade, the opportunity of exercising it will be subject to be entirely taken away.

In respect to *banishment*, the inconveniences are liable to vary to such a degree, both in quality and species, that nothing can be predicated of this mode of punishment, that shall be applicable to all cases.

The sort of evils with which it will be found to be most generally accompanied, may be arranged under the following heads:—

Separation from one's friends, relations, and countrymen.

Loss of the liberty of enjoying objects of pleasure or of amusement to which one has been accustomed, as public diversions, or the beauties of nature or art.

Loss of the opportunity of advancement in the way of life in which one had engaged, as in the military line or in public offices.

Loss of the opportunity of advancing one's fortune, and derangement in one's affairs, whether of trade or any other lucrative profession. But under this head, scarce anything can with certainty be said, till the business of each delinquent is known, and the country to which he is relegated. All opportunity of advancing one's fortune may be totally taken away, or may be changed more or less for the worse; but it may even be improved. A workman acquainted with only one branch of a complicated manufacture, if relegated to a country in which no such manufacture was carried on, would lose the whole of his means of subsistence, so far as it depended upon that manufacture. A man engaged in his own country in the profession of the law, relegated to a country governed by different laws, would find his knowledge altogether useless. A clergyman of the church of England would lose the means of subsistence derivable from his profession, if relegated to a country in which there were no members of that sect to be found.

The quantity of suffering incident to banishment, and, in some cases, to relegation, will depend upon the individual's acquaintance, or want of acquaintance, with foreign languages. For this purpose it ought to be borne in mind, that in every country the great majority of the people know no other language than their own. A great deal will depend upon the language a man speaks. A German, or an Italian, merely by being banished his own state, would suffer nothing in this respect, because in other states he will find the bulk of the people speaking precisely the same language. Next to a German or an Italian, a Frenchman would be least exposed to suffer, on account of the popularity of the French language in other European nations. An Englishman (except in America,) a Swede, a Dane, and a Russian, would find themselves worse off in this respect than inhabitants of other European countries.

A man being among people with whose language he is unacquainted, is liable to be exposed to the most serious evils. A difficulty in conversation imports a difficulty in making known all one's wants; in taking the necessary steps for procuring all sorts of pleasures, of warding off all sorts of pains. Though so much of the rudiments of a language should be acquired as may be sufficient for the common purposes of life, a man rarely acquires it in such perfection as to enable him to enjoy, unembarrassed, the pleasure of conversation: he will feel himself condemned to a perpetual state of inferiority, which must necessarily interfere with, and obstruct his engaging in any profitable employment.

To some people, banishment may be rendered in the highest degree irksome by the manners and customs of the people among whom the individual is cast. The words, manners and customs, are here employed in their greatest latitude, and are considered as comprising every circumstance upon which a state of comfortable existence depends. The principal objects to which they refer are diet, clothing, lodging, diversions, and every thing depending on difference of government and religion; which last has, among the lower classes at least, no inconsiderable influence upon the sympathies and antipathies of persons in general.

Throughout Europe, especially among persons in the higher ranks of life, a certain degree of conformity in manners and customs prevails: but a Gentoo, banished from his own country, would be rendered extremely wretched, especially on the score of religion.

Change of climate is another circumstance of importance: the change may be for the better; but the bulk of mankind, from the effects of long habit, with difficulty accustom themselves to a climate different from that of their native country. The complaints of expatriated persons usually turn upon the injuries their health sustains from this cause.

With respect to all these several evils which are thus liable to arise out of the punishment

of banishment, no one of them is certain to have place; they may or may not exist; in respect of severity, they are liable to unlimited variation, and it may even happen that the good may preponderate over the evil.*

In point of frugality, it seems as if these several punishments were all of them more eligible than imprisonment, at least than the system of imprisonment as at present managed; and that quasi-imprisonment and relegation are more frugal than banishment.

Under imprisonment, a man must at all events be maintained. Simple imprisonment adds nothing to the facility which any man has of maintaining himself by his labour: it takes from that facility in many cases. By imprisonment, some people will always be altogether debarred from maintaining themselves. These must be maintained at the expense of the public. An imprisoned man, therefore, is, on an average, a burthen: his value to the state is negative. A man at liberty is, at an average, a profit: his value to the state is positive; for each man, at an average, must produce more than he consumes, else there would be no common stock. A banished man is neither a burthen nor a profit: his value to the state is 0; it is greater, therefore, than that of an imprisoned man.

The value of a man under quasi-imprisonment and relegation, may, it should seem, be taken as equivalent or not in any assignable degree, less than that of a man at large. In the only instances in which these modes of punishment occur in England, the sufferer, instead of receiving anything from the public, pays.†

In point of certainty, they have none of them anything to distinguish them from other punishments.

In point of equality, they are all of them deficient,‡ but especially the two latter, and most of all, the last.

To be confined to within the circuit of a small town, can scarcely but be a punishment in some degree to almost all, though to some more, to others less. To live out of one's own province, or out of one's own country, is a very severe punishment to many; but to many it is none at all.

It is impossible to state with any accuracy the difference in this respect between relegation and banishment. In one point of view, it should seem as if banishment were the more penal; for the difference in point of laws, language, climate, and customs, between one's own province, and another province of one's own state, is upon an average not likely to be so great as between one's own province and a foreign state. In nations, however, that have colonies, it will generally happen that there are provinces more dissimilar to one another upon the whole in those respects than some of those provinces may be to other provinces of neighbouring nations. How small a change, for instance, would an Englishman find in crossing from Dover to Dunkirk? and how great a change in going from the first of those places to the East or West Indies?

In point of variability, except in respect of time, no punishment of the chronical kind can be more ineligible than these. But in point of intensity, although the degrees of suffering they are liable to produce in different persons are so numerous, yet they are not by any means subject to the regulation of the magistrate. It is not in his power to fix the quantity of punishment upon the whole to anything near the mark he may pitch upon in his own mind.

In point of exemplarity, they all yield to every other mode of punishment, and banishment to the other two. As to banishment, what little exemplarity it possesses, it possesses upon the face of the description. The descriptions of orators and poets have rendered it in some degree formidable upon paper. On the score of execution, it is the essential character of it to have none at all. Removed out of the observation of his countrymen, his sufferings, were they ever so great, can afford no example to his countrymen. This is the lowest degree of inexemplarity a punishment can possess, when even the person of the sufferer is out of the reach of observation.

* Gallio having been exiled to the Isle of Lesbos, information was received at Rome that he was amusing himself there, apparently very much to his satisfaction; and that what had been imposed upon him as a punishment, had, in fact, proved to him a source of pleasure: upon this they determined to recal him to the society of his wife, and to his home, and directed him to confine himself to his house, in order that they might inflict upon him what he should think a punishment.—*Essais de Montaigne*, liv. i. c. 2.

So far the French writer: Tacitus says—

"Italiâ exactus: et quia incusabatur facile toleraturus exilium, delectâ Lesbo, insulâ nobili et amœnaretrahitur in urbem, custoditurque domibus magistratuum."—*Ann.* lib. vi. c. 3.

† I am speaking of the rules in the six jails in England that have rules. The public is not at the expense of finding lodging. The houses are the property of private individuals, who get somewhat more for them than could be got for houses in the same condition out of the rules. Besides this advanced rent, the prisoner pays fees for the indulgence, which go towards the jailor's salary.

‡ This inequability may be illustrated by the history of the young Venetian noble relegated to the Isle of Candia. Despairing of being allowed to revisit the walls of his native city, and of again embracing his friends and his aged father, he committed another crime, unpardonable by the laws of the State, because he knew that he should be reconveyed to Venice for trial, and to suffer death.—Moore's *View of Society and Manners in Italy*, tom. i. lett. xiv.

The two others are upon a footing with pecuniary punishment; in which the person of the sufferer is under observation, and occasionally perhaps his sufferings; but there is no circumstance to point out the derivation of the latter from the punishment that produced them. They are inferior to imprisonment; because there the main instrument of punishment, the prison, is continually before his eyes. To quasi-imprisonment and relegation there belongs no such instrument — the punishment, as we have observed, being produced in the first instance not by any *material* but merely by *moral* means.*

On the score of subserviency to reformation, there seems to be a considerable difference among these three punishments. Quasi imprisonment is apt to be disserviceable in this view; relegation and banishment rather serviceable than otherwise, more especially the latter.

1. Quasi imprisonment is apt to be disserviceable. The reasons have been already given under the head of Imprisonment. The property which we mentioned as being incident to imprisonment, I mean of corrupting the morals of the prisoners by the accumulating, if one may so say, of the peccant matter, is incident to quasi imprisonment only in a somewhat less degree. Under the former, they can have no other company than that of each other: under the latter, there may be room for some admixture of persons of repute. Under the former, they are forced into the company of each other: under the latter, they may choose to be alone.

2. Relegation is apt to be rather serviceable than otherwise: as in solitary imprisonment, if the delinquent has formed any profligate connexions, it separates him from them, and does not, like simple imprisonment, lead him to form new ones of the same stamp. Turned adrift among strangers, he cannot expect all at once to meet with a set of companions prepared to join with him in any scheme of wickedness. Should he make advances and be repulsed, he exposes himself to their honest indignation, perhaps to the censure of the law. Should the company he happens to fall in with be persons as profligate as himself, it would be some time before he could establish himself sufficiently in their confidence. If he continue to make war upon mankind, it must be with his own single strength. He may find it easier to betake himself to charity or to honest labour. He is separated not only from the objects which used to supply him with the *means* to commit crimes, but from those which used to furnish him with the *motives*. The company he meets with in the new scene he enters upon, will either be honest, or at least, for aught he can know to the contrary, will for some time seem to be so. In the meantime, the disapprobation he may hear them express for habits resembling those which subjected him to the punishment he is undergoing, may co-operate with that punishment, and contribute to the exciting in him that salutary aversion to those habits which is styled repentance.

3. In this respect, banishment is apt to be rather more serviceable than relegation. If the delinquent be still of that age at which new habits of life are easily acquired, and is not insensible to the advantages of a good reputation, his exile, if the character in which he appears is not known, will be the more likely to contribute to his reformation, from his finding himself at a distance from those who were witnesses of his infamy, and in a country in which his endeavours to obtain an honest livelihood, will not be liable to be obstructed by finding himself an object of general suspicion. But even though he were to carry with him to the place of his banishment his original vicious propensities, he would not find the same facilities for giving effect to them, especially if the language of the country were different from his own. The laws also of the foreign country being new to him, may on that account strike him with greater terror than the laws of his own country, which he had perhaps been accustomed to evade. And even in case of meeting with success in any scheme of plunder, the want of established connexions for the disposing of it would render the benefit derivable from it extremely precarious. The consideration of all these difficulties would tend to induce him to resort to honest labour as the only sure means of obtaining a livelihood.

But, taking all the above sources of uncertainty into consideration, it will be found that the cases are very few in which banishment can be resorted to as an eligible mode of punishment. In what are called state offences, it may occasionally be employed with advantage, in order to separate the delinquent from his connexions, and to remove him from the scene of his factious intrigues. In this case, however, it would be well to leave him the hope of returning, as a stimulus to good conduct during his banishment.

CHAPTER IX.

OF SIMPLY RESTRICTIVE PUNISHMENTS.

Having now considered the several punishments which restrain the faculty of locomotion, we proceed to the consideration of those

* The little benefit that banishment, in so far as it operates as a punishment, can be of in the way of example, is reaped by foreign states; by that state, to wit, which the banished man chooses for his asylum.

which restrain the choice of occupations. These may be called simply restrictive punishments, and consist in a simple prohibition of performing certain acts.

Upon this occasion we may recur to a distinction already explained, which exists between restraint and punishment. The Civil Code and Police Code are full of restraints which are not punishments. Certain individuals are prohibited from selling poison. Innkeepers are prohibited from keeping their houses open after a certain hour. Persons are prohibited from exercising the professions of medicine or of the law, without having passed through certain examinations.

Simply restrictive punishments consist in the preventing an individual from enjoying a common right, or a right which he possessed before. If the prohibition respect a lucrative occupation; if, for example, an innkeeper or a hackney-coachman be deprived of his license, the prohibition acts as a pecuniary punishment, in its nature very inequable and unfrugal. If a man be deprived of the means of earning his subsistence, he must still be supported; the punishment therefore falls not upon the individual alone, but upon others whom it was not intended to affect.

Employments which are not lucrative may be of an agreeable nature. Their variety is infinite; but there is one point in which they all agree, and which will render it unnecessary to submit them to a detailed discussion. There are none of them, or at least scarcely one, which by its deprivation furnishes a sufficient portion of evil to enable us to rely upon its effect.

As respects pleasures, the mind of man possesses a happy flexibility. One source of amusement being cut off, it endeavours to open up another, and always succeeds: a new habit is easily formed; the taste adapts itself to new habits, and suits itself to a great variety of situations. This ductility of mind, this aptitude to accommodate itself to circumstances as they change, varies much in different individuals; and it is impossible beforehand to judge, or even to guess, how long an old habit will retain its dominion, so that its privation shall continue a real punishment.

This is not the only objection. Restrictive laws are very difficult of execution; they always require a subsidiary punishment, of which the effect is uncertain. If you prohibit an individual from gaming, drunkenness, dancing, and music, it becomes necessary to appoint an inspector for all these things, in all places, to see that your prohibition is observed. In a word, punishments of this kind are subject to this dilemma: either the attachment to the object prohibited is very weak or very strong: if strong, the prohibition will be eluded; if weak, the object desired will not be obtained.

In respect of exemplarity, they are equally defective: the privations they occasion are not of a nature to be generally known, or if known, to produce a strong effect upon the imagination; the misery they produce rankles in the mind, but is completely hidden from the public eye.

These are some of the circumstances which have reduced the employment of these punishments within so narrow a compass: they are too uncertain in their effects, and too easily eluded, to allow of their use, as the sanction to a general law. It is true, that if judges were acquainted with the characters and circumstances of individuals, they might avail themselves of them with good effect; but this knowledge can scarcely ever be expected.

This species of punishment is well suited to domestic government. There is no pleasure which a parent or teacher cannot employ as a reward, by permitting its enjoyment, or convert into a source of punishment, by restricting its use.

But though restraints of this nature, that is to say, prohibition of agreeable occupation, do not alone form effective punishments, there is one case in which they may be usefully employed in addition to some other punishment: analogy recommends such employment of them. Has an offence been committed at some public exhibition, it may be well to prohibit the delinquent from attending such public exhibitions for a time.

Among simply restrictive punishments, there is one of which a few examples are found, and which has not received a name: I have called it *banishment from the presence*. It consists in an obligation imposed upon the offender immediately to leave the place in which he meets with the offended party. The simple presence of the one is a signal for the departure of the other. If Silus, the party injured, enter a ball or concert room, a public assembly or public walk, Titius is bound instantly to leave the same. This punishment appears admirably well suited for cases of personal insult, attacks upon honour, and calumnies; in a word, for all crimes which render the presence of the offender particularly disagreeable and mortifying to the party offended.

In the employment of this punishment, care must be taken that power be not given to the party injured to banish the offender from places in which he is carrying on his habitual operations, or where his presence may be necessary for the discharge of any particular duty. Hence it will, in many cases, be found indispensable to make exceptions in respect of churches, courts of justice, markets, and political assemblies.

Instances in which this mode of punishment has been employed may be found in the de-

crees of the French Parliaments. It will be sufficient to mention one instance. A man of the name of *Aujay* having insulted a lady of rank in the most gross manner, among other punishments he was ordered, under pain of corporal punishment, to retire immediately from every place at which this lady might happen to be present.*

In the "Intrigues of the Cabinet" may be seen the account of a quarrel between Madame de Montbazon and the Princess de Condé, in the course of which the former was guilty of very gross insults towards the Princess. The Queen, Anne of Austria, ordered that Madame Montbazon should retire from every place at which the Princess was present.†

Under the English law, there are various instances in which, though not under the name of punishment, restrictions are imposed upon certain classes of persons. Catholics were formerly not allowed to exercise either the profession of the law or that of medicine. Persons refusing to take the sacrament according to the rites of the Church of England, were excluded from all public offices.

Such was the law; the practice was always otherwise: in point of fact, a very large proportion of offices, civil and military, were filled by persons who had never taken the oaths required, but who were protected from the penalties to which they would otherwise have been subjected, by an annual bill of indemnity. In point of right, the security thus afforded was a precarious one, but the uninterrupted practice of nearly a century left little room for apprehension on the part of the persons interested.

The restrictions here in question were not designed to operate as punishments; they were originally imposed with a view of avoiding the danger which, it was apprehended, might be incurred by vesting in the hands of persons of certain religious persuasions, situations of public trust. This, at least, was the avowed political reason: the true cause of the exclusion was, however, religious animosity: they were acts of antipathy.

But these were not the only motives: self-interest had its share in producing the exclusion. Exclude one set of persons, and you confer a benefit on another set: those to whom the right is reserved have to contend with a smaller number of competitors, and their prospect of gain is increased. These restrictive laws, originating in religious hatred, were afterwards maintained by injustice; the persecution, begun by misguided bigotry, was persisted in long after the original inducement had been forgotten, from the most sordid injustice. This is the short history of the persecutions in Ireland. For the benefit of the Protestants, the restrictive laws against the Catholics were kept in force: out of eight millions of inhabitants, a selection was made of one million, on whom were conferred all offices of power or of profit. In this state of things, whilst privileges are, by the continuance of the persecuting laws, placed in the hands of the persecutors, the procuring their abolition may be expected to be attended with no small difficulty. The true motive — the sordid one — will long be concealed under the mask of religion.

Though it may be said that these restrictions are not designed to operate as punishments, and that, in the making of this general law, no particular individual was aimed at, yet there results from it a distinction injurious to the particular class of persons affected by it — necessarily injurious, since the continuance of the law can be justified only by supposing them to be dangerous and disloyal. Such laws form a nucleus around which public prejudice collects; and the legislator, by acquiescing in these transient jealousies, strengthens them, and renders them permanent. They are the remnants of a disease which has been universal, and which, after its cure, has left behind it deep and lasting scars.

CHAPTER X.

OF ACTIVE OR LABORIOUS PUNISHMENT.

Active punishment is that which is inflicted on a man by obliging, or, to use another word, compelling him to act in this or that particular way; to exert this or that particular species of action.

There are two kinds of means by which a man may be compelled to act — physical and moral: the first applies itself to his body; the other to his mind, to his faculty of volition.

The actions which a man may be compelled to perform by physical means are so few, and so unprofitable, both to the patient and to others, as not to be worth taking into the account.

When the instrument is of the moral kind, it is by acting on the volition that it produces its effect. The only instrument that is of a nature to act immediately upon the volition, is an idea; but not every idea — only an idea of pleasure or of pain, as about to ensue from the performance or non-performance of the act which is the object of the volition.

It cannot be an idea of pleasure which can so act upon the volition as to give birth to an act the performance of which shall be a punishment; it must therefore be an idea of pain — of any pain, no matter what, so it be to appearance greater than the pleasure of abstaining from the performance of the penal act.

* Causes Celèbres, tom. iv. p. 307.
† Anquetil, tom. iii.

It is manifest, therefore, that when a punishment of the laborious kind is appointed, another punishment must necessarily be appointed along with it. There are, therefore, in every such case, two different punishments, at least, necessarily concerned. One, which is the only one directly and originally intended, the laborious punishment itself; which may be styled the *principal* or *proper* punishment: the other, in case of the former not being submitted to, is called in to its assistance, and may be styled the *subsidiary* punishment.

This subsidiary punishment may be of any kind that, in point of quantity, is great enough. It ought not, however, to be likewise of the laborious kind; since in that case, as well as in the case of the principal punishment, the will of the patient is necessary to constitute the punishment; and to determine the will, some incident is necessary that does not depend upon the will. It will be necessary, therefore, to employ such punishments as are purely passive, or those restrictive punishments in which the instrument is purely physical.

In regard to this class of punishments, one thing is here to be noted with reference to the instrument. In punishments of this kind, there is a link or two interposed between the instrument and the pain produced by means of it. The instrument first produces the volition; that volition produces a correspondent external act: and it is that act which is the immediate cause by which the pain here in question is produced. This punishment, then, we see, has this remarkable circumstance to distinguish it from other punishments: it is produced immediately by the patient's own act; it is the patient who, to avoid a greater punishment, inflicts it on himself.

What, then, is the sort of act that is calculated to produce pain in the case of active punishment? It admits not of any description more particular than this: that it is any act whatever that a man has a mind not to do; or, in other words, that on any account whatever is disagreeable to him.

An occupation is a series of acts of the same kind, or tending to the same end. An occupation may be disagreeable on a positive or a negative account; as being productive, in a manner more or less immediate, of some positive pain, or as debarring from the exercise of some more agreeable occupation.

Considered in itself, an occupation may be either painful, pleasurable, or indifferent; but continued beyond a certain time, and without interruption (such is the constitution of man's nature,) every occupation whatsoever becomes disagreeable: not only so, but such as were in the beginning pleasurable become, by their continuance, more disagreeable than such as were originally indifferent.*

To make the sum of his occupations pleasurable, every man must therefore be at liberty to change from one to another, according to his taste. Hence it is, that any occupation which, for a certain proportion of his time, a man is compelled to exercise, without the liberty of changing to another, becomes disagreeable, and in short becomes a punishment.

Active punishments are as various as the occupations in which, for the various purposes of life, men can have occasion to be employed. These being usually inflicted on all offenders indiscriminately, have been such as all offenders indiscriminately have been physically qualified to undergo. They have consisted commonly in various exertions of muscular force, in which there has been little or no dexterity required in the manner of its application. In general, they have been such as to produce a *profit* — a collateral benefit in addition to that expected from the punishment as such.

Among the modes of penal labour, a very common one has been that of rowing. This is an exercise performed chiefly by main strength, with very little mixture of skill, and that presently attained: Some vessels, of a bulk large enough to bear any sea, have been made so as to be put in motion in this manner, even without the help of sails. This occupation is more unpleasant in itself than that of an ordinary seaman, as having less variety, besides that the rowers are confined by chains. Such vessels are called gallies, and the rowers galley-slaves. This punishment, though unknown in England, is in use in most of the maritime states of Europe, and particularly in the Mediterranean and Adriatic Seas.

In many countries, malefactors have been employed in various public works, as in the cleansing of harbours† and the streets of towns, in making roads, building and repairing fortifications, and working in mines.

Working in the mines is a punishment employed in Russia and in Hungary. In Hungary, the mines are of quicksilver, and the unwholesome effects of that metal, upon a person who is exposed to the effluvia of it for a length of time, may be one reason for

* To eat grapes, for instance, is what, at certain times at least, will probably be to most men rather an agreeable occupation: to pick them an indifferent one. But in two or three hours, for example, the eating them will become intolerable, while the picking them may still remain, perhaps, in itself nearly a matter of indifference.

† The employment of malefactors for the cleaning of harbours was, for the first time, introduced into this country in the year 1776, by stat. 16 Geo. III. c. 43.

employing criminals in that work, in preference to other persons.

Beating hemp is the most common employment which delinquents are put to in our workhouses — persons of both sexes being subjected to it, without distinction.

From the nature of the service, active punishments may be distinguished into two sorts — specific and indiscriminate. I call it specific, when it consists in the being obliged to do such and such a particular kind or kinds of work: indiscriminate, when it consists in the being obliged to do, not any kind of work in particular, but every kind of work in general, which it shall please such or such a person to prescribe. If such person take all the profit of the work, he is called a master: if the profit is received by some other person, he is called a keeper, or overseer. There are cases of a mixed nature, in which, in certain respects, the servitude is indiscriminate; as to other respects, specific.

At Warsaw, before the partition of Poland, there was a public workhouse, in which convicts were confined in ordinary to particular employments determined by the laws or custom of the place. To this workhouse, however, any person who thought proper might apply, and upon giving security for their forthcomingness, and paying a certain stipulated price for their use, a certain number of the convicts were allotted to him, to be employed in any piece of work for a given time. The services they were employed upon were generally of a rough kind, such as digging a ditch, or paving a court; and a soldier, or a party of soldiers, according to the number of convicts thus employed, was placed over them as a guard.

This custom was also in use in Russia.*

This distinction between specific and indiscriminate servitude, may be illustrated by two examples derived from the English law.

The example of specific punishment is afforded by the statute which directs the employment of certain malefactors on board the hulks, in improving the navigation of the Thames. The statute determines the kind of labour, and the subsidiary punishments by which it is to be enforced.

Indiscriminate servitude is part of the punishment inflicted by our laws under the name of transportation. This servitude is sometimes limited as to its duration, but is without limitation, and without restriction, in respect of the services which may be required.

All these kinds of labour, whether indiscriminate or specific, require, as a necessary accompaniment, that the individual should be upon that spot where the business is to be done. Some import imprisonment; all of them import restraint upon occupations, to wit, upon all occupations incompatible with those in which they constrain a man to employ himself. The degree of this restraint is in a manner indefinite. To lay a man, therefore, under a particular constraint of any kind, is for that time to lay him under an almost universal restraint. The clear value, then, of the pleasure which a man loses by being compelled to any particular occupation, is equal to that of the greatest of all the pleasures which, had it not been for the compulsion, he might have procured for himself.

Upon examining laborious punishment, we shall find it to possess the properties to be wished for in a mode of punishment, in greater perfection, upon the whole, than any other single punishment.

1. It is *convertible to profit.* Labour is in fact the very source of profit: not that, after all, its power in this way is so extensive as that of pecuniary punishment; for, from the punishment of one man in this way, all the profit that is to be reaped is that which is producible by the labour of one man — a limited, and never very ample quantity. On the other hand, from the punishment of a man in the pecuniary way, it may happen that a profit shall be reaped equal to the labour of many hundred men. The difference, however, in favour of this punishment is, that money is a casual fund; labour one that cannot fail. Indeed, upon the whole, though pecuniary punishment be in particular instances capable of being more profitable, yet considering how large a proportion of mankind, especially of those most liable to commit the most frequent and troublesome kinds of crimes, have no other possession worth estimating than their labour, laborious punishment, if managed as it might and ought to be, may perhaps be deemed the most profitable upon the whole.

2. In point of *frugality* to the state, laborious punishment, considered by itself, is as little liable to objection as any other can be. I say, considered by itself; for, when coupled with imprisonment, as it can hardly but be in the case of public servitude, it is attended with those expenses to the public which have been noticed under the article of imprisonment. These, however, are not to be charged to the account of the laborious part of the punishment: so that the advantage which laborious punishment has on this score, over simple imprisonment, is quite a

* See the Abbé Chappé's travels in that country. The Abbé had particular reason to remember it. Wanting, for the purpose of some experiment, to have the earth dug, he was complimented with the use of a dozen of these poor prisoners. Having given them some money to purchase liquor, they employed it in making their guard drunk, and then took to flight. — Vol. I. page 149.

clear one. But the former of these two punishments, though separable from the latter in idea, is not separable in practice. Imprisonment may be made to subsist without labour; but forced labour cannot be made to subsist without imprisonment. The advantage, then, which servitude has in this respect, when compared with imprisonment, ceases when compared with any other mode of punishment. However, the profit gained by the one part is enough, under good management, to do more than balance the expense occasioned by the other; so that, upon the whole, it has the advantage, in point of economy, over any other mode of punishment but pecuniary.

3. It seems to stand equally clear of objection in point of *equability*. As to the restraint it involves, it accommodates itself of itself to each man's circumstances; for, with respect to each man, it has the effect of restraining him from following those occupations, whatever they may be, which are to him most pleasurable. The positive servitude itself will be apt to sit heavier on one man than another. A man who has not been used to any kind of labour will suffer a good deal more, for some time at least, than one who has been used to labour, though of a different kind or degree from that in question. But this inconvenience may be pretty well obviated by a proper attention to the circumstances of individuals.

4. In point of *variability*, though it is not perfect throughout, yet it is perfect as far as it goes. In a very low degree it is not capable of subsisting, on account of the infamy it involves, at least in a country governed by European manners. One of the most odious acts of the reign of the Emperor Joseph II. was the sentencing persons of high rank to labour in the public works. The Protestants of France considered the condemnation of their religious ministers to the galleys as a personal insult done to themselves: in this respect, then, it falls short of pecuniary punishment. After that exception, it is capable of being varied to the utmost nicety: being variable as well in respect of intensity, as of duration.

5. In point of *exemplarity*, it has no peculiar advantage; neither is it subject to any disadvantage. Symbols of suffering it has none belonging to itself; for the circumstance which distinguishes penal servitude from voluntary labour is but an internal circumstance — the idea of compulsion operating on the patient's mind. The symbols, however, that belong necessarily to the punishment it is naturally combined with — I mean imprisonment — apply to it of course; and the means of characterizing the condition of the patient by some peculiarity of dress are so obvious, that these may be looked upon as symbols naturally connected with it.

6. In point of *subserviency to reformation*, it is superior to any other punishment, except that mode of imprisonment which we have already insisted on as being peculiarly adapted to this purpose.* Next to the keeping of malefactors asunder, is the finding them employment while they are together. The work they are engaged in confines their attention in some measure: the business of the present moment is enough to occupy their thoughts; they are not stimulated by the impulse of *ennui* to look out for those topics of discourse which tend, in the manner that has been already explained, to fructify the seeds of corruption in their minds: they are not obliged, in search of aliment for speculation, to send back their memory into the field of past adventures, or to set their invention in quest of future projects. This kind of discipline does not, indeed, like the other, pluck up corruption by the roots; it tends, however, to check the growth of it, and render the propensity to it less powerful. Another circumstance, relative to the nature of this discipline, contributes to check the progress of corruption: to insure the performance of their tasks, it is necessary that the workmen should be under the eye of overseers. The presence of these will naturally be a check to them, and restrain them from engaging in any criminal topics of discourse.

So much for the tendency which this punishment has to keep men from growing worse. It has, besides this, a positive tendency to make them better. And this tendency is more obvious and less liable to accident than the other. There is a tendency, as has been already observed, in man's nature, to reconcile and accommodate itself to every condition in which it happens to be placed. Such is the force of habit. Few occupations are so irksome that habit will not in time make them sit tolerably easy. If labour, then, even though forced, will in time lose much of its hardship, how much easier will it become when the duration and the mode are in some measure regulated by the will of the labourer himself; when the bitter ideas of infamy and compulsion are removed, and the idea of gain is brought in to sweeten the employment; in a word, when the labourer is left to work at liberty and by choice!

7. This mode of punishment is not altogether destitute of *analogy*, at least of the verbal kind, to that class of crimes which are the most frequent, and for which an efficacious punishment is most wanted — crimes, I mean, that result from a principle of rapacity or of sloth. The slothful man is constrained to work: the vagabond is confined to a parti-

* Supra, p. 425.

cular spot. The more opposite the restraint thus imposed is to the natural inclination of the patient, the more effectually will he be deterred from indulging his vicious propensities, by the prospect of the punishment that awaits him.

8. With regard to the popularity of this species of punishment in this country, the prejudices of the people are not quite so favourable to it as could be wished. Impatient spirits too easily kindled with the fire of independence, have a word for it, which presents an idea singularly obnoxious to a people who pride themselves so much upon their freedom. This word is slavery. Slavery they say, is a punishment too degrading for an Englishman, even in ruins. This prejudice may be confuted by observing — 1*st*, That public servitude is a different thing from slavery; 2*dly*, That if it were not, this would be no reason for dismissing this species of punishment without examination. If, then, upon examination, it is found not to be possessed, in a requisite degree, of the properties to be wished for in a mode of punishment, that, and not the name it happens to be called by, is a reason for its rejection: if it does possess them, it is not any name that can be given to it that can change its nature. But these observations have been more fully insisted on in the chapter on Popularity.

Having thus spoken of this species of punishment in general, let us stop a moment to consider the different kinds of labour which ought to be preferred.

The principal distinction is that of public and private labour.

In public works, the infamy of their publicity tends to render the individuals more depraved, than the habit of working tends to reform them. At Berne there are two classes of forced labourers — the one employed in cleaning the streets, and in other public works; the others employed in the interior of the prison. The latter, when set at liberty, rarely fall again into the hands of justice; the former are no sooner set at liberty than they are guilty of new crimes. This difference is accounted for at Berne, by the indifference to shame they contract in a service, the infamy of which is renewed day by day. It is probable, that after the notoriety of this disgrace, nobody in the country would like to hold communication with, or to employ them.

The rough and painful kinds of labour, which are ordinarily selected for this kind of punishment, do not generally seem suitable. It is difficult to measure the powers of individuals, or to distinguish real from simulated weakness. Subsidiary punishments must be proportioned to the difficulty of the labour, and to the indisposition to perform it. The authority with which an inspector must be armed is liable to great abuses; to rely upon his pity, or even upon his justice, in an employment which hardens the heart, betrays an ignorance of human nature; so soon as it becomes necessary to inflict corporal punishment, the individual who is charged with its execution will become degraded in his own opinion, and he will revenge himself by the abuse of his authority.

*Nam nil asperius humili qui surgit in altum.**

Labours which require great efforts ought to be performed by free labourers. The labour obtained by the force of fear is never equal to that which is obtained by the hope of reward. Constrained labour is always inferior to voluntary labour; not only because the slave is interested in concealing his powers, but also because he wants that energy of soul upon which muscular strength so much depends. It would be a curious calculation to estimate how much is lost from this cause in those states where the greater portion of labour is performed by slaves. It would tend greatly to prove that their gradual emancipation would be a noble and beneficial measure.

Labour in mines, except in particular circumstances, is little suitable for malefactors, partly for the reason above given, and partly from the danger of degrading this occupation. The ideas of crime and shame will soon be associated with it; miner and criminal would soon become synonymous: this would not be productive of inconvenience, if the number of malefactors were sufficient for working the mines; but if the contrary is the case, there might be a lack of workmen, from the aversion inspired towards this kind of labour, in those who used to exercise it voluntarily, or who are at liberty to choose respecting it.

CHAPTER XI.

CAPITAL PUNISHMENT.

Capital punishment may be distinguished into — 1*st*, simple; 2*d*, afflictive.

I call it *simple*, when, if any bodily pain be produced, no greater degree of it is produced than what is necessary to produce death.

I call it *afflictive*, when any degree of pain is produced more than what is necessary for that purpose.

It will not be necessary, upon the present occasion, to attempt to give an exhaustive view of all the possible modes by which death might be produced without occasioning any, or the least possible quantity of collateral suffering. The task would be almost an endless one: and when accomplished, the only use to which it could be applied would be that of affording an opportunity of selecting out of the catalogue the mode that seemed to

* Claudian.

possess the desired property in the greatest perfection, which may readily be done without any such process.

The mode in use in England is far from being the best that could be devised. In strangulation by suspension, the weight of the body alone is seldom sufficient to produce an immediate and entire obstruction of respiration. The patient, when left to himself, struggles for some time: hence it is not uncommon for the executioner, in order to shorten his sufferings, to add his own weight to that of the criminal. Strangling by the bowstring may to some, perhaps, appear a severer mode of execution; partly from the prejudice against every usage of despotic governments, partly by the greater activity exerted by the executioners in this case than in the other. The fact, however, is, that it is much less painful than the other, for it is certainly much more expeditious. By this means the force is applied directly in the direction which it must take to effect the obstruction required: in the other case, the force is applied only obliquely; because the force of two men pulling in that manner is greater than the weight of one man.

It is not long, however, even in hanging, before a stop is put to sense; as is well enough known from the accounts of many persons who have survived the operation. This probably is the case a good while before the convulsive strugglings are at an end; so that in appearance the patient suffers more than he does in reality.

With respect to beheading, there are reasons for supposing that the stop put to sensation is not immediate: a portion of sensibility may still be kept up in the spinal marrow a considerable time after it is separated from the brain. It is so, at least, according to all appearance, for different lengths of time in different animals and insects, which continue to move after their heads are separated from their bodies.

§ 2. *Afflictive Capital Punishment.*

To exhaust this part of the subject, it would be necessary to make a catalogue of every various punishment of this description, of which, in practice, there has been any example, adding to them such others as the imagination could be made to supply; but, the ungrateful task performed, of what use would it be? We shall the more willingly refrain from any such labour, as in the more modern European codes these punishments have been altogether discarded; and in those in which they have not been formally abolished, they have long fallen into desuetude. Let us rejoice in these improvements: there are few opportunities in which the philosopher can offer to the governors of the world more just or more honourable congratulations.

The importance of the subject, however, will not admit of its being passed over in perfect silence. The system of jurisprudence in question has been too long established; it has had too many apologists, and has had for its supporters too many great names, to allow of its being altogether omitted in a work expressly treating on the subject of punishment. It may besides be of use to show that reason concurs with humanity in the condemning punishments of this description, not merely as being useless, but as producing effects contrary to the intention of the legislator.

If the particular nature of the several species of punishments of this description be examined, as well those that have for a long time past been abolished, such as crucifixion and exposure to wild beasts, as those that have been in use in various parts of modern Europe, such as burning, empaling, tearing to pieces, and breaking on the wheel, it will be found in all of them that the most afflictive part consists in their *duration:* but this circumstance is not of a nature to produce the beneficial effect that may have been expected from it.

When any particular species of punishment is denounced, that part of it which takes the strongest hold of the imagination is its *intensity:* its duration makes a much more feeble impression. A slight apparent addition of organical suffering made to the ordinary mode of inflicting the punishment of death, produces a strong effect upon the mind: the idea of the duration of its pains is almost wholly absorbed by the terrors of the principal part of the punishment.

In the legal description of a punishment, its duration is seldom (distinctly) brought to view; it is not mentioned, because in itself it is naturally uncertain: it depends partly upon the physical strength of the patient, and partly upon various other accidental circumstances. To this remarkable and important feature of this species of punishment there is no means by which the attention can be drawn and fixed upon it: upon those who reflect, it produces no impression: upon those who do not reflect, it is altogether lost.

It is true, that the duration of any particular punishment might be fixed by law; the number of hours or minutes might be determined, which should be employed in performing the several prescribed manipulations. This obviously would be a mode of fixing the attention upon this particular feature of the punishment: but even this mode, perfect as it may appear to be, would be found very inadequate to produce the desired effect. By the help of pictures, the intensity of any particular species of punishment may be more or less faithfully represented; but to represent its duration is impossible. The flames,

the rack, and all the engines of torture, together with the convulsive throes of the half-expiring and wretched sufferer, may be depicted, but time cannot. A punishment that is to be made to last for two hours will not appear different from a punishment that is to last only a quarter of an hour. The deficiencies of art may, to a certain degree, be compensated for by the imagination: but even then the reality will be left far behind.

It is true, that upon bystanders the duration of the punishment is calculated to make a strong impression; but even upon them, after a certain time, the prolongation loses its effect, and gives place to a feeling directly opposite to that which it is desirable to produce — sentiments of pity and sympathy for the sufferer will succeed, the heart of the spectator will revolt at the scene he witnesses, and the cry of suffering humanity will be heard. The physical suffering will not be confined to the offender: the spectators will partake of it: the most melancholy accidents, swoonings, and dangerous convulsions, will be the accompaniments of these tragic exhibitions. These sanguinary executions, and the terrific accounts that are spread concerning them, are the real causes of that deep-rooted antipathy that is felt against the laws and those by whom they are administered — an antipathy which tends to multiply offences, by favouring the impunity of the guilty.

The only reason that can be given by any government, that persists in continuing to employ a mode of punishing so highly penal, is, that the habitual condition of the people is so wretched that they are incapable of being restrained by a more lenient kind of punishment.

Will it be said that crimes are more frequent in countries in which punishments such as those in question are unknown? The contrary is the fact. It is under such laws that the most ferocious robbers are found: and this is readily accounted for. The fate with which they are threatened hardens them to the feelings of others as well as their own: they are converted into the most bitter enemies, and every barbarity they inflict is considered as a sort of reprisal.

Upon this subject, as upon so many others, Montaigne was far beyond the age in which he lived. All beyond simple death (he says) appears to me to be cruelty. The legislator ought not to expect that the offender that is not to be deterred by the apprehension of death, and by being beheaded and hanged, will be more effectually deterred by the dread of being exposed to a slow fire, or the rack. And I do not know, indeed, but that he may be rendered desperate.*

By the French Constituent Assembly, afflictive punishments were abolished. In the *Code Napoléon*, beheading is the mode prescribed for inflicting the punishment of death. And it is only in the case of parricide, and of attempts made upon the life of the sovereign, that to the simple punishment of death the characteristic afflictive punishment of cutting off the hand of the offender is added.

In this country, the only crime for which afflictive punishment is in use, is that of high treason. The judgment in high treason consists of seven different operations of the afflictive kind: 1. Dragging at a horse's tail along the streets from the prison to the place of execution; 2. Hanging by the neck, yet not so as entirely to destroy life; 3. Plucking out and burning of the entrails while the patient is yet alive; 4. Beheading; 5. Quartering; 6. Exposure of the head and quarters in such places as the king directs. This mode of punishment is not now in use. In favour of nobility, the judgment has been usually changed into beheading; in favour of the lower classes, into hanging.

I wish that upon this part of our subject we could end here; but unfortunately there remains to be mentioned an afflictive mode of punishment, most excruciating, and more hideous than any of which we have hitherto spoken, and which is still in use: it is not in Europe that it is employed, but in European colonies — in our own West India Islands.

The delinquent is suspended from a post by means of a hook inserted under his shoulder, or under his breast bone. In this manner the sufferer is prevented from doing anything to assist himself, and all persons are prohibited, under severe penalties, from relieving him. He remains in this situation, exposed to the scorching heat of the day, where the sun is almost vertical, and the atmosphere almost without a cloud, and to the chilling dews of the night; his lacerated flesh attracts a multitude of insects, which increase his torments, and under the fever produced by these complicated sufferings, joined to hunger and thirst, all raging in the most intense degree, he gradually expires.

When we reflect on this complication of sufferings, their intensity surpasses everything that the imagination can figure to itself, and consider that their duration continues not merely for many hours, but for many days, it will be found to be by far the most severe punishment ever yet devised by the ingenuity of man.

The persons to whom this punishment has been hitherto appropriated are negro slaves, and their crime, what is termed rebellion, because they are the weakest, but which, if

* Liv. ii. ch. 27. — *Cowardice the mother of cruelty.*

Et lupus et turpes instant morientibus ursi
Et quæcunque minor nobilitate fera est.
Ovid.

they were the strongest, would be called an act of self-defence. The constitutions of these people are, to their misfortune, in certain respects so much harder than ours, that many of them are said to have lingered ten or twelve days under these frightful torments.

It is said that this punishment is nothing more than is necessary for restraining that people, and keeping them in their servile state; for that the general tenor of their lives is such a scene of misery, that simple death would be generally a relief, and a death less excruciating would scarce operate as a restraint.

This may perhaps be true. It is certain that a punishment, to have any effect upon man, must bear a certain ratio to the mean state of his way of living, in respect of sufferings and enjoyments. But one cannot well help observing where this leads. The number of slaves in these colonies is to that of freemen as about six to one; there may be about three hundred thousand blacks and fifty thousand whites. Here there are three hundred thousand persons kept in a way of life that upon the whole appears to them worse than death, and this for the sake of keeping fifty thousand persons in a way of life not remarkably more happy than that which, upon an average, the same number of persons would be in where there was no slavery; on the contrary, it is found that men in general are fond, when they have the opportunity, of changing that scene for this. On the other hand, it is not to be disputed that sugar and coffee, and other delicacies, which are the growth of those islands, add considerably to the enjoyments of the people here in Europe; but taking all these circumstances into consideration, if they are only to be obtained by keeping three hundred thousand men in a state in which they cannot be kept but by the terror of such executions: are there any considerations of luxury or enjoyment that can counterbalance such evils?

At the same time, what admits of very little doubt is, that the defenders of these punishments, in order to justify them, exaggerate the miseries of slavery, and the little value set by the slaves upon life. If they were really reduced to such a state of misery as to render necessary laws so atrocious, even such laws would be insufficient for their restraint; having nothing to lose, they would be regardless of all consequences; they would be engaged in perpetual insurrections and massacres. The state of desperation to which they would be reduced would daily produce the most frightful disorders. But if existence is not to them a matter of indifference, the only pretence that there is in favour of these laws falls to the ground. Let the colonists reflect upon this: if such a code be necessary, the colonies are a disgrace and an outrage on humanity: if not necessary, these laws are a disgrace to the colonists themselves.

CHAPTER XII

CAPITAL PUNISHMENT EXAMINED.*

In making this examination, the following plan will be pursued. The advantageous properties of capital punishment will in the first place be considered: we shall afterwards proceed to examine its disadvantageous properties. We shall, in the last place, consider the collateral ill effects resulting from this mode of punishment: effects more remote and less obvious, but sometimes more important, than those which are more immediate and striking.

The task thus undertaken would be an extremely ungrateful and barren one, were it not that the course of the examination will lead us to make a comparison between this and other modes of punishment, and thus to ascertain which is entitled to the preference. On the subject of punishment, the same rule ought, in this respect, to be observed as on the subject of taxes. To complain of any particular tax as being an injudicious one, is to sow the seeds of discontent, and nothing more: to be really useful, this in itself mischievous discovery, should be accompanied by the indication of another tax which will prove equally productive, with less inconvenience.

§ 1. *Advantageous Properties of the Punishment of Death.*

1. The most remarkable feature in the punishment of death, and that which it possesses in the greatest perfection, is the taking from the offender the power of doing further injury: whatever is apprehended, either from the force or cunning of the criminal, at once vanishes away; society is in a prompt and complete manner delivered from all alarm.

2. It is *analogous* to the offence in the case of murder; but there its analogy terminates.

3. It is *popular* in respect of that same crime, and in that alone.

4. It is *exemplary* in a higher degree, perhaps, than any other species of punishment, and in countries in which it is sparingly employed, an execution makes a deep and lasting impression.

It was the opinion of *Beccaria*, that the impression made by any particular punishment was in proportion to its duration, and not to its intensity. "Our sensibility," he observes, "is more readily and permanently affected by slight but reiterated attacks, than by a violent but transient affection. For this

* See also Appendix, Letter to the French Nation, on Death Punishment.

reason, the putting an offender to death forms a less effectual check to the commission of crimes, than the spectacle of a man kept in a state of confinement, and employed in hard labour, to make some reparation by his exertions for the injury he has inflicted on society."*

Notwithstanding such respectable authority, I am apt to think the contrary is the case. This opinion is founded principally on two observations: 1. Death in general is regarded by most men as the greatest of all evils, and they are willing to submit to any other suffering whatever in order to avoid it. 2. Death, considered as a punishment, is almost universally reckoned too severe, and men plead, as a measure of mercy, for the substitution of any other punishment in lieu of it. In respect to duration, the suffering is next to nothing. It must therefore, I think, be some confused and exaggerated notion of the intensity of the pain of death, especially of a violent death, that renders the idea of it so formidable. It is not without reason, however, that, with respect to the higher class of offenders, M. Beccaria considers a punishment of the laborious kind, moderate we must suppose in its degree, will make a stronger impression than the most excruciating kind of death that can be devised. But for the generality of men, among those who are attached to life by the ties of reputation, affection, enjoyment, hope, capital punishment appears to be more exemplary than any other.

5. Though the *apparent* suffering in the punishment of death is at the highest pitch, the real suffering is perhaps less than in the larger portion of afflictive punishments. In addition to their duration, they leave after them a train of evils which injure the constitution of the patient, and render the remainder of his life a complication of sufferings. In the punishment of death, the suffering is momentary: it is a negation of all sensation.

When the last moment only is considered, penal death is often more gentle than natural death, and, so far from being an evil, presents a balance of good. The suffering endured must be sought for in some anterior period. The suffering consists in *apprehension*. This apprehension commences from the moment the delinquent has committed the crime; it is redoubled when he is apprehended; it increases at every stage of the process which renders his condemnation more certain, and is at its height in the interval between sentence and execution.

The more solid argument in favour of the punishment of death, results from the combined force of the above considerations. On the one hand, it is, to men in general, of all punishment, of the greatest apparent magnitude, the most impressive, and the most exemplary; and on the other hand, to the wretched class of beings that furnish the most atrocious criminals, it is less rigorous than it appears to be. It puts a speedy termination to an uneasy, unhappy, dishonoured existence, stript of all true worth:—*Heu! Heu! quam male est extra legem viventibus.*†

§ 2. *Desirable Penal Qualities which are wanting in Capital Punishment.*

1. The punishment of death is not *convertible to profit:* it cannot be applied to the purpose of compensation. In so far as compensation might be derived from the labour of the delinquent, the very source of the compensation is destroyed.

2. In point of *frugality*, it is pre-eminently defective. So far from being convertible to profit, to the community it produces a certain loss, both in point of wealth and strength. In point of wealth, a man chosen at random is worth to the public that portion of the whole annual income of the state which results from its division by the number of persons of which it consists. The same mode of calculation will determine the loss in respect of strength. But the value of a man who has been proved guilty of some one or other of those crimes for which capital punishment is denounced, is not equal to that of a man taken at random. Of those by whom a punishment of this sort is incurred, nine out of ten have divested themselves of all habits of regular industry: they are the *drones* of the hive; and with respect to them, death is therefore not an ineligible mode of punishment, except in comparison with confinement and hard labour, by which there is a chance of their being reformed, and rendered of some use to society.

3. *Equability* is another point, and that a most important one, in which this punishment is eminently deficient. To a person taken at random, it is upon an average a very heavy punishment, though still subject to considerable variation; but to a person taken out of the class of first-rate delinquents, it is liable to still greater variation: to some it is as great as to a person taken at random; but to many it is next to nothing.

Death is the absence of all pleasures indeed, but at the same time of all pains. When a person feels himself under temptation to commit a crime punishable with death, his determination to commit it, or not to commit it, is the result of the following calculation: He ranges on one side the clear portion of happiness he thinks himself likely to enjoy in case of his abstaining: on the other, he places the clear happiness he thinks

* Des Delits et des Peines.—Sect. xvi.

† Petron. Satyr.

himself likely to enjoy in case of his committing the crime, taking into the account the chance there appears to him to be, that the punishment threatened will abridge the duration of that happiness.

Now then, if in the former case there appear to be no clear happiness likely to accrue to him, much more if there appear to be a clear portion of unhappiness; in other words, if the clear portion of happiness likely to befal him appear to be equal to 0,* or much more if it appear to be negative, the pleasure that constitutes the profit of the crime will act upon him with a force that has nothing to oppose it: the probability of seeing it brought to an abrupt period by death will subtract more or less from the balance; but at any rate there will be a balance.

Now this is always the case with a multitude of malefactors. Rendered averse to labour by natural indolence or disuse, or hurried away by the tide of some impetuous passion, they do look upon the pleasures to be obtained by honest industry as not worth living for, when put in competition with the pains; or they look upon life as not worth keeping, without some pleasure or pleasures which, to persons in their situation, are not attainable but by a crime.

I do not say that this calculation is made with all the formality with which I have represented it: I do not say that in casting up the sum of pains on the one side, and pleasures on the other, exact care is always used to take every item into the account. But however, well or ill, the calculation is made; else a man could not act as he is supposed to do.

Now then, in all these cases, which unhappily are but too frequent, it is plain the punishment of death can be of no use.

It may be said, no more would any other punishment; for any other punishment, to answer its purpose, must have the effect of deterring or otherwise disabling the person in question from committing the like crimes in future. If, then, he is thus deterred or disabled, he is reduced to a situation in which, by the supposition, death was to him an event desirable upon the whole. Being, then, in his power, he will produce it.

The conclusion, however, is not necessary. There are several reasons why the same impulse which is strong enough to dispose a man to meet death at the hands of justice should not be strong enough to dispose him to bring on himself that event with his own hand.

In the first place, the infliction of it as a punishment is an event by no means certain. It is in itself uncertain; and the passion he is supposed to be influenced by, withdrawing his attention from the chances that are in favour of its happening, makes it look still more uncertain.

In the next place, although it were certain, it is at any rate distant: and the mortification he undergoes, from the not possessing the object of his passion, is present.

Thirdly, death is attended with much more pain when a man has to inflict it on himself with his own hand, than when all he does is simply to put himself in a situation in which it will be inflicted on him by the hands of another, or by the operation of some physical cause. To put himself in such a situation, requires but a single and sudden volition, and perhaps but a single act in consequence, during the performance of which he may keep his eyes shut, as it were, against the prospect of the pain to which he is about to subject himself: the moment of its arrival is at an uncertain distance. The reverse is the case where a man is to die by his own hand. His resolution must be supported during the whole period of time that is necessary to bring about the event. The manner is foreseen, and the time immediate. It may be necessary, that even after a part of the pain has been incurred, the resolution should go on and support itself, while it prompts him to add further pain before the purpose is accomplished.

Accordingly, when people are resolved upon death, it is common for them, when they have an opportunity, to choose to die rather by the hand of another than by their own. Thus Saul chose to die by the hand of his armour-bearer; Tiberius Gracchus by that of his freeman; so again the Emperor Nero by one of his minions.

Fourthly, when a man is prompted to seek relief in death, it is not so much by the sudden vehemence of some tempestuous passion, as by a close persuasion that the miseries of his life are likely to be greater than the enjoyments; and, in consequence, when the resolution is once taken, to rest satisfied without carrying it immediately into effect; for there is not a more universal principle of human conduct, than that which leads a man to satisfy himself for awhile with the power, without proceeding immediately, perhaps without proceeding ever, to the act. It is the same feeling which so often turns the voluptuous man to a miser.

Now this is likely enough to be the condition of those who, instead of death, may have been sentenced to another punishment. They defer the execution of their design from hour to hour—sometimes for want of means, sometimes for want of inclination; till at last some incident happens that puts in their heads a train of thought which in the end diverts them from their resolution. In the mental, as well as in the material part of the human frame, there is happily a strong

* Zero.

disposition to accommodate itself by degrees to the pressure of forced and calamitous situations. When a great artery is cut or otherwise disabled, the circumjacent smaller ones will stretch and take upon themselves the whole duty of conveying to the part affected the necessary supplies. Loss of sight improves the faculty of feeling; a left hand learns to perform the offices of the right, or even the feet, of both; an inferior part of the alimentary canal has learned to perform the office, and even to assume the texture of the stomach.

The mind is endowed with no less elasticity and docility, in accommodating itself to situations which at first sight appeared intolerable. In all sufferings there are occasional remissions, which, in virtue of the contrast, are converted into pleasure. How many instances are there of men who, having suddenly fallen from the very pinnacle of grandeur into the gulphs of misery, have, when the old sources of enjoyment were irrecoverably dry, gradually detached their minds from all recollections of their customary enjoyments, and created for themselves fresh sources of happiness. The Comte de Lauzun's spider, the straw-works of the Bicêtre, the skilfully wrought pieces of carved work made by the French prisoners, not to mention others, are sufficient illustrations of this remark.

Variability is a point of excellence in which the punishment of death is more deficient than in any other. It subsists only in one degree; the quantity of evil can neither be increased nor lessened. It is peculiarly defective in the case of the greater part of the most malignant and formidable species of malefactors — that of professed robbers and highwaymen.*

4. *The punishment of death*† *is not remissible.* Other species of afflictive punishments, it is true, are exposed to the same objection; but though irremissible they are not irreparable: for death there is no remedy.

No man, how little soever he may have attended to criminal procedure, but must have been struck at the very slight circumstances upon which the life of a man may depend; and who does not recollect instances in which a man has been indebted for his safety to the occurrence of some unlooked-for accident, which has brought his innocence to light? The risk incurred is doubtless greater under some systems of jurisprudence than under others. Those which allow the torture to supply the insufficiency of evidence derived from other sources; those in which the proceedings are not public, are, if the expression may be used, surrounded with precipices. But it may be said, is there, or could there be devised, any system of penal procedure which could insure the judge from being misled by false evidence or the fallibility of his own judgment? No; absolute security in this branch of science is a point which, though it can never be attained, may be much more nearly approached than it has hitherto been. Judges will continue fallible; witnesses to depose falsehood, or to be deceived; whatever number may depose to the same fact, the existence of that fact is not rendered certain: as to circumstantial evidence, that which is deemed incapable of explanation, but by supposing the existence of the crime, may be the effect of chance, or of arrangements made with the view of producing deception. The only sort of evidence that appears entitled to perfect conviction, is the voluntary confession of the crime by the party accused; but this is not frequently made, and does not produce absolute certainty, since

* "Are you not aware that we are subject to one disease more than other men?" said a malefactor upon the rack to his companion, who shrieked from pain. When one observes the courage or brutal insensibility, when in the very act of being turned off, of the greater part of the malefactors that are executed at Newgate, it is impossible not to feel persuaded that they have been accustomed to consider this mode of ending their days as being to them a natural death — as an accident or misfortune, by which they ought no more to be deterred from their profession than soldiers or sailors are from theirs, by the apprehension of bullets or of shipwreck.

† There is an evil resulting from the employment of death as a punishment, which may be properly noticed here—*It destroys one source of testimonial proof.* The archives of crime are in a measure lodged in the bosoms of criminals. At their death, all the recollections which they possess relative to their own crimes and those of others perish. Their death is an act of impunity for all those who might have been detected by their testimony, whilst innocence must continue oppressed, and the right can never be established, because a necessary witness is subtracted.

Whilst a criminal process is going forward, the accomplices of the accused flee and hide themselves. It is an interval of anxiety and tribulation: the sword of justice appears suspended over their heads. When his career is terminated, it is for them an act of jubilee and pardon: they have a new bond of security, and they can walk erect. The fidelity of the deceased is exalted among his companions as a virtue, and received among them for the instruction of their young disciples, with praises for his heroism.

In the confines of a prison, this heroism would be submitted to a more dangerous proof than the interrogatories of the tribunals. Left to himself, separated from his companions, a criminal ceases to possess this feeling of honour which unites him to them. It needs only a moment of repentance to snatch from him those discoveries which he only can make; and without his repentance, what is more natural than a feeling of vengeance against those who caused him to lose his liberty, and who, though equally culpable with himself, yet continue in the enjoyment of liberty! He need only listen to his interest, and purchase, by some useful information, some relaxation of the rigour of his punishment.

instances have not been wanting, as in the case of witchcraft, in which individuals have acknowledged themselves guilty, when the pretended crime was impossible.

These are not purely imaginary apprehensions, drawn from the region of possibility: the criminal records of every country afford various instances of these melancholy errors; and these instances, which, by the concurrence of a number of extraordinary events, have attained notoriety, cannot fail to excite a suspicion that, though unknown, many other innocent victims may have perished.

It must not be forgotten either, that the cases in which the word evidence is most apt to be employed, are not unfrequently those in which the testimony adduced is exposed to most suspicion. When the pretended crime is among the number of those that produce antipathy towards the offender, or which excite against him a party feeling, the witnesses almost unconsciously act as accusers. They are the echoes of the public clamour; the fermentation goes on increasing, and all doubt is laid aside. It was a concurrence of such circumstances which seduced first the people, and then the judges, in the melancholy affair of *Calas*.

These melancholy cases, in which the most violent presumptions, which fall little short of absolute certainty, are accumulated against an individual whose innocence is afterwards recognised, carry with them their own excuse: they are the cruel effects of chance, and do not altogether destroy public confidence. To produce any such effect, we must be able to detect in such erroneous decisions proofs of temerity, ignorance, and precipitation, of an obstinate and blind adherence to vicious forms, and of those determined prejudices which the very situation of Judge is apt to generate. A judge, whose business it is to deal with human nature in its worst forms, having daily before his eyes the false pretences and mendacity to which the guilty have recourse, perpetually contriving expedients for unvailing imposture, gradually ceases to believe in the innocence of those accused, and by anticipation expects to find a criminal using all his arts to deceive him. That it is the character of all judges to be actuated by these prejudices, I am far from thinking; but when the propriety of arming men with the power of inflicting the punishment of death is the question under consideration, it ought not to be forgotten, before putting into their hands the fatal weapon, that they are not exempted from the weaknesses of humanity; that their wisdom is not increased, neither are they rendered infallible, by thus arming them.

The danger attending the use of capital punishment appears in a more striking point of view when we reflect on the use that may be made of it by men in power, to gratify their passions, by means of a judge easily intimidated or corrupted. In such cases, the iniquity covered with the robe of justice may escape, if not all suspicion, at least the possibility of proof. Capital punishment, too, affords to the prosecutor as well as to the judge, an advantage that in all other modes is wanting—I mean greater security against detection—by stifling by death all danger of discovery arising from the delinquent, at least: while he lives, to whatever state of misery he may be reduced, the oppressed may meet with some fortunate event by which his innocence may be proved, and he may become his own avenger. A judicial assassination, justified in the eyes of the public by a false accusation, with almost complete certainty assures the triumph of those who have been guilty of it. In a crime of an inferior degree, they would have had everything to fear; but the death of the victim seals their security.

If we reflect on those very unfrequent occurrences, but which may at any time recur—those periods at which the government degenerates into anarchy and tyranny, we shall find that the punishment of death, established by law, is a weapon ready prepared, which is more susceptible of abuse than any other mode of punishment. A tyrannical government, it is true, may always re-establish this mode of punishment after it has been abolished by the legislature. But the introducing what would then become an innovation, would not be unattended with difficulty: the violence of which it was to be the precursor would be too much exposed, the tocsin would be sounded. Tyranny is much more at its ease when exercised under the sanction of law, when there is no appearance of any departure from the ordinary course of justice, and when it finds the minds of people already reconciled and accustomed to this mode of punishment. The Duke of Alba, ferocious as he was, would not have dared to sacrifice so many thousand victims in the Low Countries, if it had not been a commonly received opinion that heresy was a crime which merited the punishment of death. Biren, not less cruel than the Duke of Alba — Biren, who peopled the deserts of Siberia with exiles, caused them previously to be mutilated, that being the most severe punishment that was in use in that country — he very rarely ventured to punish them capitally, because capital punishment was not in use: so little do even the most arbitrary despots dare to violate established customs. Hence we may draw a strong reason for seizing upon periods of tranquillity for destroying these dangerous instruments, which, though no longer dreaded when covered with rust, are with such facility brought into use again, when passion invites their employment.

The objection arising from the irremissibility of the punishment of death applies to all cases, and can be removed only by its complete abolition. Upon this occasion it is necessary to bear in mind that there are two branches of security, for each of which it is necessary to make provision. Security against the errors and corruptions in judicial procedure, and security against crimes. If the latter were not to be attained but at the expense of the former, there would be no room for hesitation. With respect to crimes, from whom is it that the terror is felt? From every person that is capable of committing a crime; that is to say, from all men, and at all times. With respect to the errors and corruptions of justice, these are the exceptions, the accidental and rare occurrences.

This punishment is far from being popular; and it becomes less and less so every day, in proportion as mankind become more enlightened, and their manners more softened. The people flock in crowds to an execution; but this eagerness, which at first might appear so disgraceful to humanity, does not proceed from the pleasure expected from the sight of men in the agonies of death: it arises from the pleasure of having the passions strongly excited by a tragic scene. There is, however, one case in which it does seem to be popular, and that in a very high degree; I mean the case of murder. The attachment seems to be grounded partly on the fondness for analogy, partly on the principle of vengeance, and partly, perhaps, by the fear which the character of the criminal is apt to inspire. Blood, it is said, will have blood, and the imagination is flattered with the notion of the similarity of the suffering, produced by the punishment, with that inflicted by the criminal.

In other cases, the punishment of death is unpopular; and this unpopularity produces different dispositions, all equally contrary to the ends of justice: a disposition on the part of the individuals injured not to prosecute the offenders, for fear of bringing them to the scaffold; a disposition on the part of the public to favour their escape; a disposition on the part of the witnesses to withhold their testimony, or to weaken its effect; a disposition on the part of the judges to allow of a merciful prevarication in favour of the accused; and all these anti-legal dispositions render the execution of the laws uncertain, without referring to that loss of respect which follows upon its being considered meritorious to prevent their execution.

§ 3. *Recapitulation and Comparison of the Punishment of Death, with those Punishments which may be substituted for it.*

The punishment of death, it has been observed, possesses four desirable properties:—

1. It is in one case analogous to the offence.
2. In that same case it is popular.
3. It is in the highest degree efficacious in preventing further mischief from the same source.
4. It is exemplary, producing a more lively impression than any other mode of punishment.

The two first of these properties exist in the case of capital punishment when applied to murder; and with reference to that species of offence alone, are they sufficient reasons for persevering in its use? Certainly not: each of them, separately considered, is of very little importance. Analogy is a very good recommendation, but not a good justification. If in other respects any particular mode of punishment be eligible, analogy is an additional advantage: if in other respects it be ineligible, analogy alone is not a sufficient recommendation: the value of this property amounts to very little, because, even in the case of murder, other punishments may be devised, the analogy of which will be sufficiently striking.

In respect also of *popularity*, the same observations apply to this mode of punishment. Every other mode of punishment that is seen to be equally or more efficacious will become equally or more popular. The approbation of the multitude will naturally be in proportion to the efficacy of the punishment.

The third reason, that it is efficacious *in preventing further mischief from the same source*, is somewhat more specious, but not better founded. It has been asserted, that in the crime of murder it is absolutely *necessary*; that there is no other means of averting the danger threatened from that class of malefactors. This assertion is, however, extremely exaggerated: its groundlessness may be seen in the case of the most dangerous species of homicide — assassination for lucre, a crime proceeding from a disposition which puts indiscriminately the life of every man into immediate jeopardy. Even these malefactors are not so dangerous nor so difficult to manage as madmen; because the former will commit homicide only at the time that there is something to be gained by it, and that it can be perpetrated with a probability of safety. The mischief to be apprehended from madmen is not narrowed by either of these circumstances. Yet it is never thought necessary that madmen should be put to death. They are not put to death: they are only kept in confinement; and that confinement is found effectually to answer the purpose.

In fine, I can see but one case in which it can be necessary, and that only occasionally. In the case alleged for this purpose by M. Beccaria — the case of rebellion, or other offence against government of a rebellious ten-

dency, when by destroying the chief you may destroy the faction, where discontent has spread itself widely through a community, it may happen that imprisonment will not answer the purpose of safe custody. The keepers may be won over to the insurgent party, or if not won over, they may be overpowered. They may be won over by considerations of a conscientious nature, which is a danger almost peculiar to this case; or they may be won over by considerations of a lucrative nature, which danger is greater in this case than in any other, since party projects may be carried on by a common purse.

What, however, ought not to be lost sight of in the case of offences of a political nature is, that if by the punishment of death one dangerous enemy is exterminated, the consequence of it may be the making an opening for a more formidable successor. "Look," said the executioner, to an aged Irishman, showing him the bleeding head of a man just executed for rebellion — "look at the head of your son." "My son," replied he, "has more than one head." It would be well for the legislator, before he appoints capital punishment, even in this case, to reflect on this instructive lesson.

The fourth reason is the strongest. The punishment of death is exemplary, pre-eminently exemplary: no other punishment makes so strong an impression.

This assertion, as has been already noticed, is true with respect to the majority of mankind: it is not true with respect to the greatest criminals.

It appears, however, to me, that the contemplation of perpetual imprisonment, accompanied with hard labour and occasional solitary confinement, would produce a deeper impression on the minds of persons in whom it is more eminently desirable that that impression should be produced, than even death itself. We have already observed, that to them life does not offer the same attractions as it does to persons of innocent and industrious habits. Their very profession leads them continually to put their existence in jeopardy; and intemperance, which is almost natural to them, inflames their brutal and uncalculating courage. All the circumstances that render death less formidable to them, render laborious restraint proportionably more irksome. The more their habitual state of existence is independent, wandering, and hostile to steady and laborious industry, the more they will be terrified by a state of passive submission and of laborious confinement, a mode of life in the highest degree repugnant to their natural inclinations.

Giving to each of these circumstances its due weight, the result appears to be, that the prodigal use made by legislators of the punishment of death has been occasioned more by erroneous judgments [arising from the situation in which they are placed with respect to the other classes of the community] than from any blameable cause. Those who make laws belong to the highest classes of the community, among whom death is considered as a great evil, and an ignominious death as the greatest of evils. Let it be confined to that class, if it were practicable, the effect aimed at might be produced; but it shows a total want of judgment and reflection to apply it to a degraded and wretched class of men, who do not set the same value upon life, to whom indigence and hard labour is more formidable than death, and the habitual infamy of whose lives renders them insensible to the infamy of the punishment.

If, in spite of these reasons, which appear to be conclusive, it be determined to preserve the punishment of death, in consideration of the effects it produces *in terrorum*, it ought to be confined to offences which in the highest degree shock the public feeling — for murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers; and in these cases, expedients, by which it may be made to assume the most tragic appearance, may be safely resorted to, in the greatest extent possible, without having recourse to complicated torments.

§ 4. *Collateral evil effects of the frequent use of the Punishment of Death.*

The punishment of death, when applied to the punishment of offences in opposition to public opinion, far from preventing offences, tends to increase them by the hope of impunity. This proposition may appear paradoxical; but the paradox vanishes when we consider the different effects produced by the unpopularity of the punishment of death. In the first place, it relaxes prosecution in criminal matters; and in the next place, foments three vicious principles: — 1. It makes perjury appear meritorious, by founding it on humanity; 2. It produces contempt for the laws, by rendering it notorious that they are not executed; 3. It renders convictions arbitrary, and pardons necessary.

The relaxation of criminal procedure results from a series of transgressions on the part of the different public functionaries, whose concurrence is necessary to the execution of the laws: each one alters the part allotted to him, that he may weaken or break the legal chain by which he is bound, and substitute his own will for that of the legislator;* but all these causes of uncertainty in criminal procedure are so many encouragements to malefactors.

* "Observe that juryman in a blue coat," said one of the Judges at the Old Bailey to Judge Nares; "do you see him?" "Yes."

BOOK III.

OF PRIVATIVE PUNISHMENTS, OR FORFEITURES.

CHAPTER I.

PUNISHMENT ANALYZED.

We now come to the last of the two grand divisions of Punishments—*Privative Punishments*, or *Forfeitures*.

The word forfeiture is never used but with reference to some *possession*.*

Possessions are either substantial or ideal: substantial, when it is the object of a real entity (as a house, a field;) ideal, when it is the object of a fictitious entity (as an office, a dignity, a right.)

The difficulty of dealing with cases of this description will immediately be seen. Real entities have all a common genus, to wit, *substance*. Fictitious entities have no such common genus, and can only be brought into method in virtue of the relation they bear to real objects.

Possessions, of whatsoever nature they be, whether real or fictitious, are *valuable;* and to forfeit them can never otherwise be a punishment, than as far as they are instruments of pleasure or security. By specifying, then, the sort of persons or things from which the benefit said to belong to a fictitious possession is actually derived, all will be done that can be done towards giving a methodical view of those possessions, and of the penal consequences of forfeiting them.†

To investigate, therefore, the several kinds of proper forfeitures, it is necessary to investigate the several kinds of possessions. On this subject, however, as it comes in only collaterally on the present occasion, it will not be necessary to insist very minutely.

Possessions are derived either from things only, or from persons only; or from both together. Those of the two first sorts may be styled simple possessions; those of the other, complex.

Possessions derived from things may consist either — 1. in money: these may be called pecuniary; 2. in other objects at large. The former may be styled pecuniary; the latter quasi-pecuniary. Accordingly, forfeiture of money may be styled pecuniary forfeiture: forfeiture of any other possession derived from things, quasi-pecuniary. Quasi-pecuniary forfeitures are capable of a variety of divisions and subdivisions; but as these distinctions turn upon circumstances that make no difference in the mode of punishment, it will not be necessary, on the present occasion, to enter into any such detail.

Possessions derived from persons, consist in the *services* rendered by those persons. Services may be distinguished into *exigible* and *inexigible*. By exigible, I mean such as a man may be punished (to wit, by the political sanction) for not rendering: by inexigible, such as a man cannot be punished for not rendering; or, if at all, not by any other sanction than either the moral or the religious.‡ The faculty of procuring such as are exigible is commonly called *power*, to wit, power over persons: the faculty or chance of procuring such as are inexigible depends, in great measure, upon *reputation;* hence re-

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"Well, there will be no conviction of death today." And the observation was confirmed by the fact.

* As all our ideas are derived ultimately from the senses, almost all the names we have for intellectual ideas seem to be derived ultimately from the names of such objects as afford sensible ideas; that is, of objects that belong to one or other of the three classes of real entities; insomuch that, whether we perceive it or no, we can scarce express ourselves on any occasion but in metaphors. A most important discovery this in the metaphysical part of grammar, for which we seem to be indebted to M. d'Alembert.—See his *Mélanges*, tom. i. *Disc. Prelim. &c.*

The way in which the import of the word forfeiture is connected with sensible ideas seems to be as follows: the words *to forfeit* come either immediately, or through the medium of the old French, from the modern Latin word *forisfacere*. *Foris* means out of doors, or out of the house; *facere*, is to make or to cause to be. The conceit then is, that when any object is in a man's possession, it is as it were within doors — within his house: any act, therefore, which, in consequence of some operation of the law, has the effect of causing the object to be no longer in his possession, has the effect of causing it, as it were, to be out of his doors, and no longer within his house.

† Forfeiture is, in some cases, though rarely, applied to corporal punishments. Thus capital punishment is called forfeiture of life; mutilation, forfeiture of limbs or members. It is also, with the addition of the word liberty, applied to corporal punishments of the restrictive classes, as in the case of imprisonment and quasi imprisonment. The other modes of confinement require further additions to be made to them: as, to express *foreign* banishment, forfeiture of the liberty of residing in any part of the dominions of the state; to express *domestic* banishment, forfeiture of the liberty of being any longer in the place of his abode. The infinite variety of specific restraints may also be expressed by the phrase of forfeiture of liberty, with so many different additions: forfeiture of the liberty of exercising such or such an operation, forfeiture of the liberty of pleading, &c.

‡ To services inexigible, but by the force of these auxiliary sanctions, correspond what are called imperfect rights. Whatever right a man may have to a service, which the party is not punishable by law for not rendering him, is what is called, by writers on the pretended law of nature, an imperfect right: and the obligation to render any such service, an imperfect obligation.

sult two farther kinds of forfeiture: forfeiture of power and forfeiture of reputation.*

Reputation may be distinguished into natural and factitious: by factitious, I mean that which is conferred by rank or dignity.

Credibility is a particular species of reputation — the reputation of veracity. Hence we have two further kinds of forfeiture, both subordinate to that of reputation: forfeiture of rank or dignity, and forfeiture of credibility.

As to complex possessions, and the forfeitures that relate to them, these are too heterogeneous to be arranged in any systematic method: all that can be done is to enumerate them. Thus much only may be said of them in general, that the ingredients of each of them are derived from both the classes of objects which we have mentioned as being the sources from which the several kinds of simple forfeitures are derived.

It should seem, however, that they might all of them, without any great violence, be brought under the title of *conditions*. Conditions, then, may, in the first place, be distinguished into *ordinary* and *peculiar*.

Ordinary conditions or modes of relationship may be distinguished into *natural* and *acquired*. By natural conditions, I mean those which necessarily belong to a man by birth; to wit, in virtue of either his own birth or that of some other person to whom he stands related; such as that of son, daughter, father, mother, brother, sister, and so on, through the several modes of relationship, constituted by the several degrees of consanguinity. To stand in any of these relations to such or such a person may be the source of various advantages. These conditions, it is plain, cannot themselves be forfeited; a man, however, may, and in some instances has been said to have forfeited them, and may actually be made to forfeit many of the advantages attending them.

Acquired conditions may be distinguished, in the first place, into *political* and *religious;* and political again into *domestic* and *public*. Domestic conditions may be distinguished into *family* conditions and *professional*. Family conditions are — 1*st*, The matrimonial; or that of being husband or wife to such a person; 3*d* and 4*th*, that of being guardian or ward; 5*th* and 6*th*, that of being master or servant to such a person.

By public political condition, I mean that of belonging to any voluntary society of men instituted on any other than a religious account.

By religious condition, I mean that of belonging to any society or sect instituted for the sake of joining in the performance of religious ceremonies.

Of conditions that may be termed peculiar, the several sorts may, it should seem, be all comprised under the head of conditions constituted, either 1*st*, by offices; or 2*dly*, by corporation privileges. A right of exercising an office is an exclusive right to render certain services.

Conditions constituted by offices may be ranked in the number of complex possessions, inasmuch as they are apt to include the three simple possessions following; to wit, a certain share of power, a certain rank, and a certain salary, or fees or other emoluments coming under the head of pecuniary or quasi-pecuniary possessions.

Of offices there is an almost infinite variety of kinds, and a still greater variety of names, according to the almost infinite modifications of rank and power in different countries, and under different governments. This head is, consequently, susceptible of a great variety of divisions and subdivisions; but these it will not be necessary, on the present occasion, to consider.

Corporations may be distinguished into political and religious. Under the head of religious corporations may be included the various monastic orders established in countries professing the Roman Catholic religion.

As to political corporations, the catalogue of the possessions that may be annexed to the condition of one who is a member of those bodies is so various, that no other account need, on the present occasion, or indeed can be given of it, than that there are scarce any of the simple possessions above enumerated, but may be included in it.†

To the condition of one who is a member of a religious order or corporation, may be annexed, besides the above possessions, others, the value whereof consists in such or such a chance as they may appear to confer of enjoying the pleasures of a future life, over and above such chance of enjoying the same pleasures as appears to be conferred by the condition or privilege of being an ordinary professor of the same religion.

As an appendix to the above list of possessions, may be added two particular kinds of possessions, constituted by the circumstance of contingency, as applied in different ways to each one in that list. These are, the legal capacity of acquiring, as applied to those articles respectively, and the protection of the law, whereby a man is secured against the

* Of services that are altogether inexigible, such as are strictly spontaneous, gratuitous, depend altogether upon good-will: upon the good-will of the party rendering them to the party to whom they are rendered. This good-will depends, in great measure, upon the reputation of the party to whom they are rendered.

† A share beneficial or fiduciary in the use of such a quantity of money, of such an estate in land: a share in such an office of power or trust: an exemption from such a tax or other public burthen: the exclusive privilege of such or such an occupation.

chance of losing them, if acquired. These abstract kinds of possessions form the subject of so many kinds of forfeiture: forfeiture of legal capacity and forfeiture of the protection of the law: forfeiture of legal capacity with respect to any possession, taking away from a man whatever chance he might have of acquiring it; forfeiture of protection, subjecting him to a particular chance of losing it.*

CHAPTER II.

OF THE PUNISHMENTS BELONGING TO THE MORAL SANCTION.

Punishments of this class admit of no distinctions; and this, however paradoxical it may seem, from no other reason than their extreme variety. The way in which a man suffers, who is punished by the moral sanction, is by losing a part of that share which he would otherwise possess of the esteem or *love* of such members of the community as the several incidents of his life may lead him to have to do with. Now, it is either from the esteem they entertain for him, or the love they bear him, or both, that their *good-will* towards him, in a great measure, depends: moreover, the way in which this good-will displays itself, is by disposing the person who entertains such affection, to render good offices, and to forbear doing ill offices (or in other words, to render *inexigible services)* to the party towards whom it is entertained; the way in which the opposite affection, *ill-will*, displays itself, is accordingly by disposing the former to forbear doing good offices, and if it has risen to a certain degree, by disposing him to render ill offices, as far as may be consistent with his own safety, to the latter.

Now then, from the good offices of one man to another, may all sorts of possessions, and through them, or even more immediately, all sorts of pleasures, be derived. On the other hand, from the withholding of the good offices one man might have expected from another, may all sorts of pains, and death itself, be also derived; much more may they from positive ill offices added to those other negative ones. And what are the good offices which you may be disposed to withhold from me, or the ill offices you may be disposed to do me, from my having become the object of your ill-will? It is plain, not one or other particular species of good or ill office, but any species whatever, just as occasion serves, that shall be proportionate to the strength of your ill-will, and consistent with your own safety. This consideration will make our work short, under the head which respects the several modes or species of punishment subordinate to the mode in question.

The same consideration will make it equally short under the second head, relative to the evils producible by the mode or modes of punishment in question. These, it must have been already seen, may be all sorts of evils: all the different sorts of evils which are producible by any of the punishments belonging to the political sanction; by any punishments properly so called: in a word, all the different sorts of evils to which human nature is liable.

But though the punishments belonging to the moral sanction admit not of any varieties that are separable from one another, there are two distinct parcels, as it were, into which the evils produced by any lot of punishment issuing from this source, on the occasion of any offence, may be divided. One (which, as being the basis of the other, may be mentioned first, though the last in point of time) consists of the several contingent evils that may happen to the offender in consequence of the ill-will he has incurred; the other consists of the immediate pain or anxiety, the painful sense of shame, which is grounded on the confused apprehension of the unliquidated assemblage of evils above mentioned. It is this last which is referable in a peculiar manner to the moral sanction, and which cannot be produced by the political, any otherwise than as far as those who have the management of that sanction can gain an influence over the moral: it may, therefore, for distinction sake, be styled the *characteristic evil* of the moral sanction. This must obtain, in a greater or less degree, upon every instance of detected delinquency, unless in those callous and brutish natures, if any such there be, in whom all sense of disgrace, and all foresight of the consequences, is utterly extinguished. The others above spoken of may be styled the casual evils.

These casual evils (as we have already intimated,) owing to their extreme uncertainty, admit not of any determinate variations in point of *quality:* in point of *quantity*, however, they do admit of some distinctions, resulting from — 1*st*, their *Intensity;* 2*dly*, their *Extent*. This distinction ought not to be overlooked, since we shall have occasion to make frequent application of it to practice.

These two lots of evils, howsoever distinguishable, intermix with and aggravate one another. I have done an immoral act: I am discovered: I perceive as much. Now then, before I happen to have occasion to avail myself of the good offices of such of my acquaintance as come to know of it — before I happen to be in a way to suffer from the denial of those good offices — in a word,

* Forfeiture of protection may be considered also, in another point of view, as being the forfeiture of the services of such ministers of justice, whose office it is to afford a man protection in the enjoyment of the possession in question.

before I have experienced any of the *casual* evils annexed by the moral sanction to my delinquency, I already foresee more or less clearly, and apprehend more or less strongly, the loss of those good offices and of that good-will: I feel the painful sense of shame, the pain of ignominy; I experience, in a word, the *characteristic* evil of the moral sanction as the punishment of my misbehaviour. This sense of shame stamps the marks of guilt upon my deportment. This being the case, either out of despair I avoid my acquaintance, or else I put myself in their way. If I avoid them, I by that means already deprive myself of their good offices: if I put myself in their way, the guilt which is legible in my countenance, advertises and increases their aversion: they either give an express denial to my request, or, what is more common, anticipate it by the coldness of their behaviour. This reception gives fresh keenness to the sting of shame, or (in the systematical language I have ventured to make use of,) the experiment I have made of the *casual* evils adds force to the *characteristic* evils of this sanction.

We have already intimated the distinction between positive and negative ill offices: to the former, and even in a few instances to the latter, it is the duty, and a great part of the business, of the political magistrate to set limits. These limits, however, may come accidentally to be transgressed, as there are scarce any laws that can be made but what may come accidentally to be disobeyed. On this account, the evils that may result from this source remain still indeterminate and unlimited. But were the laws that might be made in this behalf ever so certain in their operation, those evils would still remain indeterminate and unlimited, notwithstanding. For so uncertain and unforeseeable may be the connexion between the refusal of a good office, and the miseries which in particular circumstances may be the consequences of such a refusal, that no law could make a secure provision against those miseries in every case, without such a subversion of all liberty and all property as would produce much greater miseries. Your giving me a shilling to buy me food, or taking me twenty miles to a physician, may, on a critical occasion, save me from an excruciating disease; but no law, without leaving it to the determination of the person in want, can with sufficient certainty describe such occasions; nor can any law, without depriving you of all liberty and all property, oblige you to give money to, or take a journey for, every man who shall determine himself to be in want of such assistance.

Howosever this be with regard to negative ill offices, positive ill offices not only may be limited, but in most cases may be, and commonly are, forbidden. In no settled state of government is private displeasure permitted to rise so high as to vent itself indiscriminately in any of those direct ways of inflicting pain which the political magistrate himself may have thought it expedient to recur to. However flagrantly immoral may have been the conduct of a delinquent, persons at large are never permitted, of their own authority, to punish him by beating or maiming, or putting him to death. Positive ill offices may be divided into such as display themselves in actions at large, and such as display themselves in discourse. Now, it is to speech that the latitude which is still left to the right of rendering positive ill offices in a *direct* way, is principally confined:* and even this right is commonly subject to a number of limitations. But ill offices which are confined to speech, are not, if they stop there, productive of any evil. When they are, it is ultimately by disposing other persons to entertain a displeasure against the same person, and manifest it by actions of another kind. If, then, such positive ill offices as display themselves in actions at large be excluded, all that remains is resolvable ultimately into *negative* ill offices. And of these, those which a delinquent has in ordinary cases to apprehend, amount only to such as are not *illegal*.

Nor is even this a contemptible and inconsiderable source of suffering. Dependent as men in a state of society are upon one another, the punishment derived from the source in question, even when narrowed by all these restrictions, may, and indeed frequently does, rise to a tremendous height. It admits of no evasion: it comes upon a man from all quarters: he can see no end to its duration, nor limit to its effects. It is not unusual for it to bereave him of the chief pleasures and sources of profit he has set his heart upon: it may deprive him of all those profits and enjoyments he had been accustomed to expect at the hands of his friend or his patron: by setting his common acquaintance at a distance from him, it may fill the detail of his life with a perpetual train of disappointments and rebuffs. It leaves him joyless and forlorn: and, by drying up the source of every felicity, it embitters the whole current of his life.

Were we indeed to inquire minutely into the distinction between the nature of the political and moral sanctions, it would come out that, of the evils which, when considered as issuing from the moral sanction, I have styled *casual* evils, some are even more *likely*

* I am conscious that the distinction here stated, between the direct and indirect way of rendering ill offices, is far enough from being explicit; but there would be no way of making it so without despatching a large and intricate title of the doctrine of offences.

to be brought upon a man by the action of one of these sanctions, and some others by that of the other. But as to the species of evil, this is all the distinction we shall be able to make out; for there is not any evil which the exertion of one of these forces may bring upon a man, but which may also be brought upon him by the action of the other.

The most studied and artificial torments, for instance, that can be invented by a political magistrate, and the most unlikely for a man to be exposed to suffer by the unassisted powers of nature, or even from the unauthorized resentment of an individual, are what he may by accident be exposed to from the latter source. It may be for want of some evidence that an individual might furnish, and from ill-will forbears to furnish, that I may have been doomed to these torments by a judge; or if the like torments be supposed to be inflicted by the unauthorized violence of an enemy, they may be attributed in the first place, indeed, to the vengeance of that enemy; but in the second place, to the disesteem and ill-will borne me by some stranger, who having it in his power to rescue me, yet exasperated against me on account of some real or supposed instance of immorality in my behaviour, chose rather to see me suffer than to be at the pains of affording me his assistance.

On the other hand, the whole sum of the evils depending upon the moral sanction, to wit, not only the casual evils, but the sense of infamy which constitutes the characteristic evil, is liable in many instances to be brought upon a man by the doom of the political magistrate. This is what we have found it unavoidably necessary, on various occasions, to give intimation of, and what we shall have need more particularly to enlarge upon hereafter.

It is in the *manner*, then, in which the evils that come alike under the department of each of the two sanctions come to be inflicted, that the only characteristic difference discernible between these two sanctions is to be seen. With regard to punishment issuing from the political sanction, the species, the degree, the time, the place, the person who is to apply it, are all assignable. With regard to that which may issue from the moral sanction, none of these particulars are assignable.

When I say assignable, I must be understood to speak with reference to some particular time, coincident with or subsequent to that of the commission of the offence. At that very time, then, with respect to political punishment, that is, with respect to personal punishments and forfeitures, many of those particulars, and sometimes all of them, are assignable, and may be foreseen. At the time the offence (theft suppose) is committing, it may be foreseen that a number of stripes given with such an instrument, not more than so many, nor fewer than so many, will be inflicted (in case of detection) so many days or weeks hence, at such a place and by the hands of such an executioner: and *vice versâ*, when they come to be inflicted, the punishment will be seen to be the consequence of such an offence. Now, when the organical pain produced by the punishment thus inflicted is over, all the punishment for that offence, as far as depends upon the political sanction, is commonly over and at an end. But as to the ill offices, as well negative as positive, which constitute the substance and groundwork of the moral sanction, no man can tell what they will be — what particular evils they will subject a man to — when they will commence, or when they will end — where they will display themselves, nor who will render them. Nor, *vice versâ*, when they have actually been rendered, when such or such a neighbour has shut his door against me, and I am pining with hunger or shivering with cold, can I always know for certain that the immorality I was guilty of at such or such a time was the occasion of his unkindness. In a word, *determinateness* is the perfection of the punishments belonging to the political sanction: *in*determinateness is the very essence of those issuing from the moral.

A word or two may be of use in this place with respect to the nomenclature employed in speaking of the punishments belonging to this sanction. The expressions made use of on this occasion are singularly various: a whole legion of fictitious entities are created, for the purpose of representing the one fundamental idea in question, under the different aspects of which it is susceptible. The names of these fictitious entities are many of them disparate: they require different sets of words to enable them to make a meaning; and the coincidence lies not between the import of these names when separately taken, but between certain sentences or propositions, in which they may respectively be made to bear a part. Among these words may be reckoned reputation, honour, character, good name, dishonour, shame, infamy, ignominy, disgrace, aversion, and contempt. In speaking, then, of a man as suffering under a punishment of the moral sanction, it may be more or less convenient, according to the occasion, to use, amongst others, any of the following expressions: We may say that he has forfeited his reputation, his honour, his character, his good name; that his fame has been tarnished; that his honour, his character, or his reputation, has received a stain; that he stands disgraced; that he has become infamous; that he has sunk under a load of

infamy, ignominy, or disgrace; that he has fallen into disgrace, into disesteem, into disrepute; that he has incurred the ill-will, the aversion, the contempt of the neighbourhood, of the public; that he is become an object of aversion or contempt. It were the task rather of the lexicographer than the jurist to exhaust the catalogue of these expressions. Those which have been already exhibited may be sufficient to advertise the reader of the similarity there may be in point of sense between a variety of other expressions of like import, however dissimilar they may be in sound.

Hitherto we have considered the punishment belonging to the moral sanction in no other point of view than that in which it appears when standing singly, uncombined with and uninfluenced by the political. In this state, the direction given to it, and the force with which it acts, are determined altogether by the persons to whom it belongs ultimately to dispense it, unassisted and uncontrouled by the political magistrate. In this state it acted before the formation of political society, before the creation of that artificial body of which the political magistrate is the head. In this state, by its connexion with the various modes of conduct which it happened to be employed to prohibit or to recommend, it gave birth to that fictitious set of rules which are what some moralists have sometimes at least in view, when they speak of the *law of nature*. In this state it was an engine, to the power of which the political magistrate was a witness, before the construction of that which is of his own immediate workmanship. It then was, it still is, and it ever must be, an engine of great power, in whatever direction it be applied; whether it be applied to counteract or to promote his measures. No wonder, then, he should have sought by various contrivances to press it into his service. When thus fitted up and set to work by the political magistrate, it becomes a part of the vast system of machinery to which we have given the name of the political sanction. And now, then, we are in a condition to discuss the nature of that genus of political punishment which, in systems of jurisprudence, is commonly spoken of under the name of infamy, or forfeiture of reputation.

§ 2. *Advantages and Disadvantages of the Punishments belonging to the Moral Sanction.*

We will now proceed to examine the punishments belonging to the moral sanction itself, independently of any employment of it by the magistrate to aggravate or guide the effect of his designs.

Punishments of this class, as has been already said, admit of no distinctions: they comprise all sorts of evils: the ill-will produced manifests itself in a variety of modes, that can neither be calculated nor foreseen. They admit, then, of no precise description; for it is only when the effects are determinate, that a punishment admits of a description. Will they be analogous to the offence, or unfrugal, or excessive? Upon these points nothing can be said.

Our observations will be comprised under three heads: — their divisibility, equability, and exemplarity.

1. These punishments admit of minute division: they have all the degrees possible from mere blame to infamy, from a temporary suspension of good-will, to active and permanent ill-will: but these several degrees depend altogether upon accidental circumstances, and are incapable of being estimated by anticipation. Punishments of the pecuniary or chronical class, as, for example, imprisonment, are susceptible of being exactly measured: punishments that depend on the moral sanction, not. Before they are experienced, the value put upon them is necessarily extremely inaccurate. In respect of intensity, they are liable to be inferior to the greater part of those belonging to the political sanction; they consist more in privations of pleasure, than in positive evils. This it is that constitutes their principal imperfection; and it is solely for supplying this imperfection, that penal laws were established.

One of the circumstances by which their effect is weakened, is the *locality* of their operation. Do you find yourself exposed to the contempt of the people with whom you are in the habit of associating? to exempt yourself from it, all that you have to do is to change your abode. The punishment is reduced to the giving a man the option to remain exposed to the inconveniences resulting from this contempt, or to inflict on himself the punishment of banishment, which may not be perpetual. He does not abandon the hope of returning, when by lapse of time the memory of his transgressions shall be effaced, and the public resentment appeased.

2. In respect of *equability*, these punishments are really more defective than at first sight they might appear. In every condition in life, each man has his own circle of friends and acquaintance: to become an object of contempt or aversion to this society is a misfortune as great to one man as to another. This is the result that may at first view present itself to the mind, and which, to a certain extent, is really correct; it will, however, upon a more narrow scrutiny of the matter, be found, that in point of intensity this class of punishment is subject to extreme variation, depending, as it does, upon the condition in life, wealth, education, age, sex, and other circumstances: the casual evils resulting from

the punishments belonging to this sanction are infinitely variable: shame depends upon sensibility.

Women, especially among civilized nations, are more alive to, and susceptible of, the impression of shame than men. From their earliest infancy, and even before they are capable of understanding the object of it, one of the most important branches of their education is, to instil into them principles of modesty and reserve; and they are not long in discovering that this guardian of their virtue is at the same time the source of their power. They are, moreover, physically weaker, and more dependent than men, and stand more in need of protection; it is more difficult for them to change their society, and to remove from the place of their abode.

At a very early age, generally speaking, sensibility to the moral sanction is not remarkably acute: in old age it becomes still more obtuse. Avarice, the only passion that is fortified by age, subdues all sense of shame.

A weak state of health, morbid irritability, any bodily defect, any natural or accidental infirmity, are circumstances that aggravate the suffering from shame, as from every other calamity.

Wealth, considered of itself, independently of rank and education, has a tendency to blunt the force of these impressions. A rich man has it in his power to change his residence; to procure fresh connexions and acquaintance, and by the help of money to purchase pleasures for which other people are dependent upon good-will. There exists a disposition to respect opulence on its own account; to bestow on the possessor of it gratuitous services, and, above all, external professions of politeness and respect.

Rank is a circumstance that augments the sensibility to all impressions that affect the honour; but the rules of honour and morality are not always calculated upon the same scale: the higher ranks are, however, in general, more alive to the influence of opinion than the inferior classes.

Profession and habitual occupation materially affect the punishments proceeding from this source. In some classes of society, the point of honour is at the very highest pitch, and any circumstance by which it is affected produces a more acute impression than any other species of shame. Courage, among military men, is an indispensable qualification: the slightest suspicion of cowardice exposes them to perpetual insults: thence, upon this point, that delicacy of feeling among men who, upon other points, are in a remarkable degree regardless of the influence of the moral sanction.

The middle ranks of society are the most virtuous: it is among them that in the greatest number of points the principles of honour coincide with the principles of utility: it is in this class also that the inconveniences arising from the forfeiture of esteem are most sensibly felt, and that the evil consequences arising from the loss of reputation produce the most serious ill consequences.

Among the poorer classes, among men who live by their daily labour, sensibility to honour is in general less acute. A day labourer, if he be industrious, though his character be not unspotted, will be at no loss for work. His companions are companions of labour, not of pleasure: from their gratuitous services he has little to expect, and as little to ask. His wants are confined to the mere necessaries of life. His wife and his children owe him obedience, and dare not withhold it. The pleasures which arise from the exercise of domestic authority fill up the short intervals of labour.

3. The greatest imperfection attending punishments arising from the moral sanction, is their want of *exemplarity*. Their effect, in this respect, is less than that of any of the punishments of the political sanction. When a man is exposed to suffering from loss of reputation, it may be unknown to all the world, or at least the knowledge may be confined to those who are the instruments of his punishment, and to the immediate circle of his friends and acquaintance. But these are witnesses only of a small part of his sufferings. They perceive that he is treated with indifference or disdain; they observe that he does not find protection or confidence: but all these observations are transitory. The individual, wounded by these signs of coldness or aversion, shuns the company of the authors or the witnesses of his shame; he retires to solitude, where he suffers in secret; and the more unhappy he is, the smaller is the number of the spectators of his punishment.

Punishments, connected with the moral sanction, are advantageous with reference to *reformation*. When a man suffers in consequence of a violation of the established rules of morality, he can only refer the evil he experiences to its true cause: the more sensible he is to shame, the more he will fear to increase it: he will become either more prudent that he may avoid detection, or more careful to save appearances; or he will in future submit to those laws which he has been unable to break without suffering. Public opinion, with the exception of a few cases, is not implacable. There is among men a reciprocal need of indulgence, and a levity and ease in forgetting instead of forgiving faults, when the remembrance of them is not renewed by fresh failures

On the other hand, with respect to dishonourable actions for which there is neither appeal or pardon, the punishment of infamy acts as a discouragement, and not as a mo-

tive to reformation. *Nemo dignitate perditæ parcit.*

These disadvantages are in a measure compensated, and this sanction receives a degree of force which is often wanting in the political sanction, from the *certainty* of its action. There is no offending against it with impunity: an offence against one of the laws of honour, arouses all its guardians. The political tribunals are subjected to a regular process: they cannot pronounce a decision without proof, and proofs are often defective. The tribunal of public opinion possesses more liberty and more power: it is liable to be unjust in its decisions, but they are never delayed on that account; they can be reversed at pleasure. Trial and execution proceed with equal steps, without delay or necessity for pursuit. There are everywhere persons ready to judge, and to execute the judgment. This tribunal always inclines to the side of severity: its judges are interested by their vanity and their love of display in making its decisions severe; the more severe they appear, the more they flatter themselves with the possession of the good esteem of others. They seem to think that the spoliation of one character forms the riches of another. Thus, although the punishments of the moral sanction are indeterminate, and for the most part, when estimated separately, of little weight, yet by the certainty of their operation, their frequent recurrence, and their accumulation, from the number of those who have authority to inflict them, they possess a degree of force which cannot be despised by any individual, whatever may be his character, his condition, or his power.

The power exercised by the moral sanction varies according to the degree of civilization.

In civilized society there are many sources of enjoyment, and consequently many wants, which can be supplied only from considerations of reciprocal esteem: he who loses his reputation is consequently exposed to extended suffering in all these points.

The exercise of this sanction is also favoured or restrained by different circumstances. Under a popular government, it is carried to the highest degree; under a despotic government, it is reduced almost to nothing.

Easy communications, and the ready circulation of intelligence, by means of newspapers, augments the extent of this tribunal, and increases the submission of individuals to the empire of opinion.

The more unanimous the decisions of the moral sanction, the greater their force. Are its decisions different among a great number of different sects or parties, whether religious or political, they will contradict each other. Virtue and vice will not use the same common measure. Places of refuge will be found for those who have disgraced themselves, and the deserter from one sect or party will be enrolled in another.

CHAPTER III.

FORFEITURE OF REPUTATION.

WE now come to consider the punishment of infamy, or forfeiture of reputation.* The nature of this punishment we have already had occasion to discuss, in treating of the moral sanction from which it derives its origin. All that remains for us to do in this place, is to state the various contrivances by which the political magistrate has gone about to modify its direction, and to augment its force.

In point of *direction*, the way in which he influences the action of this punishment is

* Though infamy is the more common, forfeiture of reputation is the more convenient expression of the two. Infamy is a term which appears forced, when applied to any other than very high degrees of the punishment in question: the phrase, forfeiture of reputation, is accommodated to one degree as well as another; for the quantity of reputation may be conceived to be divided into as many lots or degrees as there can be reason for.

The turn and structure of language having put a man's reputation, like his estate, upon the footing of his possessions, men have considered and spoken of the subject as if it were a quantity alike determinate, and as if a man might be made to forfeit the whole of his reputation at a single stroke, as he may the whole of his estate. But that this, though possible in the latter instance, is impossible in the former, will presently be seen, by tracing up these fictitious objects of possession to the real objects from whence they are respectively derived. A man's estate is derived out of *things*; out of certain determinate allotments of things, moveable or immoveable; or if any part of it be derived immediately out of persons, it is derived out of the services of a few persons, and those persons (and very frequently those services due from each person) determinate and certain. But a man's reputation is derived immediately out of *persons*; out of the services of persons; out of any services of any persons whatsoever; out of the services of as many persons, be they who they may, as choose to render him any. This is a stock which the political magistrate can never, perhaps, by any one operation, nor indeed by any number of operations of any kind, be certain of exhausting; much less by any such vague and feeble operations as those are by which an offender is commonly understood to have been made to incur the forfeiture of reputation, that is, the punishment of infamy.

If there be, it is that punishment which, if the vulgar tradition is to be depended upon, was inflicted by Richard III. on Jane Shore — the direct prohibiting of all persons from rendering to the offender any kind of service. But this is but, in other words, the punishment of *starving*. The same punishment has sometimes been denounced in other countries, where, being strictly executed, it has been, as it could not but be, attended with that effect.[a]

[a] Case of the Albigenses. — See Rapin (Monfort). — See Watson's Phil. 2d.

very simple. It is this: by annexing it to the commission of any act which, by prohibiting, he has constituted an offence.

In point of *force*, he may influence it by various means.

The methods by which this may be done may be divided, in the first place, into *legislative* or *executive*. 1*st*, It may be done by methods simply legislative, without any of that interference which, in the case of ordinary punishments, is necessary, of the executive power: the law in this case commits to each individual, in as far as he himself is concerned, the office of judge and executioner. 2*d*, But in this case, as in any other, the law may carry itself into execution in the ordinary methods of procedure; authorizing the judge, either in imitation of his predecessors, or in conformity to the letter of positive law, to direct and animate the resentment of the community at large.

By the simple exercise of the legislative office, the law may annex to any mode of conduct a certain quantity of disrepute, in the following ways: —

1. By simply prohibiting any mode of conduct, although no political penalty be also employed to enforce the prohibition. This is the lowest degree in which the political magistrate can be instrumental in applying the force of the several sanctions. This slightest exertion of the force of the moral sanction is inseparable, we see, from an exertion of that of the political. A few words may be of use on this occasion, to show to what causes it is owing that a certain share of the former of these forces is become, as it were, appurtenant to the other.

2. If no political penalty is denounced, the community find in this circumstance a stronger or additional reason for annexing their disesteem to the breach of it. For since it must be evident to the legislator, as it is to every man, that no rule can have any effect without a motive to prompt a man to observe it, his omitting to annex any other penalty is naturally understood to be a kind of tacit warning to the community at large to take the execution of the law into their own hands. All he does in such case, is to give *direction* to the moral sanction, trusting to its native force for the execution of his law.

3. If the ordinance be accompanied by an express exhortation to obey it, or, what comes to much the same thing, if the terms in which it is delivered savour of exhortation, this is another and more express declaration of his persuasion of the utility of the ordinance he promulgates. And the more anxious he is that it should meet with obedience, the more pernicious [it shows] he appears to deem the conduct of any one who disobeys it, or at least the more convinced he shows himself to be, that, to a certain degree at least, the non-observance of it would be pernicious to the community.*

5. A fifth expedient, by which the moral sanction is called upon in a manner still more express to enforce a political ordinance, is by censure directly levelled at him, whosoever he shall prove to be, that shall infringe it. This censure may be levelled at the offender either immediately, or else mediately, by being immediately pointed at the offence.†

6. A sixth expedient is by transferring, or at least endeavouring to transfer, upon one offence, the measure of disrepute that naturally attends upon another. The way in which this is done, is by affecting to regard the obnoxious practice in question as an evidence of another practice, on which men are already in the habit of bestowing a superior degree of disrepute.‡ It is plain that the cases in which this can be attempted with any prospect of success must necessarily be limited. To warrant the inference, some appearance in connexion, however superficial, there must be between the two offences. But any little connexion, however slight, is ordinarily sufficient. In such a case, men in general are not apt to be very difficult with regard to the evidence. The vanity of being thought sagacious, the pride of sitting in judgment and condemning, the hope of earning a certain measure of reputation on the score of virtue at an easy rate, the love of novelty and paradox, and the propensity

* This anxiety may be grounded or excited, not solely by a supposed utility of the law, but in some degree by a supposed propensity in the people to disobey it.

† Of terms of condemnation applied directly to the offence, the *improbè factum* of the Lex Valeria may serve for an example: "Valeria Lex, quum eum qui provocásset virgis cædi securique necari voluisset, siquis adversus ea fecisset, nihil ultra quam *improbè factum* adjecit." — Livy, l. 10, ch. 9.

The laws of Greece and Rome afford several examples, where for different offences the offender is pronounced infamous. [a]

‡ Of this we have an example in certain laws of Zaleucus, the Locrian legislator, pretended to have been preserved (says my authority) by Diodorus Siculus: "Let not a free woman go forth from the city in the night, *unless* when she goes to prostitute herself to her gallant. Let her not wear rich ornaments, or garments interwoven with gold, unless she be a courtezan." — Princ. of Pen. Law, c. 26.

This was as much as to say, that if he knew of a woman's going abroad in a lone place at the unseasonable hour he is speaking of, the legislator should take it for granted that such was the errand she went out upon. If she dressed in a manner in which it was particularly the business of courtezans to dress, he should take for granted her being of that stamp.

[a] So by 9 Anne c. 14, § 5, a loss at play, if prosecuted on that statute, is to be declared infamous. — *Vide etiam* stat. Ed. 6.

to exaggeration, especially on the unfavourable side, second the aim of the legislator.

So much for the ways in which the political magistrate may exert an influence over the moral sanction by the bare exercise of his *legislative* powers: we now come to the instances in which he requires the assistance of the executive.

Of all the expedients that may be classed under this head, the least severe is that of *publication* — the making public the fact of the offence, accompanied with a designation of the offender. It is principally in point of *extent* that a measure of this sort tends to add to the natural *quantum* of disrepute; though something likewise may be supposed to be contributed by it in point of *intensity*, on account of the certainty which it gives to men's opinions of the delinquency of the offender. Even this mode of proceeding, mild as it may appear, is capable of various degrees of severity, according to the various degrees of publicity that may be given to the fact. It may be registered in a written instrument to which few people have access; it may be registered in a written instrument to which any person may have access. It may be notified by proclamation, by sound of trumpet, by beat of drum. Since the invention of printing, it may be recorded in indelible characters, and circulated through the whole state.* It is obvious, that the discredit reflected by this expedient, must be greater or less in point of intensity, as the offence is esteemed more or less disreputable.

The censure which in the law is pronounced in general terms upon such uncertain persons as may chance to become offenders, may, upon conviction, by the assistance of the executive power, be brought home to, and personally levelled at any individual offender. And this may be done in a manner more or less public, and either in a settled form of words, or with more latitude in a speech *ad libitum*, to be delivered by the judge.†

But the severest expedient for inflicting infamy is that which consists in the applying of some political punishment, which, by its influence on the imaginations of mankind, is in possession of the power of producing this effect. This leads us to inquire into the different measures of infamy that stand naturally annexed to the several modes of punishment; and in the course of this inquiry we shall find reason to distinguish certain punishments from the rest, by the special epithet of infamous.

A certain degree of infamy or disrepute, we have already remarked, is what necessarily attends on every kind of political punishment. But there are some that reflect a much larger portion of infamy than others.‡ These, therefore, it is plain, are the only ones which can be stated properly by that name.

Upon looking over the list of punishments, we shall find that it is to those which come under the name of corporal punishments that this property of reflecting an extraordinary degree of infamy is almost exclusively confined. Pecuniary punishments, which are the most common, are attended with a less degree of infamy than any other, unless it be quasi-pecuniary punishments; which in this respect, as in most others, are pretty much upon a par with pecuniary. Next to these come the several modes of confinement; among which, if there be any difference, *quasi* imprisonment and local interdiction seem the mildest in this respect; next to them, banishment and imprisonment the severest. Of specific restraints and active punishments at large, they are so various, that it is not easy to give an account. In general, they seem to be on a footing with those punishments that are mildest in this respect, unless where, by means of analogy, they are so contrived as to reflect and aggravate in a peculiar manner the infamy of the offence.‖ The same account may be given of all the other kinds of forfeiture.

With regard to corporal punishments short of death, there is no punishment of this class but is understood to carry with it a very high degree of infamy. The degree of it, however, is not by any means in proportion to the organical pain or inconveniences that are respectively attendant upon those punishments. On the contrary, if there be any difference, it seems as if the less the quantity is which a punishment imparts, of those or any other kind of inconveniences, the greater is the quantity which it imports of

* In certain offences against the police, — for instance, in selling bread by shortweight, — it is not an uncommon thing, where the degree of delinquency appears to be considerable, for the magistrate to threaten the offender, that upon the next conviction he shall be advertised in the newspapers. Such a punishment seems to be looked upon as more severe than the fine imposed by statute.

† When the punishment is capital, or the sentence discretionary, it is common with us in England to preface it with such a speech.

‡ Aware of this circumstance, the Roman lawyers have taken a distinction between the *infamia facti* and the *infamia juris* — the natural infamy resulting from the offence, and the artificial infamy produced through the means of the punishment by the law. See Heinecc. Elementa Jur. Civil. Pand. l. 3, tit. 2, § 399, whose explanation, however, is not very precise.

‖ Such as the obligation to ask pardon — an instance of active punishment: the forbearing to carry on an employment which the offender has exercised fraudulently — an instance of restrictive punishment: the forbearing to come into the presence of the party injured — an instance of ambulatory confinement.

infamy. The reason may be, that since it is manifest the punishment must have been designed to produce suffering in some way or other, the less it seems calculated to produce in any other way, the more manifest it is that it was for this purpose it was made choice of. Accordingly, in regard to punishments to which the highest degrees of infamy are understood to be annexed, one can scarcely find any other suffering which they produce. This is the case with several species of transient disablement; such as the punishments of the stocks, the pillory, and the carcan: and with several species of transient as well as of perpetual disfigurement; such as ignominious dresses and stigmatization. Accordingly, these modes of punishment are all of them regarded as neither more nor less than so many ways of inflicting infamy. Infamy thus produced by corporal punishments, may be styled corporal ignominy or infamy.

According as the corporal punishment that is made choice of, for the sake of producing the infamy, is temporary or perpetual, the infamy itself may be distinguished into temporary and indelible. Thus the infamy produced by the stocks, the pillory, and the carcan, is but temporary; that which is produced by an indelible stigma is perpetual. Not but that any kind of infamy, howsoever inflicted or contracted, may chance to prove perpetual; since the idea of the offence, or, what comes to the same thing, of the punishment, may very well chance to remain more or less fresh in men's minds to the end of the delinquent's life: but when it is produced by an indelible stigma, it cannot do otherwise than continue so long as the *mark* remains, whatsoever happens to him: wheresoever he goes, and how long soever he lives, he bears about him the evidence of his guilt.

Mutilation and the severer kinds of simple afflictive punishments, discolourment, disfigurement, and disablement, are all attended likewise with a very intense degree of infamy; that is, in as far as the effects produced by them are known to be produced on purpose in the way of punishment. But with regard to many of the sorts of punishment that come under the three latter heads, as the effects of them are, upon the face of them, no other than might have been produced by accident, they are therefore the less certain of producing the effect of infamy. The infamy produced by these punishments is, in point of duration, of a mixed nature, as it were, between temporary and perpetual. At the time of the execution, it stands upon a par in this respect with the pillory or the stocks, with whipping or any other kind of simple afflictive punishments: after that time, it is greater than what is produced by any of these punishments, because the visible consequences still continue: it is not, however, so great as what is produced by stigmatization, because it does not of itself, like that galling punishment, make known the guilt of the delinquent to strangers at the first glance.

Nearly allied to corporal infamy are two other species of infamy, which, as they derive their influence altogether from that which is possessed by corporal infamy, may be styled quasi-corporal. The one is inflicted by an application made, instead of to a man's body, to some object, the idea of which, by the principle of association, has the effect of suggesting to the imagination the idea of a punishment applied actually to the body itself. This, inasmuch as it operates by the force of symbols or emblems, may be styled symbolical or emblematical corporal infamy.* The other is inflicted by a punishment applied, indeed, to the body, but not till after it has ceased to be susceptible of punishment — I mean, not till after death: this may be styled *posthumous* or post-obitory corporal infamy.†

To the head of forfeiture of reputation, must be referred a forfeiture of a very particular kind — forfeiture of credibility; that is, in effect, forfeiture of so much of a man's reputation as depends upon the opinion of his veracity. The effect of this punishment (as far as it can be carried into effect) is to cause people to bestow on the delinquent that share of ill-will which they are naturally disposed to bear to a man whose word they look upon as not being to be depended upon for true.

This punishment is a remarkable instance of the empire attempted, and not unsuccessfully, to be exercised by the political magistrate over the moral sanction. Application is made

* Among the ancient Persians, in some cases, when the criminal was of high rank, instead of whipping the man himself, it was the custom to whip his clothes. To this head may also be referred the custom which prevails in France and other nations upon the continent of executing criminals in effigy. The feigned punishment inflicted on the effigy is commonly, I suppose, the same that would have been really inflicted upon the man's person for the same offence; nor is it usual, I believe, to employ this punishment where the delinquent is forthcoming.

In Portugal, several of the persons who were concerned in the attempt upon the late king's life were punished in this manner.

† To this head may be referred a part of the punishment in use in England for high treason, according to the common law; the taking out and burning of the entrails, the cutting off the head, and the dividing the body into four quarters, which are disposed of at the King's pleasure. 2 *Hawkins*, 443.

By an English statute, in cases of murder, the judge is enjoined to order the body (after the criminal has been put to death by hanging) to be publicly dissected, and is empowered to order it to be hung in chains, as the phrase is; which is practised by suspending it from a gibbet in an iron frame.

to the executors of that sanction, that is, the public at large, to bestow on the delinquent not so much of their disesteem in general, nor yet so much of their disesteem as they are disposed to annex to some particular offence of which he has been found guilty, but such a share as they are disposed to annex to another offence of which he has not been proved guilty, and which, unless by accident, has no connexion with that of which he has actually been proved guilty.

The method, too, which is taken to inflict this punishment, is equally remarkable. It is inflicted, not by any restraint or other punishment applied to the delinquent, but by a restraint laid upon another person — a judge; or by an inconvenience which may be of any kind whatsoever, thrown (as the case may require) upon any person whatsoever. The judge is forbidden to interrogate him, or to permit him to be interrogated as a witness in any cause, as also to pay any regard, on any such occasion, to any instrument purporting to contain his written attestation. The party who may have stood in need of his evidence, for the preservation of his life, liberty, or fortune; or the public, who may have stood in need of it to warrant the punishment, and guard itself against the enterprises of another, perhaps more atrocious, criminal, are precluded from that benefit.

I know not of any instance in which it is absolutely clear that a man has been made to incur this singular kind of forfeiture in the express view of punishment. In all the cases in which it has been adopted, it is not impossible but that the restraint which it imports may have been imposed in no other view than that of improving the rules of evidence, and guiding the judge against error in his decision upon the questions of fact brought before him.

Be this as it may, it is certain that in the English law it stands annexed, in many instances, to offences which have not the remotest connexion with the veracity or mendacity of the offender.*

To this head also must be referred the punishment of forfeiture of rank, otherwise entitled degradation. For the purpose of understanding this modification of ignominious punishment, reputation must be distinguished into natural or *ordinary*, and factitious or extraordinary. By *natural* share of reputation and good-will, I mean that which each man possesses in virtue of his own personal conduct and behaviour: by factitious, I mean that extraordinary share of these possessions which, independently of a man's personal conduct, is bestowed on him by the institution and contrivance of the political magistrate.

This kind of factitious reputation is commonly annexed to office or employment; but it sometimes exists by itself. This is the case, for instance, in England, with the ranks of gentlemen, esquire, knight, and baronet, and the ranks derived from academical degrees.

Rank may be conferred either by custom or by authority. When derived from custom, it is annexed either to family or to occupation: when derived from authority, it is annexed to the person. But whether it were conferred by authority or no, it is in the power of authority to diminish the reputation belonging to it, if not wholly to take it away. A sentence of a judge, degrading a man from the rank of gentleman, cannot cause a man not to have been born of a father that was a gentleman, but it may divest him of a greater or less share of that respect which men were disposed before to pay him on that account.

As to the mode of inflicting degradation, it may be inflicted by any process that serves to express the will of the magistrate, that the delinquent be no longer considered as possessing the rank in question, with or without corporal ignominy.

Degradation, did it answer precisely to the definition given of it, when it is styled forfeiture of rank, should take away from a man that precise quantity of reputation, and consequently of good offices, and consequently of happiness, for which he stands indebted to his rank. But as these quantities are incapable of being measured, or even estimated with any tolerable degree of exactness, the punishment of degradation can never with any certainty be made to answer precisely to such definition. It seems probable, that a man who has once been possessed of a certain rank, can never be totally deprived of all the reputation, respect, and good offices that are commonly rendered to that rank: the imaginations of mankind are too stubborn to yield instant and perfect obedience to the nod of power. It seems probable, notwithstanding, that the condition of a man who has undergone a degradation of rank, is thereby commonly rendered worse upon the whole than if he had never been possessed of it; because, in general, simply not to possess, is not so bad as, having possessed, to lose. To speak with more precision, it should seem that the characteristic pain of the moral sanction produced by such a punishment, is in

* For instance, to high treason, or the adherence to the unsuccessful side in a competition for the Crown: to homicide committed in revenge, on a sudden quarrel, or in the course of a duel, by consent: to rape, and other irregularities of the venereal appetite. This, however, seems to proceed not so much from design as from inattention in the authors of our common law; and is one of the many absurd and mischievous consequences that follow from the lumping together offences of the most heterogeneous natures under the name of felonies.

general more than equivalent to the sum of such of the casual benefits of that sanction as the punishment fails to take away.

It is common enough to speak of a *total* loss of reputation; and some jurists speak of such a loss as if it could easily be, and were frequently incurred. But such a notion is not compatible with any precise idea of the import of that term. To understand this, it will be necessary to conceive in idea a certain average or mean quantity of reputation equal to zero, from whence degrees of good reputation may be reckoned on one side, and of bad reputation on the other. This mean quantity of reputation, or good-will, call that which any given member of the community may be deemed to possess, who has no rank, and who either has neither merits nor demerits, if such a human being be conceivable, or rather, whose merits stand exactly upon a level with his demerits. All *above* this average quantity may be styled *good* reputation, all *below* it *bad* reputation. In one sense, then, a total forfeiture of reputation should consist of nothing more than a total forfeiture of good reputation, as thus defined. Now then, according to this account of the matter, a total forfeiture of reputation would be nothing more than what is very possible, and indeed must be very frequent. But it is plain that this is not what the jurists, nor indeed what persons in general, in speaking of a total forfeiture of reputation, have in view. For all that this would amount to, would be the reducing the delinquent to a level with a man of ordinary merit and condition: it would not put his reputation upon so low a footing as that to which a man of ordinary merit and reputation would be reduced by the slightest instance of moral or political delinquency. What they have in view is the acquisition, if one may so term it, of a certain share of ill reputation, the quantity of which they view in a confused manner, as if it were determinate, and consisted of all the ill reputation a man could possibly acquire. But this, it is plain, it never can do, at least in the cases to which they apply it. For they speak of such an event as if it could be, and commonly were, the effect of a single instance of delinquency; for instance, a robbery or ordinary murder. This, it is plain, it can never be, unless it should be maintained that an act of parricide, for example, would not make a man worse looked upon than he was before, after having committed only a robbery or ordinary murder. It is plain that the maximum of bad, as well as that of good reputation, is an infinite quantity, and that in this sense there is no such thing within the sphere of real life as a total forfeiture of reputation.

§ 2. *Simple Ignominious Punishments examined.*

The infliction of ignominious punishment is an appeal to the tribunal of the public — an invitation to the people to treat the offender with contempt, to withdraw from him their esteem. It is (to speak in figurative language) a bill drawn upon the people for so much of their ill-will as they shall think proper to bestow. If they look upon him in a less favourable light than they would otherwise, the draft is honoured: if they do not, it is protested, and the charge is very apt to fall upon the drawer. Ignominious punishments are like those engines which are apt to recoil, and often wound the hand that unadroitly uses them.

But if skilfully managed, what important services may they not be made to render! The legislator, by calling in to his aid, and trusting to the moral sanction, increases its power and the extent of its influence: and when he declares that the *loss of honour* is to be considered as a severe punishment, he gives to it in the eyes of every man an additional value.*

1. This species of punishment, so far as it goes, is not without some commodious properties: it is *variable* in quantity, from the paternal admonition of the judge, to a high degree of infamy. Accompanied with more or less publicity, with various circumstances of disgrace and humiliation, the legislator may proportion the punishment to the malignity of the offence, and adapt it to the various circumstances of age, rank, sex, and profession. Every station in life will, for this purpose, afford facilities that are peculiar to it, and in particular the military.

In point of variability, punishments of this kind have an advantage over every other mode of punishment. This quality is desirable in a mode of punishment, that it may be capable of being made to bear a due proportion to every offence to which it is annexed. With regard to all other kinds of punishments that are constituted solely by the law, the proportion must be settled by the law; whereas this mode has a tendency to fall into that proportion of itself. The magistrate pronounces — the people execute. The people, that is, as many of the people as think proper: they execute it, that is, in whatever proportion they think proper. The malignity towards the delinquent is in general proportionate to the malignancy of his offence. It is not, however, like corporal punishment, capable of being universally applied to all offences. In many cases, an offence may be productive of real mischief, but a mischief which the people, the executioners

* See Traités de Legislation, tom. iii. c. 17. Emploi du Mobile de l'Honneur.

of this mode of punishment. are not qualified to perceive. On this part of the subject we shall have occasion to speak further presently.

2. In point of *exemplarity*, this mode of punishment cannot be excelled. Whatever it is that a man suffers by the publication of his offence, whether by degradation or by being subject to ignominious exposure, it is evident that he suffers it from the infamy attached to his character under the sanction of the legislator.

3. In point of *frugality*, it is advantageous enough. The mischief apprehended from the ill-will annexed to a disreputable act, bears, I suppose, at least as high a ratio to the eventual mischief, as the mischief apprehended from any other mode of punishment does to the eventual.

4. In point of *popularity* it cannot be excelled. For what objection can the people have to a man's being punished in this manner, when all that is done to him is the giving them notice that within the bounds which the law allows, they themselves may punish him as they please — when they themselves are both judges and executioners?

5. They are *remissible*. An erroneous sentence may be annulled. A greater degree of notoriety may be given to the justification, than accompanied the condemnation. The stain that had been thus affixed on his character will not only be completely effaced, but the supposed offender, from the unjust persecution that he will have undergone, will become a general object of sympathy, and especially to those who have been instrumental in inflicting the punishment.

What is more, even though justly inflicted, the patient, by the stimulus he will have received, may be excited to exertions to recover the esteem he has lost, and to earn fresh honours to hide his disgrace. In the army it has happened that whole bodies of troops, after having been stigmatized by their officers, have atoned for their offence by distinguished acts of valour, and have received the highest marks of honour.

This advantage is not possessed by ignominious corporal punishments: the stain that they leave is indelible; and unless the patient expatriates himself, his lost reputation is irrecoverable.

Having thus stated the properties that belong to punishments of this kind, we proceed to notice a difficulty which arises in their application, and which is peculiar to them. The legislator cannot at pleasure attach to any given species of offence the degree of infamy that he may be desirous of affixing to it. There are some classes of offences really detrimental to the country, such, for example, as election bribery and smuggling. for the punishing of which the legislator has no means of pressing the great bulk of the people into the service. Upon other points, the popular sentiments are in direct opposition to those of the legislature: there are others, on which they are wavering, neutral, or too feeble to serve his purpose. The case of duelling may serve as an example.

"So far," says Rousseau, "is the censorial tribunal from leading the public opinion, it follows it: and when it departs from it, its decisions are vain and nugatory."*

Be it so: but what follows from this? Is it that the legislator is to be the slave of the most mischievous and erroneous popular notions? No: this would be to quit the helm, while the vessel was surrounded with rocks. His greatest difficulty will consist in conciliating the public opinion, in correcting it when erroneous, and in giving it that bent which shall be most favourable to produce obedience to his mandates.

The legislator is in an eminent degree possessed of the means of guiding public opinion. The power with which he is invested gives to his instructions, whenever he may bestow them, far greater weight than would be attributed to them if falling from a private individual. The public, generally speaking, presumes that the Government has at its command, more completely than any private man, the requisite sources of information. It is presumed also, that in the great majority of cases its interest is the same with that of the people, and that it is unbiassed by personal interest, which is so apt to misguide the opinion of individuals. If things go on unprosperously, the responsible agents become subject to the animadversion of the public; if prosperously, they have the credit and the advantage. Of this, people in general have a confused notion, and it is the ground of their confidence.

In extirpating prejudices that appear to him to be mischievous, the legislator has the means of laying the axe to the root of the evil. He may form institutions which, without inculcating doctrines in direct repugnance to received opinions, may indirectly attack them. Instead of planting against them a battery, he may sink a mine beneath them, the effect of which will be infallible.

The legislator is clothed not only with political, but with moral power. It is what is commonly expressed by the words consideration, respect, confidence. There are not wanting instances in which, by means of such instruments, the most important effects have been produced.

A certain degree of infamy, it is obvious, must naturally result upon a conviction for any offence which the community are accustomed to mark with their displeasure: thus much results from the bare conviction, in-

* *Contrat Social*, liv. iv. c. 7.

deed from the bare detection, without any express designation of the magistrate. The only way, therefore, in which the magistrate can produce any additional degree of infamy —I mean all along pure and simple infamy— is by taking extraordinary measures to make public the fact of the offence. In this way it is only in point of *extent* that the magistrate adds to the actual portion of infamy that flows from the offence.

In point of intensity, there is but one way in which the law can contribute anything to the infliction of simple infamy. This is by bestowing on the act in question some opprobrious appellation—some epithet, calculated to express ill-will or contempt on the part of him who uses it. Thus, a legislator of ancient Rome (in a passage of Livy, quoted by the Author of Principles of Penal Law,*) after describing a particular mode of offence, is said to have done nothing more towards punishing it, than by subjoining these words, *improbè factum.* Here the legislator begins the song of obloquy, expecting that the people will follow in chorus. The delinquent is to be pelted with invectives, and the legislator begins and casts the first stone.

But when the object of the legislator is to conciliate the public opinion, and especially when that opinion is opposite to the one he would establish, he must address himself to their reason.

I hope it will not be supposed that, under the name of *reasons*, I have here in view those effusions of legislative babbling—those old-womanish aphorisms, mocking the discernment of the people, degrading the dignity of the legislature, which stuff up and disgrace the preambles of our statute-books: "Whereas it has been found inconvenient — Whereas great mischiefs have arisen,"—as if it were endurable that a legislator should prohibit a practice which he did *not* think "inconvenient," which he did *not* think "mischievous," and as if, without his saying as much, the people would not give him credit for wishing that it might be believed he thought it.

Of what sort, then, should the reasons be, which the legislator ought to employ to back and justify an epithet of reproach? They should be such as may serve to indicate the *particular* way in which the practice in question is thought liable to do mischief; and by that means point out the analogy there is between that practice, and those other practices, more obviously, but perhaps not more intensely mischievous, to which the people are already disposed to annex their disapprobation. Such reasons, if reasons are to be given, should be simple and significant, that they may instruct—energetic, that they may strike—short, that they may be remembered.

Take the following as an example in the case of smuggling:—*Whosoever deals with smugglers, let him be infamous. He who buys uncustomed goods, defrauds the public of the value of the duty. By him the public purse suffers as much as if he had stolen the same sum out of the public treasury. He who defrauds the public purse, defrauds every member of the community.*†

As the legislator may lay the hand of reproach upon him who counteracts the purposes of the law, so may he take it off from him who forwards them. Such is the informer—a sort of man on whose name the short-sightedness and prejudice of the people, inflamed by the laws themselves, have most undeservedly cast an odium. The informer's law might be prefaced in the following manner:

It is the artifice of bad men to seek to draw contempt upon them who, by executing the laws, would be a check upon their misdeeds. If the law is just, as it ought to be, the informer is the enemy of no man, but in proportion as that man is an enemy to the rest. In proportion as a man loves his country, he will be active in bringing to justice all those who, by the breach of the laws, entrench on its prosperity.

It will be remarked, that in this new part of the law—in this struggle to be made against the errors of the moral sanction—there is work for the dramatist as well as the legislator, or else, that the politician should add somewhat of the spirit of the dramatist to all the information of the lawyer. Thus wrote the legislators of ancient days—men who spoke the significant and enchanting language of Ancient Greece. Poetry was invited to the aid of law. No man had ever yet thought of addressing the people in the barbarous language that disgraces our statute-book, where the will of the legislator is drowned in a sea of words. Habited in a Gothic accoutrement of antiquated phrases, useless repetitions, incomplete specifications, entangled and never-ending sentences, he may merely, from incomprehensibility, inspire

* P. 290, 1st edit.

† I say the public purse—I do not say the public simply. Far from the pen of the legislator be that stale sophistry of declaiming moralizers, which consists in giving to one species of misbehaviour the name and reproach of another species of a higher class, confounding in men's minds the characters of vice and virtue. Pure from all taint of falsehood should the legislator keep his pen; nor think to promote the cause of utility and truth by means which only tyranny and imposture can stand in need of. In what I have said above, there is nothing but what is rigorously and simply true. But it were not true to say that a theft upon the public were as mischievous as a theft upon an individual: from this there results no alarm, and the more the loss is divided, the lighter it falls upon each.

terror, but cannot command respect. It may be matter of astonishment, why the arbiters of our life and of our property, instead of disporting themselves in this grotesque and abject garb, cannot express themselves with clearness, with dignity, and with precision: the best laws would be disfigured if clothed in such language.

"In a moderate and virtuous government," says an elegant and admired writer, "the idea of shame will follow the finger of law."

Yes, so as his finger be not so employed as to counteract and irritate the determined affections of the people. He goes on and says, "Whatever species of punishment is pointed out as infamous, will have the effect of infamy." True, whatever is appointed by the legislator as a mark to signify his having annexed his disapprobation to any particular mode of conduct, will have this effect: it will make the people sensible that he wishes to be *thought* to disapprove of that mode of conduct; in most cases, that he does really disapprove of it. But to say, that whatever the legislature professes to disapprove of, the people will disapprove of too, is, I doubt, going a degree too far.

We may direct his attention to an instance of an offence which, under as moderate and virtuous a government, I dare believe (all prejudices apart,) as ever yet existed, laws have rendered penal, magistrates have endeavoured to render infamous, by a punishment which in general marks the patient with infamy, but which no laws, no magistrates, no punishments, will in this country ever render infamous. I mean state-libelling.

The offence of libelling, as marked out by the law as it stands at present, is this: it is the publishing, respecting any man, anything that he does not like. This being the offence of libelling in general, the offence of state-libelling is the publishing, respecting a man in power, anything which he does not like.

A libel is either *criminative* or *vituperative*. By criminative, I mean such an one as charges a man with having done a specific act (determinable by time and place,) of the number of those that are made punishable by law. By *vituperative*, simply vituperative, I mean such an one as, without charging a man with any specific fact, does no more than intimate, in terms more or less forcible, the disapprobation in which the libeller holds the general conduct or character of the party libelled. Such are all those epithets of vague reproach, — liar, fool, knave, wicked profligate, abandoned man, and so forth; together with all those compositions which, in the compass of a line, or of a volume, intimate the same thing. A criminative libel, therefore, is one thing: a vituperative is another. The law knows not of these terms; but it acknowledges the distinction they are here intended to express.

Of these two, a libel of the criminative kind admits, we may observe, of another much more confined and determinate definition: a vituperative libel will admit of no other than that which is given above.

Now then, so it is, that for a libel simply vituperative, against a private person, the law will not let a man be punished by what is called an action to the profit of the party, unless it be under particular circumstances, which it is not here the place to dwell upon. But by imprisonment, or to the profit of the crown, by what is called an indictment, or more especially what is called an information, it will let him be punished at the caprice, (for no rules are or can be laid down to guide discretion)—at the caprice, I say, and fancy of the judges. For a libel of the criminative kind, against a private person, the law will not let a man be punished, if the libeller can prove his charge to be a true one. But for a libel against a man in power, criminative or vituperative, true or false, moderate or immoderate, it makes a man punishable at all events, without distinction. If it be true, it is so much the worse: judges, thinking to confound reasoning by paradox, have not scrupled to hazard this atrocious absurdity. The judges of antiquity broached it long ago; succeeding judges have adhered to it; present judges, whose discernment cannot but have detected it — present judges, as if borne down by the irresistible weight of authorities, recognise it, and it triumphs to this hour.

This being the case, he who blames the proceedings of a man in power, justly or unjustly, is a libeller: the more justly, the worse libeller. But for blaming the proceedings of men in power, and as they think justly, never will the people of this country look upon a man as infamous. Lawyers may harangue, juries may convict; but neither those juries, nor even those lawyers, will in their hearts look upon him as infamous.*

The practical conclusion resulting from this is, that the legislator ought never directly to oppose the public opinion by his measures, by endeavouring to fix a stain of ignominy upon an act of the description of those in question, which are equally liable to originate

* In 1758, Dr. Shebbeare, was pilloried[a] for writing a libel against the then King, under a Whig administration. He stood in triumph: the people entertained him with applause. At another time, J. Williams, bookseller, was pilloried for publishing a libel against his Majesty George the Third, under an administration charged with Toryism: the people made a collection for him. At another time, W. Beckford, Lord Mayor of London, replied extempore, in an unprecedented and affrontive manner, to a speech from the throne: the citizens put up his statue in Guildhall. Shame did not then, I think, follow the finger of the law.

[a] 2 Bur. 792.

in the most virtuous as in the most vicious motives, and which consequently escape general reprobation.

But it is not less true, that in a very extensive class of cases, an argument addressed to the understandings and sentiments of the people, would, if properly applied, have some considerable effect, as well as an argument addressed to their fears. If he thought the experiment worth trying, the legislator might do something by the opinion of his probity and his wisdom, and not be forced to do everything by the terror of his power. As he creates the political sanction, so he might lead the moral. The people, even in this country, are by no means ill-disposed to imagine great knowledge where they behold great power. A few kind words, such as the heart of a good legislator will furnish without effort, will, if the substance of the law be not at variance with them, be enough to dispose the people to be not uncharitable in their opinion of his benevolence.

Not that the legislator in our days, and in those countries which, on the subject of government, one has principally in view, ought to expect to possess altogether the same influence over the moral sanction as was exercised by the legislators of such small states as those of Greece and Italy in the first dawnings of society. The most prominent reason of this difference is, that in monarchical governments it is birth, and not any personal qualifications, that fix a man in this office. It is rare that the person in whose name laws are issued, is the person who is believed to make them. It is one thing to make laws, and another to touch them with a sceptre.

The Catherines and Gustavuses govern, and are seen to do so. Other princes are either openly governed, or, locking up their bosoms from the people, reign as it were by stealth.

In a mixed government like our's, where the sovereign is a body, he has no personal character. He shows himself to the people only in his compositions, which are all that is known of him. By those writings he may doubtless give some idea of his character. But as his person is in a manner fictitious and invisible, it is not to be expected that the idea of his character should make so strong an impression upon the imagination of the people, as if they had the idea of this or that person to connect it with.

In the small states of Greece, the business of legislation stood upon a very different footing. The Zaleucuses, the Solons, the Lycurguses, were the most popular men in their respective states. It was from their popularity, and nothing else, that they derived their title. They were philosophers and moralists, as well as legislators: their laws had as much of instruction in them as of coercion; as much of lectures as of commands. The respect of the people had already placed the power of the moral sanction in their hands, before they were invested with the means of giving direction to the political. Members of a small state, the people of which lived as if they were but one family, they were better known to the whole people for whom they made laws, than with us a Member ordinarily is by the people of the county he is chosen for.

In those days, men seem to have been more under the government of opinion than at present. The word of this or that man, whom they knew and reverenced, would go further with them than at present. Not that their passions, as it should seem, were more obsequious to reason; but their reason was more obsequious to the reason of a single man. A little learning, or the appearance of it, gleaned from foreign nations, gave a man an advantage over the rest, which no possible superiority of learning could give a man at present. *Ipse dixit* is an expression that took its rise from the blind obsequiousness of the disciples of Pythagoras, and not uncharacteristic of the manner of thinking of those who pretended to make any use of their thinking faculty throughout ancient Greece.*

CHAPTER IV.

OF PECUNIARY FORFEITURES.

We now come to consider the several kinds of Forfeitures; and, first, the sorts of forfei-

* Let me be permitted here to illustrate what has been said of the power possessed by ancient legislators, by a modern example, borrowed from what to some persons will appear a frivolous subject, and certainly from a frivolous person. The legislator in question was a master of ceremonies. For a long series of years, by the authority of opinion, *Nash*, commonly called *Beau Nash*, regulated at Bath the conduct of the company assembled at that place during the season: sovereign arbiter and director of all points pertaining to the custom and etiquette of the place, of the order in which balls, concerts, &c. were to succeed each other. How did he go to work? "*Let such a thing be done*," said the legislator of the Bath Assemblies. "*Let not such a thing be done.*" "*Let such an Assembly take place on such a day: that it begin at such an hour, that it finish at such an hour*," &c. &c. Setting aside the extreme disparity of the object, the resemblance is striking between these ordinances of fashion, and such laws of antiquity as have been handed down to us. There were no punishments, properly so called. The company assembling met there, confiding in his prudence and experience in the concerns he had to regulate, put into his hands a certain quantity of the power of the moral sanction, and the public voice was ready to be raised against the infractors of his rules; and laws the weakest in appearance, were most strictly obeyed.

ture that bear the name of pecuniary and *quasi*-pecuniary: forfeiture of money, and what is exchangeable for money.

A pecuniary forfeiture is incurred when a man is, by a judicial sentence, compelled to pay a sum of money to another, or, as it is in some cases called, a fine.

As to the methods which may be taken by the law to inflict a punishment of this sort, they are as follows:—

1. The simplest course is to take a sum of money, to the amount in question, out of the physical possession of the delinquent, and transfer it into the physical possession of the person who is to receive it; after which, were he to meddle again with the money so taken, he would be punished just as if he had meddled with any other parcel of money that never was in his possession. This course can only be taken when it happens to be known that the delinquent has such a sum in his possession, and where it lies. But this is seldom the case.

2. The next and more common expedient is to take such and such a quantity of what other corporal effects he may have in his physical possession, as, if sold, will produce the sum in question, and to make sale of them accordingly, and bestow the produce as before.

3. Another expedient is, to make use of compulsive means to oblige him to produce the sum himself. These means will be either, 1*st*, The subjecting him to a present punishment, to be taken off as soon as he *has* done the thing required; or, 2*d*, The threatening him with some future punishment, to be applied at such or such a time, in case of his *not* having done by that time the thing required.

4. A fourth expedient is, to take such property of his, whether in money or other effects, or whereof, though the legal right to them, or in a certain sense the legal possession of them, is in him, the physical possession is in other people. As the existence of such legal right, and the place where the effects in question are deposited, are circumstances that can seldom be known but by his means, this makes it necessary to apply compulsion to him, to oblige him to give the requisite information.

Of these four expedients, the first and second commonly go together, and are put in practice indiscriminately at one and the same operation. The officer to whom the business is entrusted, if he finds money enough, takes money; if not, he takes other effects to make up the deficiency. The first, then, may, in future, be considered as included under the second.

In England, the second and the third have both of them been in practice from time immemorial: not indiscriminately, however, but according to the name that has been given to the punishment by which the money has been exacted. When this punishment has been called a *fine*, the third method has been exclusively employed: when it has been called damages, the second and third have been employed together—not, indeed, in their full force, but under certain restrictions, too particular to be here insisted on.

The fourth is comparatively of late invention. It was first applied to traders by one one of the bankrupt laws, and has since been extended by the insolvent acts to persons at large, where the obligation they are under to pay money bears the name of debt. Such is the case in many instances where that obligation is imposed with a view to punishment.

§ 2. *Pecuniary Forfeitures examined.*

1. As to the evils produced by a punishment of this kind, they are all reducible to the *pain of privation* occasioned by the loss of so much money.*

2. Pecuniary forfeiture shares with penal servitude in the striking advantage of being *convertible to profit.*

The quantity of profit is not limited in this case as in that. This is its peculiar excellence; and this it is that adapts it particularly to the purpose of compensation.

3. In respect of *equality*, it is not less advantageous. No punishment can be made to sit more equally than this can be made to sit on different individuals; so as the quantum of it be proportioned to the means which the delinquent has of bearing it. For money (that is, the ratio of a given sum of money to the total sum of a man's capital) we have already shown to be the most accurate measure of the quantity of pain or pleasure a man can be made to receive. The pleasures which two men will be deprived of, by being made to lose each a given part (suppose a tenth) of their respective fortunes, will in *specie* perhaps be very different; but this does not hinder but that, on taking into the account quantity on the one hand, and actual expectations and probable burthens on the other, they may be the same: they will be the same as nearly as any two quantities can be made to be so by any rule of measuring. It is from his money that a man derives the main part of his pleasures; the only part that lies open to estimation. The supposition we are forced to follow is, that the quantities of pleasure men are capable of purchasing with their respective capitals are respectively equal. This supposition is, it must be supposed, very loose indeed, and inaccurate, because the quantity of a man's capital is subject to infinite fluctuations, and because there is great reason to suppose that a richer man is apt to be happier, upon an average, than a poorer

* See Introd. to Morals and Legislation, ch. 3.

man. It is, however, after all, nearer to the truth than any other general suppositions that for the purpose in question can be made.

4. In point of *variability*, it is evident nothing can excel this mode of punishment, as far as it extends. It commences at the very bottom of the scale. In this respect it has greatly the advantage over corporal punishments, which are always complicated with a certain degree of infamy; while in the instance of pecuniary punishments, no other infamy is produced than what is necessarily attached to the offence.

5. In respect of *frugality*. Pecuniary punishment, especially when the relative quantum of it is great, is liable to a disadvantage which balances in some degree against the advantage which it has of being convertible to profit. Along with the delinquent, other parties who are innocent are exposed to suffer; *to wit*, whatever persons were comprised within the circle of his dependents. This suffering is not the mere pain of sympathy, grounded on the observation of his suffering: if it were, there would be no reason for making mention of it as belonging in a more especial manner to the present mode of punishment. It is an original pain, produced by a consciousness of the loss which they themselves are likely to incur by the impoverishment of their principal. This evil, again, is not a mere negative evil; the evil which consists in the not being to have the comforts which, had it not been for his impoverishment, they would have had. If it were, there could be no more reason for taking it into the account on this occasion, than the pain of sympathy; for, whatever it be, it is balanced, and that exactly, by the pleasure that goes to those persons, whosoever they be, to whose profit the money is applied. The pleasure resulting from the use of that money is neither diminished nor increased by the operation: it only changes hands. The pain, then, that is peculiar to this species of punishment, is neither more nor less than the pain of disappointment produced by the destruction of those expectations which the parties in question had been accustomed to entertain, of continuing to participate in the fortune of their principal, in a measure proportioned to that in which they had been accustomed to participate in it.

6. In point of *exemplarity*, it has nothing in particular to boast of. At the execution of it, no spectacle is exhibited: the transfer of a sum of money on this account has nothing to distinguish it from the case of an ordinary payment. It is not furnished with any of those symbolical helps to exemplarity which belong to most punishments of the corporal kind. Upon the face of the description, the exemplarity it possesses is in proportion to the quantum of it; that is, in the ratio of the quantum of the forfeiture to the capital of him whom it is to affect.

There is one case, however, in which it is particularly deficient in this article: this is when it is laid on under the shape of costs. Upon the face of the law, nothing occurs from whence any adequate idea can be drawn of what eventually turns out to be the quantum of the punishment.

7. In point of *remissibility*, it is in an eminent degree advantageous. Under no other mode of punishment can reparation be made for an unjust sentence with equal facility.

8. In point of *popularity*, this punishment exceeds every other. It is the only one of any consequence against which some objection or other of the popular cast has not been made.

9. In point of *quantity*, pecuniary forfeitures are susceptible of varieties which may have considerable influence on their effects.

The quantum of such a forfeiture, as inflicted by statute or common law, may be either discretionary or indeterminate; or if determinate, it may be either limited or fixed: and in either case, it may be determined either absolutely or by reference. In the latter case, with regard to the standards by which it is determined, it would manifestly be in vain to attempt to set any bounds to their variety. The circumstances most commonly made choice of for this purpose are — 1. The profit of the offence; 2. The value of the thing which is the subject-matter of the offence; 3. The amount of the injury; 4. The fortune of the offender.

In England, a punishment of this kind is known in different cases by different names, which have nothing to do with the nature of the punishment (that is, of the suffering) itself, nor essentially with the manner in which it is inflicted. They are taken only from the accidental circumstance of the manner in which the produce of the punishment is disposed of.

When this produce is given to the king or his grantee, the punishment being left unlimited by the legislature, after the quantum of it has been settled by a judge, it is called Fine.

When, after being limited by the legislature, it has been settled by the judge, the name employed to denote it by, howsoever applied, has commonly been the general term of Forfeiture.

When the *quantum* of it has been left unlimited by the legislature, and the produce of it given to a party injured by the offence, the punishment is called Damages. In this case, the settling of the quantum has generally been committed to a jury.

§ 3. *Of Quasi-pecuniary Forfeitures.*

By quasi-pecuniary forfeitures, I mean the

forfeitures of any kind of property that is not money, but is of such a nature as admits of its being exchanged for money.

The enumeration of the different species of property belongs more to a treatise upon civil law, than to a work upon punishments. As many species of property, so many species of forfeiture.

The observations we have made upon pecuniary punishments may in general be applied to quasi-pecuniary punishments. The evil produced by their infliction may be estimated according to the pecuniary value lost; but there is one exception to be made with respect to objects possessing a value in affection. An equivalent in money will not represent any of the pleasures attached to these objects. The loss of patrimonial lands, of the house which has passed from father to son in the same family, ought not to be estimated at the price for which those lands or that house would sell.

Punishments of this kind are in general more exemplary than pecuniary punishments. The confiscation of lands, of a manor, for instance, more visibly bears the marks of a punishment, attracts the attention of a greater number of persons, than a fine of the same or of a greater value. The fact of the possession is a fact known through all the district — a fact of which the recollection must be recalled by a thousand circumstances, and perpetuated from generation to generation.

These considerations open a vast field for reflection, upon the use of confiscations of territorial property, especially in the case of those equivocal crimes called rebellions or civil wars. They perpetuate recollections which ought to be effaced. We shall recur to this subject when we speak of *Punishments misplaced.* — Book IV.

CHAPTER V.

FORFEITURE OF CONDITION.

WHEN the property under consideration consists of a real tangible entity, as a house or lands, it presents itself under its most simple and intelligible shape: but when it is of an *incorporeal* nature, it can only be designated by abstract terms; and to explain those terms it is necessary to have recourse to those real entities from which those fictitious entities derive their name and their signification. In order to explain the nature of any particular condition in life, for example that of husband, it is necessary to state the right conferred upon him by the law, over the person, the property, and the services of an existent being — the woman to whom he is married. To explain the nature of *rank*, it is necessary to explain the rights that it confers — the exclusive privilege of using a certain title, of being habited in a particular manner, of being entitled to priority upon certain occasions; in short, to enjoy such honours as are attached to the particular rank in question So far the effect produced is produced by the operation of the law. As to the honour itself, which is the source of their value, it depends upon the moral sanction. It is, however, a species of property. A man invested with a certain rank is entitled to receive from persons at large unexigible services, services of respect, and which will be generally rendered to him in consideration of his rank.

In respect of *offices* — public offices — we may point out the power possessed by the person holding them over his subordinates, the emoluments that are attached to them, and the unexigible services that may result from the possession of them; that is to say, benefits resulting from the disposition that may be supposed to be felt by persons at large to render services to a man placed in an official station.

By the same process we may explain the nature of all rights; for example, the right of voting in a parliamentary election. Every person in possession of this right has the privilege of giving a vote, by which he influences the choice of the person to be vested with a particular species of power. The value of this interest, under the present state of things, consists principally in giving the elector a certain power over the candidate and his friends. An honest and independent exercise of this right is a means of acquiring reputation. To generous and benevolent minds there also accrues from it a pleasure of sympathy, founded on the prospect of public happiness, that is to say, upon the influence that the choice of a virtuous and enlightened candidate may have upon the public welfare.

The value of a condition in life, of a right, of a privilege, being explained to consist in power, profit, and reputation, that is to say, the pleasures resulting from the possession of it, we are in possession of all the necessary elements for estimating the evil accruing from their loss, or, in other words, the magnitude of the punishment occasioned by their forfeiture.

To give an analytical view of all the modifications of which property is susceptible, and every species of forfeiture to which it may be exposed, would be a work of almost endless labour. We shall content ourselves here with giving a few examples, beginning with,

§ 1. *The Matrimonial Condition.*

The evils liable to be experienced by the husband from the forfeiture of this condition, consist in the loss of the pleasures belonging to it.

1. The pleasures which are the principal objects in the institution of marriage, may be divided into — 1*st*, Pleasures of sense; and 2*d*, Pleasures proceeding from the perception of an agreeable object, which depends partly on the senses, and partly on the imagination.

2. The innumerable minor pleasures of all kinds resulting from those inexigible services which belong to a husband's authority. Notwithstanding their variety, they may be all of them comprised under the head of pleasures of possession.

3. The pleasures resulting from the use of the property derived from the wife: these belong to the same head as the preceding.

4. Where the wife has separate property, over which a power of disposal is reserved to her, pleasure resulting from the hope of becoming possessed of this part of her property. Pleasure of expectation founded on the pleasures derivable from the possession of wealth.

5. The pleasure resulting from the persuasion of being beloved — this affection producing a variety of uncompellable services, which have all the charms of appearing to be as spontaneous as those that are the result of friendship. These pleasures may be referred to the pleasures of the moral sanction.

6. The pleasure resulting from the good repute of the wife, which is reflected upon the husband, and which has a natural tendency, as honour derived from any other source, to conciliate to him the esteem and good-will of persons in general. This may also be referred to the pleasures arising from the moral sanction.

7. The pleasure of witnessing her happiness, and especially that part of it which he is most instrumental in producing. This is the pleasure of benevolence or good-will.

8. The pleasure resulting from the several uncompellable services received at the hands of the family of which he has become a member. This may be referred to the pleasures of the moral sanction.

9. The pleasure of power, considered generally, independently of any particular use that may be made of it, with which he is invested, in virtue of the exclusive controul he possesses over the fund for reward and punishment. This may be referred to the pleasures of the imagination.

10. The pleasure resulting from the condition of father. This we shall have occasion to notice in considering the evils resulting from the forfeiture of the condition of father.

This same catalogue, with such slight variations as the reader will find no difficulty in making, is applicable to the condition of wife.

The task of coolly analyzing and classifying feelings of this nature may appear tedious, but it is not the less necessary, if we would estimate the amount of evil resulting from the loss of this condition.

§ 2. *The Paternal Condition.*

The evils resulting from the forfeiture of the condition of father may be referred most of them to the loss of the following pleasures: —

1. The pleasures derived from the imagining his own existence perpetuated in that of his child. This is a pleasure of the imagination.

2. The pleasure of having at his command, during the child's minority, the services that he may be in a condition to render. This is a pleasure of power.

3. The pleasure of employing, in so far as it can be done without diminution, the separate property of this child. This is a pleasure referable to two sources — that of father, and of guardian (of which presently.)

4. The pleasure of filial affection — a pleasure of the moral sanction.

5. The pleasure reflected upon him by the good repute of his child. This also is a pleasure of the moral sanction.

6. The pleasure of advancing the happiness of his child — pleasure of benevolence or good-will.

7. The pleasure derived from the several inexigible services that he may hope to receive from the connexions that his son, as he grows up, may form in the world — pleasure of the moral sanction.

8. The pleasure resulting from the sentiment of paternal power. This is a pleasure of the imagination.

9. In some cases, the pleasure derived from the expectation of becoming possessed of the whole or a part of the property the child may have acquired, or in case of his death the actual possession of such property. Pleasure, in the one case, of expectation founded on the pleasures derivable from the possession of wealth; in the other case, from the actual possession of wealth.

§ 3. *Condition of Child.*

Pleasures belonging to the condition of child: —

1. The pleasure derived from the use of the exigible services of the parent.

2. The pleasure resulting from the power of using certain parts of the property belonging to the father.

3. The pleasure resulting from the persuasion of being beloved by him.

4. The pleasure derived from the good repute of the father, which is reflected upon the child.

5. The pleasure of witnessing the father's happiness, and of contributing to promote it; a pleasure rendered more vivid by being accompanied with sentiments of gratitude.

6. The pleasure resulting from the connexions of the father, and the right he may have to certain services at their hands.

7. The pleasure derived from the hope of inheriting the whole or a part of his father's property; or if he be dead, from the possession of the property.

§ 4. *Pleasures derived from the Condition of Trustee.*

The pleasures resulting from standing in the condition of trustee, are the following:—

1. The pleasure resulting from the hope of contributing to the happiness of the individual whose interest is in question. This is a pleasure of benevolence or good-will.

2. The pleasure derived from the hope of the inexigible services to be expected from the gratitude of the individual in question. Pleasure of the moral sanction.

3. Pleasure founded on the hope of receiving inexigible services at the hands of persons benefited by the being entrusted with the use of the trust-property. This also is a pleasure of the moral sanction.

4. Pleasure founded on the hope of sharing in the esteem, the good-will, and the inexigible services of the different persons to whom his capacity and probity in the management of the trust property may have become known. This is also a pleasure of the moral sanction.

5. When a salary is annexed to the duty: pleasure of pecuniary profit.

It is but too well known, that the pleasures respectively belonging to these conditions are liable to vanish, and at any rate to be alloyed by a corresponding set of pains. These pains are too obvious to need insisting on. The value of any such condition may therefore be either positive or negative; in plain terms, a man may either be the better for it, or the worse. Where the value of it is positive, it will consist of the sum of the values of the several pleasures, after that of the several pains had been deducted: when negative, as the sum of the value of the pains after that of the pleasure has been deducted. When, therefore, the value of any such condition happens to be negative, a sentence taking a man out of it must needs operate, not as a punishment but as a reward.

With regard to those pleasures or benefits which are common to several of the above conditions, it is manifest that, though the pleasure is in each of these several cases nominally the same, they are liable to be very different in point of value. Thus the pleasure of contributing to the happiness of the person who forms the other term in the relation, is incident to the condition of parent, and also to that of a guardian: but it is more certain and more vivid in the case of the father than in that of the guardian. To engage, however, further in such details, besides their being so obvious, would lead us from the subject of politics to that of morals.

Let us now proceed to consider the manner in which the several forfeitures may be produced, or, as the case be, any part of them may be employed as an instrument of punishment.

The advantages of the conjugal condition may be subtracted as a punishment by a judicial sentence, declaring that the offender is not, or shall not be any longer considered as the husband or wife of the person in question.

The consequence of such sentence would be, not completely to destroy the advantages of that condition, but to render them precarious.

If after this sentence has been pronounced, they cohabit, or are suspected of cohabiting together, the woman is considered as a concubine. When this sort of connexion is known to subsist, it is in some countries punished by the moral sanction, in others, both by the moral and political.* By legal divorce, a man is also deprived, in the whole or in part, of the inexigible services derived from the right he has over the property of his wife, and especially of those services derived from cohabitation; it would make him dependent upon her with respect to the testamentary disposition over such part of her property of which she might have an absolute power of disposal.

With respect to the pleasures derivable from the relation of father, the law, it is true, cannot deprive a man altogether of the pleasures connected with this condition, but it may be greatly embittered; as, for example, by a retrospective sentence, declaring his children to be illegitimate. Upon those who might be born subsequent to the sentence of divorce, the punishment would fall with much greater certainty, for the public opinion, which would not be forward in supporting the degradation of children born under the faith of lawful wedlock, would not exercise the same indulgence towards those who were born after a divorce.

The paternal and filial condition may, in so far as the nature of the case admits of it, be in the same manner subtracted by a judicial sentence, declaring that the offender is

* By the laws of the State of Connecticut (North America)—"If a man and woman who have been divorced shall again cohabit together as man and wife, they shall be punished as adulterers;" and "the punishment for adultery is discretionary whipping, branding in the forehead with the letter A, and wearing a halter about the neck on the outside of the garments, so as to be visible. On being found without the halter, on information and proof made before an assistant or justice of the peace, he may order them to be whipped not exceeding thirty stripes."—*Swift's Laws of Connecticut*, vol. ii. p. 328.

not, or shall no longer be considered as the father or the son of the person in question.

The certain effects of a sentence of the kind in question, in respect of the father, would be to deprive him of all legal power over the person of his child: in respect of the child, to deprive him of taking by inheritance or representation the property of his father.

As to the other advantages derivable from these relations, the sentence may or may not have any effect, according to the feelings of the parties interested; its operation will depend upon the father and the son — upon their more immediate connexions, and upon the public in general.

As to the office of guardian, and other offices of a fiduciary nature, the sentence will operate to the whole extent of those offices: a legal interdiction of all the acts annuls all the advantages issuing from them.

It may at first sight appear extraordinary that a power should be attributed to the magistrate, of destroying relations founded in nature. It is, it may be observed, an event — an event that has already happened; and how can it be in the power of any human tribunal to cause that which has taken place, not to have taken place? This cannot be accomplished; but the magistrate may have power to persuade people to believe that an event has happened in a manner different from what it actually did happen. It is true that, upon the parties themselves, and upon the persons who have a direct knowledge of the fact, the power of the magistrate, as to this purpose, is altogether nugatory; but with the public at large, an assertion so sanctioned would have the greatest weight. The principal obstacle to the exercise of any such power, however, is, that a declaration to this effect as a penal instrument, would, upon the face of it, bear marks of its own falsehood. This is a dilemma from which there is no escaping. If the offender is not the father of the person in question, to declare that he is not, is not an act of punishment: if he is his father, the declaration is false.

The idea of employing as a mode of punishment the subtraction of any of the rights attached to the several conditions as above, is not, however, so extravagant as at first might be imagined. If not the same thing, what approaches very near to it, is already in use.

This object may be effected in two modes: one, the endeavouring to cause it to be believed that the offender does not stand in the relation of father or of son, as the case may be, to the person regarded as such: the other is in endeavouring to cause it to be believed, that from the non-observance of some legal form, the progeny is illegitimate.

A case somewhat analogous to this, is that famous one upon which so many volumes have been written — *corruption of blood;* or, in other words, the perfection of inheritable blood. The plain object, stripped of all disguise, is to prevent a man from inheriting, as he would have done if this punishment had not been pronounced: but what is endeavoured to be done, by the help of this expression, is to cause it to be believed that the blood of the person in question undergoes some real alteration, which is a part of the punishment.

Another example in which, at least in words, a controul is assumed over events of the description of those in question, is, by that barbarous maxim, that a *bastard is the son of no one* — a maxim which has a tendency, as much as it is in the power of words to give it, to deprive a man of all parental connexions. It is not, however, ever employed as a punishment.

Another example, opposite to the preceding one, is that other legal maxim, *pater est quem nuptiæ demonstrant* — a maxim by which sanction is frequently given to a palpable falsehood. By recent decisions, the severity of this rule has, however, been relaxed; it being now settled, that though marriage is to be considered as presumptive proof of filiation, it may be rebutted by evidence of the impossibility of any connexion having taken place.

In France, a mode of punishment has been employed, which, it is true, without any such pretence as that of destroying the fact of parentage, endeavoured, as far as might be, to abolish all trace of it, by imposing on the person in question the obligation of changing his name.*

The same punishment has been employed in Portugal.†

The punishment consisting in the forfeiture of credibility is another example, no less remarkable, of an attempt to exercise a despotic controul over the opinions of men. As part of the punishment for many sorts of offences, which do not import any want of veracity, the offender is declared to have lost all title to credence: the visible sign of this punishment is the not being permitted to depose in a court of justice.

The forfeiture of the conjugal condition, at least to a certain extent, is frequently among the consequences of imprisonment, especially when with imprisonment is combined penal labour. This part of the punishment is not formally denounced, but it is not the less real. It is not ever in express terms de-

* This was done in the case of Damiens and Ravaillac.

† In the case of certain persons convicted of an attempt against the life of the King.

clared that a man is divested of this condition; but he is in fact precluded from the principal enjoyments of it, and the condition, separate from the pleasures that belong to it, is evidently nothing more than a mere name. The forfeiture is temporary or perpetual, according as the imprisonment is either one or the other.

§ 5. *Condition of Liberty.*

Liberty being a negative idea — exemption from obligation — it follows, that the loss of liberty is a positive idea. To lose the condition of a freeman, is to become a slave. But the word slave, or state of slavery, has not any very definite meaning which serves to designate that condition as existing in different countries. There are some countries in which slavery is unknown. In countries in which slavery is in use, it exists under different forms, and in different degrees. The pain of servitude would be different, according to the class to which the offender might be aggregated.

Slaves are of two classes: they may belong to the government or to individuals.

The condition of public slaves, determined by regulation, fixing the nature and amount of the work, and the coercive punishments by which the performance of it may be compelled, is not distinguishable from the condition of persons condemned for life to penal labour: if there exist no such regulations, it varies little from private slavery. A public slave, unprotected by any such regulations, is placed under the despotic controul of an overseer, who is bound to employ him, for the benefit of the public, in a certain sort of occupation: this power, arbitrary as it is, does not extend to life and death. This condition varies very little from that of private slavery. A negro, for example, employed upon a plantation belonging to the crown, is not from this circumstance in a condition greatly superior to what he would be in if standing in the same relation to a private individual, who, instead of being his own overseer, employed an agent for that purpose.

The most ready means of forming a correct conception of the condition of slavery, is by considering it, in the first instance, as absolute and unlimited. In this situation the slave is exposed to every possible species of evil. The punishment designated, then, by the expression, forfeiture of liberty, is no other than the being exposed to a greater or less chance, according to the character of the master, of suffering all sorts of evils; that is to say, of all evils resulting from the different modes in which punishment may be inflicted. To form an accurate notion of this situation, all that is required is to glance the eye over all the possible varieties of punishment. The slave, with respect to the individual standing in the condition of master, is absolutely deprived of all legal protection.*

Such is the nature of slavery under its most simple form: such is the nature of the total deprivation of liberty. The different restrictions that may be imposed on the exercise of this power, renders the state of servitude more or less mild.

There are, then, two heads to which the evils resulting from this condition may be referred: —

1. The risk, on the part of the slave, of being subject to every possible evil, with the exception of such only as the master is expressly prohibited from inflicting; 2. The continuity of the pain, founded on the apprehension of these sufferings.

§ 6. *Condition of Political Liberty.*

I shall say but one word upon a subject that would require a volume.

The loss of political liberty is produced by a change in the condition, not merely of any particular individual, but of the whole community. The loss of liberty is the result of a fresh distribution of the power of the governing body — a distribution which renders the choice of the persons, or their measures, less dependent upon the will of the persons governed. A fresh distribution of power depends absolutely upon a corresponding disposition to pay obedience to that fresh distribution. When superior physical force is in the possession of those from whom obedience is demanded, it is evident that the power of commanding can be exercised only in so far as that obedience is rendered. As this disposition to pay obedience may be produced by the conduct of a single individual of the governing class, it may be, and has frequently been said, that a single man has destroyed the constitutional liberty of a whole nation. But if the analysis of such events be followed out, it will be found that this liberty can be destroyed only by the people themselves.

CHAPTER VI.

FORFEITURE OF THE PROTECTION OF THE LAW.

A CLASS of forfeitures, as miscellaneous and extensive as any, and the last that we shall now take notice of, is that of the *protection*, whatever it be, which the law affords a man for the enjoyment of the objects of possession. This is not altogether the same thing with a forfeiture of the possessions themselves. In the instance of some of them, the law, by taking from him the possessions them-

* Such a condition would be too rigorous for criminals: it is for innocent men that it is reserved.

selves, excludes him, by sure and physical means, from the enjoyment of them. In the instance of others, the law, without taking away from him altogether the physical capacity of enjoying them, punishes him in the case of his attempting to enjoy them. In the remaining cases, the law uses not either of those compulsive methods: it, however, does an act by which the parties on whose choice the enjoyment of the object in question depends, are disposed, on pre-established principles, to put an end to it. It therefore, in this case, likewise becomes still the author of the punishment. This is the case with the forfeitures in which the political sanction produces its effect, not by its own immediate energy, but by the motion it gives, if one may so say, to the moral and religious sanctions.

In the case of forfeiture of protection, the law takes no such active part. All it does is this: it simply withdraws, in part or altogether, that punishment by means of which it protects a possessor in the enjoyment of those several possessions. If, then, every man refrain from disturbing him in the enjoyment of any such possession, it is well the law does nothing of itself to prompt them to it. But if any persons of their own motion choose to disturb him, it is also well the law does nothing of itself to hinder them. Forfeiture of protection is, in short, neither more nor less than the forfeiture of the use of the ministers of justice; that is, of such persons whose business it is to protect the several members of the community in the enjoyment of their respective rights.

Between forfeiture of protection, and forfeiture of capacity, the difference is, that by the latter, the law *does* what is necessary to prevent a man's acquiring a possession: in the former, it *forbears* to do anything to prevent his losing it. When considered with reference to the individual who has forfeited the protection of the law, this species of punishment may be called forensic disability; it forms part of the artificially complex punishment of outlawry; the consideration of which will be subsequently resumed.*

BOOK IV.

OF THE PROPER SEAT OF PUNISHMENT: OR SAY, OF MIS-SEATED PUNISHMENT.

What is here meant by mis-seated punishment, is *not* that which in another place was meant by groundless punishment.

The case in which the epithet *groundless* was applied to the subject punishment, is that in which, by the supposition, there was no offence in the case — no act to which, by the annexation of eventual punishment, any such character as that of an offence ought, by the legislature, to have been superinduced.

The case in which the epithet *mis-seated* is applied to the same subject — the case which on the present occasion is in view — is that in which there exists an offence; that is, an act fit to be, as above, converted into an offence — an act to which it is fit that punishment be accordingly attached, and in which case punishment is attached accordingly. Thus far all is right: but what there is wrong in the case consists in this, that punishment is to be found, which, *in consideration of the same offence*, has been attached to a *wrong* person; that some persons, one or many, are to be found, on whom, in respect of that same offence, no punishment from which they could have been saved ought to have been attached, but on whom punishment, of some sort or other, from which they might have been saved, does notwithstanding stand attached.

When, in so far as, by appointment of the legislature or of the judge, acting (as in all cases of unwritten or judge-made law) in the place of the legislator, punishment is inflicted on any person by whom no part has been borne in the offence, it may be said to be mis-seated—seated in a place which is not its proper place.

In this case, if, along with the non-offender, no offender suffers, the mis-seated punishment may be, as in practice it has been termed, *vicarious:* if in the contrary case, extravasated punishment; that is, flowing in a wrong channel.

Punishment ought naturally to be the work of reflection: but whether it be vicarious or extravasated, should there be found an instance in which the infliction of it appears to have been the result, not so much of reflection and thought, as of want of thought—and the mass of such instances will be found but too extensive — in such case it may be termed *random* punishment.

Punishment (which is mis-seated, and in particular, that which is in an extravasated state), may be so unavoidably or avoidably.

First, as to the case in which the extravasation is unavoidable. On another occasion, in another work, and for another purpose, this case has already been brought to view; viz. under the head of "*Circumstances influencing sensibility.*"†

Whether in the way and for the purpose of punishment, or in any other way, and for any other purpose, a man cannot be made to suffer, but his connexions, if he have any — always his connexions in the way of sympathy,

* Book V. ch. v.

† Introduction to Morals and Legislation.

frequently his connexions in the way of interest (understand self-regarding interest,) are made to suffer along with him; and forasmuch as it can only be by some rare accident that a man can be found who has not, in either of those ways, any connexions; thence it follows, that if, where it is unavoidable, the certainty or probability of its extravasation were regarded as a sufficient cause for forbearing to inflict punishment, it would only be by a correspondently rare accident that any thing could be done for the prevention of offences of any sort; the consequence of which would be general impunity to crimes and other offences of all sorts, and with it the destruction of society itself.

In so far as it is mis-seated, and is not unavoidably so, punishment, it is almost needless to observe, is, with reference to the person on whom it is thrown, *groundless:* as such it is thrown away; it is so much evil expended in waste: — reformation, determent, disablement — it contributes not anything to any one of the proper ends of punishment — not so much as to vindictive satisfaction for injury: at least, to any mind that is not more or less deranged, it is repugnant to utility, inconsistent with humanity, inconsistent with justice.

To all these it is repugnant; but what it is not repugnant to, is English law, written as well as unwritten; for under both these dispensations, instances of it are to be found — instances altogether deplorable in extent, as well as abundance.

When the epithet *unavoidable* is on this occasion employed, some such limitative clause as is expressed by the words *without preponderant inconvenience*, must be understood. For, in point of possibility, punishment, *i. e.* the infliction of suffering on that score, being on the part of the legislator and the judge an act of the will, to avoid inflicting it will, on this as on every other occasion, be respectively in their power at all times, not only on this but on every occasion. On so simple a condition as that of seeing government, and with it society itself, perish, you may avoid inflicting punishment altogether.

Bearing continually in mind this necessary and not unobvious limitation, in answer to the question, what, in regard to mis-seated punishment, ought to be the conduct of the legislator? two simple propositions may be laid down without difficulty: —

1. One is — Where it is unavoidable, mis-seated punishment may be employed.

2. Where it is avoidable, mis-seated punishment ought in no case to be employed.

Unhappily, there exists not a system of established law which does not exhibit instances in which mis-seated punishment is thus wrongfully employed.

First, as to the case when the application thus made of the matter of punishment is unavoidable — not to be avoided without letting in, in some other shape, evil in such a quantity, as, after deduction made of the evil saved on the score of punishment, shall leave a nett balance on the side of evil upon the whole.

Now, taking the matter on the footing of the principles of utility, — punishment, however mis-seated, not only may be, but ought to be introduced: and on the part of him by whom that principle is embraced, and taken for his constant guide, to say that of punishment so circumstanced that it ought not to be introduced, would be equivalent to a contradiction in terms.

But, says an objector, punishment, in so far as it is inflicted, falls upon the guiltless, and to inflict punishment on the guiltless is to violate one of the most important, and fundamental, and universally recognised principles of justice.

The answer is: This being one of those principles which in substance are continually alluded to, but which in truth are not any where to be found, cannot with propriety be employed in the character of an objection to any rule which, standing expressed in a determinate form of words, is seen to be unexceptionable.

To inflict punishment when, without introducing preponderant inconvenience, the infliction of such punishment is avoidable, is, in the case of the innocent, contrary to the principle of utility. Admitted: — and so is it in the case of the guilty likewise.

To punish where, without introducing preponderant inconvenience, such punishment is unavoidable, is not in either case contrary to the principle of utility; — not in the case of the guilty: no, nor yet in the case of the innocent.

What, then, are the cases in which the application of punishment to the innocent is avoidable? what the cases in which it is unavoidable?

Answer: Wheresoever, punishment not being, in the case in question, in itself undue, it is in your power to apply to the guilty, punishment in as great a quantity as (supposing it actually administered) is commensurate to the end of punishment — namely, without having recourse to the innocent, there the evil, whatsoever it be, that would be produced by the infliction of punishment on the innocent, is avoidable.

Now the fact is, and so it will be found, that (with the exception of such suffering as extravasates and overflows upon the innocent, in consequence of their connexion in the way of sympathy or particular and casual interest) wheresoever the nature of the case admits of the distinguishing who is innocent from who is guilty, the infliction of suffering on the innocent is avoidable.

Define punishment in a certain way, and

even the above limitation need not be made. Say that to give it the character of punishment, it is necessary that the suffering that is inflicted should, the whole of it, be directly intentional — that is, either mediately or ultimately intentional; and in that case, such part of the suffering as, in virtue of their connexion with the guilty person, falls unavoidably upon third persons (a wife or husband, children, relations, dependants, friends or creditors, and so forth,) is not punishment — does not come under the denomination of punishment.

This, however, is but a question of words. Take any lot of evil you will, such as it is, it is, whatsoever be its name. Say that it *is punishment*, the reason for avoiding to produce it, if unavoidable, will not be the stronger; say that is *not* punishment, the reason for avoiding to produce it, if avoidable, will not be the weaker.

§ 1. *Naturally Extravasating Punishment — Rules concerning it.*

In regard to such punishment as comes under the denomination of derivative or naturally extravasating punishment, the following seem to be the rules that may be laid down: —

1. The consideration that the lot of punishment in question comes under the denomination of derivative or extravasating punishment — punishment overflowing upon the guiltless from the guilty — can never of itself constitute a sufficient reason for forbearing to inflict such punishment.

For were that a sufficient reason, punishment could not, in the way of legislation, be appointed in any case.

2. In so far as punishment not coming under this denomination is capable of being inflicted to a sufficient amount, without the addition of any punishment which comes under this denomination; in other words, in as far as properly seated punishment to a sufficient amount is capable of being inflicted without the addition of derivative or extravasating punishment, no such addition ought by the legislator to be appointed, viz. either prescribed or authorised.

3. For so far as, without prejudice to the sufficiency of the remainder, the lot of punishment actually to be inflicted is capable of being cleared of derivative or extravasated punishment (punishment or suffering borne by those who have had no share either in the commission of the offence or in the benefit of the offence) — such clearance ought always to be made.

4. In the account taken of the suffering, for the purpose of any punishment which is about to be inflicted by the judge, such derivative suffering ought always be comprised: comprised, in the first place, in respect of what it is in itself and of itself; in the next place, in respect of the pain which, if inflicted on the innocent connexions of the guilty person, it may be expected to produce, viz. in the shape of a pain of sympathy, in the bosom of the guilty person himself.

5. Accordingly, in the case of a delinquent having such connexions, to the end that the *real* quantity of punishment may not be greater than in the case of a delinquent in the same degree of delinquency having no such connexions, the *nominal* may be — and, so far as the deduction is capable of being made with sufficient precision, ought to be — made by so much the less.

6. For the purpose of making any such allowance as may be requisite on this score, proceed thus: In the first place, settle with yourself what would be a sufficient punishment, on the supposition that the delinquent had no connexions: then, inquiring into such connexions, if any, as he has, proceed to make such abatement, if any, as may be requisite on this score.

7. For any such purpose, the view of the judge must not absolutely confine itself to the connexion itself, the outward and visible sign and presumptive evidence of the internal and invisible sympathy, viz. the fact that the delinquent has a wife, has children, has other persons in his dependence. Of the existence of the degree of sympathy naturally and usually attached to the species of relationship in question, the existence of the relationship itself may, it is true, be received in the character of *primâ facie* or presumptive evidence; such evidence as, in default of evidence to the contrary, may be taken for conclusive.

But supposing any such contrary evidence to be offered, or to be capable of being, without preponderant inconvenience, collected, such presumptive evidence as above mentioned ought not to be taken and acted upon as if conclusive.

If, for example, it appear, that in consequence of ill usage inflicted by him, his wife has been separated from him, it is not right that, on that account, he should be let off with a less punishment, merely because he has a wife: if it appear that, in consequence of ill usage, or desertion, or neglect, on his part, children of his have been taken in hand and provided for by some relation or private friend, or some public institution, it is not right that, merely because he has children, he should be let off with a less punishment, as above.

8. In so far as it is in the nature of the punishment to extract and provide any quantity of matter applicable to the purpose of compensation, the legislator and the judge, respectively acting within their respective spheres, ought not, in the care taken by them to avoid the production of unnecessary

mis-seated punishment, to confine themselves to negative measures.

If, for example, either by the general nature of the appointed punishment—imprisonment, for example, or banishment, or death —a separation be made, or, to the purpose in question, by special appointment, can be made, between the lot of the delinquent and the lot of his guiltless connexions, it may be right, out of and to the extent of the pecuniary means of the delinquent, to make a provision for his guiltless connexions.

9. In other words. So far as can be done, without reducing to too low a pitch the suffering inflicted on the delinquent, the claims of any guiltless connexion of his, to be saved harmless from such mis-seated punishment, as would otherwise be made to overflow upon them from the punishment inflicted upon him, should have the preference over the interest of the public purse.

This rule may, without reserve or difficulty, be in its full extent applied to ordinary creditors, to persons whose connexion with the delinquent is accordingly a connexion purely in the way of interest, unaccompanied with any such connexion as in the case of wife and children, or other near relatives, has place in the way of sympathy. For example, to speak particularly and precisely, on the score, and for the purpose of punishment, money extracted from the pocket of a delinquent ought not to be poured into the public purse, such sum excepted as, if any, remains to be disposed of, after satisfaction of all just and *bonâ fide* demands made, or capable of being made, by creditors.

§ 2. *Punishment apparently, but not really mis-seated — Civil Responsibility.*

One class of cases may be marked out, in which a punishment to which it may happen in appearance to be mis-seated, is not mis-seated in reality. The offence is committed by A, who is a person under power; the punishment is inflicted on B, in whom the power resides. In other words, the superordinate is made responsible for the subordinate.

To this class of cases may be aggregated the following: —

Responsibility of the husband for the wife.
..... the father for the children.
..... the guardian for his ward.
..... the madman's keeper for the madman.
..... the gaoler for his prisoners.
..... the sheriff for the gaoler.
..... the military commander for his subordinates.
..... the master for his servants.

In all these cases, though to appearance the punishment may be mis-seated, yet in point of fact the punishment is inflicted on the person having the power, not under the notion of innocence on his part, but in contemplation of delinquency on the score of negligence for an ill choice of, or want of attention to, his subordinates. It is on his part a transgression of the negative cast, consisting in the omitting to take proper precautions for the prevention of the positive offence committed by his subordinates.

Under our law, the sheriff is punished if any of the prisoners under the gaoler's custody escape. The sheriff has not the immediate custody of the prisoners; his other duties are incompatible with that. From this circumstance alone, then, there is no reason for supposing any complicity on his part. But the gaoler is appointed by him; and the object of the law is to render him circumspect in his choice. The gaoler himself is the person immediately responsible, but as the safe custody of prisoners is a matter of the highest importance, the punishment levelled at the sheriff is in the highest degree expedient, and the more so as the amount of it is in certain cases left to the discretion of the judge.

The responsibility thus imposed on superiors for the acts of their subordinates, is founded not only on the reasons above mentioned, but on others equally substantial, which have been more particularly developed before.*

§ 3. *Mis-seated Punishment, Varieties of.*

Punishment is mis-seated in either of two cases: — 1. Where the delinquent himself is not made to suffer at all, but some other is in his stead; 2. When the delinquent himself is punished, and some other guiltless person with him, in virtue of an express provision of the law.

If the delinquent himself be not punished, but some other person be, in his stead, the punishment may be called vicarious punishment. It is thus that in the case of a suicide, who is of course removed beyond the reach of human punishment, suffering is inflicted on his wife, his children, or his dependants.

When, in virtue of a social connexion between the delinquent and some other person, it passes from the delinquent upon that other, it may be styled *transitive punishment*. It is thus that in our law the children and other descendants in many cases are punished with their parents, for the delinquencies of their parents and other ancestors.

Where a large body of persons are punished at once, upon a presumption that the delinquent or delinquents are to be met with in that body, it may be styled *collective punishment*. Thus it is, in our law, corporations are in several cases punishable for the delinquencies of the co-corporators.

* See — Of Substitutive Satisfaction, p. 383.

Lastly, where along with the delinquent a person is punished who is a total stranger to him, the punishment in this case may, as far as the stranger is concerned, be styled *random punishment*. Thus it is, that by our law a person who, after certain acts of delinquency secretly committed, has bought land of the delinquent, loses his money and the land.

Punishment by lot, as is sometimes practised where the delinquents are numerous, as in large bodies of soldiery, comes not within this case. The persons who are made to cast lots are all supposed to be delinquents. There is, therefore, no punishment but what is *in propriam personam* in this case. It is not random *punishment*, but random *pardon*.

In *vicarious punishment*, we see it is a third person, as the phrase is, that is punished alone. In *transitive punishment*, a third person with the delinquent, in virtue of his connexion with him. In *collective punishment*, a large body of third persons, uncertain and indeterminate, because probably the delinquent is of the number. In *random punishment*, a single third person, who, for certain, is not the delinquent, and with whom the delinquent has nothing to do.

§ 4. *Vicarious Punishment.*

The case in which punishment is in the most palpable degree mis-seated, is that in which it has received the name of *vicarious*: Upon the person who has had any share in the offence, no punishment is inflicted, yet upon the same occasion, punishment is inflicted upon this and that person who has not had any share in the offence.

In the reign of James I. there lived a Sir Kenelm Digby, who, besides being a person of quality, was an adept in the science of medicine. Dressing of wounds is among the number of those operations that are attended with pain and trouble. By means of a powder of Sir Kenelm's invention, this inconvenience was saved. In addition to this powder, all that he required for the cure of the most desperate wound, was a little of the blood that had been made to flow from it. To this blood a competent dose of the powder being applied, the wound closed, and the cure was radical. The presence of the patient was no more necessary, than to our present quack doctors. While the compound of powder and blood was lying upon Sir Kenelm's shelves, the patient might be at the antipodes.

Exactly of a piece with the therapeutics that invented this *sympathetic powder*, for such was the name which by the author was applied to it, are the politics that gave birth to vicarious punishment.

I was about to exhibit the absurdity and mischief of this mode of punishment, but what end would it answer? A simple statement, that one man is punished for the offence of another, is calculated to produce a stronger impression on the mind, than could be produced by the aid of logic and rhetoric. An error so extravagant could never have been acted on, but from confusion of ideas, or upon suppositions, the improbability of which was altogether lost sight of.

In the English law, the only instance which is to be seen of a case of mis-seated punishment, which is clearly and palpably vicarious, is that of the punishment attached to suicide. It may perhaps be said, that the man himself is punished as much as the case will admit of; that his body used to be pierced with a stake, that he is still buried with ignominy, and that, with respect to him, every thing that could be done, is done; that this is not found sufficient, and that, as an additional check to the commission of this offence, it is necessary to call in aid the contemplation of the sufferings that his wife and children may endure by his death. But the effect of this contrivance is obviously very trifling. The prospect of the pain he shall suffer by continuing to live, affects him more than that of the pain it seems to him they will suffer upon his putting himself to death. He is more affected, then, with his own happiness than with theirs: the selfish predominate in his mind over the social affections. But the punishment of forfeiture, that is, the punishment of those relations and friends, can have the effect of preventing his design upon no other supposition than that the social affections are predominant in him over the selfish; that he is more touched by their suffering than by his own: but this is shown by his conduct not to be the case.

Nor is this all: it is not only nugatory as to its declared purpose, but in the highest degree cruel. When a family has thus been deprived of its head, the law at that moment steps in to deprive them of their means of subsistence.

The answer to this may be, that there is some species of property, which upon this occasion is not forfeited; that the law is not executed; that the jury elude it, by finding the suicide to be insane; and that, moreover, the king has the power of remitting the forfeiture, and of leaving to the widow and orphans the paternal property.

That such is the disposition of juries, and of the sovereign, is undeniable: but is that a reason for preserving in the penal code, a law that it is considered a duty invariably to elude? And by what means is it eluded? By perjury; by a declaration made by twelve men, upon oath, that the suicide was deranged in his mind, even in cases in which all the circumstances connected with the case exhibit marks of a deliberate and steady determination. The consequence is, that every suicide who dies

worth any property, is declared to be *non compos*. It is only the poorest of the poor, who, after making the same calculation that was made by Cato, and finding the balance on the same side, act accordingly, that are ever found to be in their senses, and their wives and children to be proper victims for the rigour of the law. The cure for these atrocious absurdities is perjury: perjury is the penance that, at the expense of religion, prevents an outrage on humanity.

In speaking of vicarious punishment, in order to avoid the confusion that might be produced by its liability to be ranked under this head, it may be necessary to mention a case belonging to the subject of international law — the case of reprisals in war. By a foreign nation, innocent persons are subjected to the most rigorous punishment — to confinement, and even to death, the real author of the offence not being in the jurisdiction of the foreign state. The exercise of this power is justified by necessity, as a means of preventing the infliction of injuries not warranted by the rules of war.

This is not, strictly speaking, vicarious punishment. The reprisals inflicted on his subjects operate upon the sovereign himself, either by the compassion felt for their suffering, or by the fear, if patiently submitted to, of alienating the affections of his people. It is more particularly useful between contending armies. Honour is the principal sanction of the laws of war, but the power of making reprisals is a very necessary coadjutor. In these cases, what humanity dictates is, that the sufferings inflicted on the innocent should be the least possible, consistent with the production of the desired effect; that they should be remissible, and that the utmost degree of publicity should be given to them, either by public declarations, or in any other more effectual manner.

One word more, and I have done. Instances have not been wanting in history, when an innocent person has offered to satiate the resentment of the person injured, and his self-devotion has been received in expiation. What satisfaction did the offended person reap from this sacrifice? — the degradation and shame belonging to it. The glory of the sufferer was the disgrace of the judge.

It may be asked, Is it possible to find any case in which one person may with propriety be allowed spontaneously to subject himself to the punishment designed for another — a son for his father — a husband for his wife — a friend for his friend? Such cases might perhaps be imagined; but it is useless to enter upon the consideration of such deviations from the ordinary course of things.

§ 5. *Transitive Punishment.*

It has already been observed, that it is the nature of all punishments, to affect not only those that are the immediate objects of them, but also those that are connected with the offender, in the way of sympathy, and their participation in his suffering is unavoidable. With these we have nothing to do. What we have to do with, are those that the legislator, by an express provision of the law, inflicts upon persons connected with the delinquent — punishments, the existence of which depends entirely upon the legislator, and which, as he has created, he can abrogate them. Thus, under the English law, with respect to property of a particular description, the innocent grandson, by the delinquency of his father, is made to lose the chance he had of succeeding to his grandfather, because no title can be deduced through the corrupt blood of the father: this is what, by English lawyers, is called *corruption of blood.**

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* As the subject is involved in a good deal of obscurity, it may be necessary, in order that the expediency of this mode of punishment may be understood, to state the nature of it a little more explicitly.

By a rule of positive law, founded on the most obvious dictate of utility, so obvious as to have been received with little variation over the whole world, a man is permitted to succeed, in case of death, to the property undisposed of by his next relation.

This general rule is, with a variety of caprice, with which the conceptions and expectations of the people can never keep pace, differently narrowed and modified by the different laws of various states. With us, it is not in every instance that a man is permitted to succeed to his relation. And the misery produced by the unintelligible exceptions to the general provision of the law is, in all cases, in proportion to the strength of the expectation that is thus disappointed.

Forfeiture is more penal in its consequences than *escheat*. By both forfeiture and escheat, an individual and his descendants are made to lose their chance of coming to the estate of him to whom they stood as next immediate descendants. But corruption of blood goes further. By corruption of blood, the party in question, and his descendants, are made to lose the chance they had of succeeding either to a remote ancestor, or to any collateral relation.

Offences by which the blood is said to be corrupted are styled, how different soever in their nature, by one common appellation, felonies. — Between my brother and me, the common ancestor is my father. If, then, my father commit a felony, the consequence is, I am prevented from succeeding, not only to whatever real property was my father's, but to whatever was my brother's also, or that of any one descended from him; and this because, in making out my title to the property in question, in virtue of my relationship to my brother, I must reckon through my father, although my father (such is the provision made by the law) could not himself have taken it. — Between my paternal uncle and me, the common ancestor is my grandfather. If, then, my father commit a felony, I lose the chance of succeeding, not only to whatever real

The strength of the argument lies in the metaphor: this cabalistic expression serves as an answer to all objections. The justice of the metaphor turns upon two suppositions:—

The one is, that where a man has committed a felony (stolen a horse, for instance,) his blood immediately undergoes a fermentation, and (according to the system of physiology in use upon this occasion,) becomes really corrupt.

The other is, that when a man's blood is in this state of putrescency, it becomes just and necessary to deprive his children not only of all real property, of which he was in the enjoyment, but of what might thereafter be derived through him.

The end of punishment is to restrain a man from delinquency. The question is, whether it be an advantageous way of endeavouring at this, to punish in any and what cases, in any and what mode, to any and what degree, his wife, his children, or other descendants; that is, with a direct intention to make them sufferers.

If a man can be prevented from running into delinquency, by means of punishment hung over the heads of persons thus connected with him, it is not, as in the cases above mentioned, because it is expected that they should have it in their power to restrain him, by any coercion, physical or mental, of their imposing: it is not that they are likely to have it in their power, by anything they can *do*. In the case of the wife, it is not very likely; in the case of children already born, it is still less likely; in the case of children not yet born, it is impossible. What is expected to work upon him, is the image of what they may be made to *suffer*. The punishment, then, upon them, may be, and it is expected will be, without any act of theirs, a punishment upon him. It will produce in him a pain of sympathy.

First, we will consider the case of the wife, where the punishment consists in being made to lose what is already in specific prospect: viz. The immoveable property in which she had her dower.

It has been doubted whether it were possible for a man to love another better than himself; that is, to be affected, not merely momentarily, but for a length of time together, more by the pains and pleasures of another than by his own. Some have denied the possibility; all will admit that it is extremely rare. Suppose it, then, to happen in one case out of five hundred; and, to do all possible honour to the marriage state, let us suppose that this person whom a man loves better than he does himself, is never any other than his wife. But it is not so many as half the number of men, of an age to commit crimes, that have wives. Nor is there above one in a hundred who has lands, of which a wife is endowed. Upon this calculation, there is not above one man in 50,000 of those that are liable to this mode of punishment, on whom it would operate in as great a degree as if laid on himself. In the remaining 49,999 instances, in order to produce the same effect, more punishment must be laid upon the innocent wife, than would need to be laid upon the offending husband. Let us suppose, for the purpose of the argument, that every man loves his wife half as much as he does himself: on this supposition, ten degrees or grains (or by what other name soever it shall be thought proper to call so many aliquot parts of punishment) must be laid upon the wife, in order to produce, the effect of five grains laid directly upon the husband. On this supposition, then in 49,999 cases out of 50,000, half the punishment that is laid on in this way, is laid on in waste.*

2. What has been said with regard to the wife, may, without any very considerable variation, be applied to the children. In this latter case, however, generally speaking, the affection is likely to be more uniform and certain, and consequently the contemplation of the suffering they may be exposed to more certainly efficacious, in restraining the commission of the act intended to be guarded against. The same method, making due allowance on this score, will therefore apply to this, as to the preceding case.

What follows from this, therefore, is, that till the whole stock of direct punishment be exhausted upon the offender himself, none ought in this way to be attempted to be applied through the medium of the innocent.

If there be any case in which forfeiture can be employed with advantage, it would be that of *rebellion*—rebellion, not treason; for treason is a name applied to a variety of offences that have nothing in common but their name. And if it were employed against the descendants of a rebel, it should not be in the way of transitive punishment, nor in the way of punishment at all, but as a measure of self-defence—of self-defence against the mischief that might be expected, not from the criminal, who is no more, but from his dependants. When the husband is engaged in rebellion, it is probable that the

property was his, but also to whatever was either my grandfather's or my uncle's. So also, if my grandfather commit a felony, I lose the chance of succeeding, not indeed to the property that was my father's, but, however, to whatever was either my grandfather's or my uncle's, or any descendant of my uncle's.

* It will not, it is hoped, be understood that any stress is meant to be laid upon the particular number here employed: the reader may put in numbers for himself: they are merely given as a specimen of the manner in which such an inquiry ought to be conducted.

affections of his wife* are enlisted on the same side. Is it certain? By no means. But, however, it is probable. Is it probable that so also are his children? Is it certain? By no means. All rebellions, and particularly the last Scotch rebellion, afford instances to the contrary. But, however, it is probable. What, then, should be done? Presume guilt, and make it require an effort to exempt the party from the consequences? No; but presume innocence, and make it require an effort on the part of the crown to afflict him. Let the crown be empowered, immediately upon the attainder of a rebel, to seize into its hands the possessions, real as well as personal, of his wife, his children, and his other descendants too; with a power to continue the seizure from year to year upon special mention of each person, in so many proclamations to be issued for that purpose: and this too, under whatever title such property may be held, without suffering the law, as it is now, to be turned into a dead letter, by expedients for giving to property such modifications as render it unforfeitable. This would be a remedy exactly analogous to the suspension of the *Habeas Corpus Act:* putting the near kindred of a convicted rebel upon the same footing, with respect to their fortunes, which by that act all men without distinction are put upon, with respect to their liberties. This would be a certain, not a casual safeguard, giving strength to the government, without bringing guiltless oppression upon the people.

State crimes, with treason at the head of them, may issue from various sources: from indigence, from resentment, from ambition; but in many instances they are crimes of conscience. By lawyers in this country, it is spoken of as one of those almost incredible abominations, at which nature shudders: like murder, not to be committed by any man, but one who has sold himself to the devil. They see not, or would not seem to see, that the character of rebel, or of loyalist, turns upon the accidents of war; that men may differ with the most perfect integrity, and with the purest intentions, about the title to the crown, or to such a branch of public power, as well as about a town, or a piece of land; and that it is only party prejudice that makes rebellion and wickedness synonymous. But in those difficult and distracted times, when right and duty are liable to be confounded, the Hydes, the Falklands, the Seldens, and the Hampdens, divide themselves: who can read the recesses of their hearts? Men enlist from pure motives in the worse, and from sordid in the better cause. Now, when conscience is the motive, it is always probable that the same conscience which governs the principal may govern the dependants, or in other words, the same that governs the husband and the father, may govern the wife whom he cherishes, and the children whom he educates. Rebellion, then, is a family offence.

That treason, however, which consists in secretly conspiring in a united nation with a foreign enemy, stands upon a very different footing. This is always among offences against conscience; it can scarcely arise even from personal resentment: it arises from the most sordid of all sources—lucre. Every one acknowledges the baseness of such a crime; and a man could scarcely be more detested by the public at large, than he would be if discovered by his own family. This is no more a family offence than robbery or murder are family offences. In this kind of offence, therefore, there is not the same reason for casting the family upon the mercy of the crown. Whatever the family suffers is endured without reason and in waste.

§ 6. *Disadvantages of this Mode of Punishment.*

1. From what has been said, except in the above case of rebellion, it will be pretty apparent that in point of *certainty* this mode of punishment is eminently deficient. In by far the greater number of cases in which the offence has been committed, this punishment cannot take place for want of a subject on which to operate. A man who has no wife or children, cannot be punished in the persons of his wife and children. Couple this circumstance with the cases in which the offender will have nothing to forfeit, and it will be found that the punishment will be inoperative in nine hundred and ninety-nine cases out of a thousand. Now a punishment that is good in one case only out of a thousand is good for nothing. Some other punishment, then, must be adopted in its room. This punishment must be as much as is enough in those cases, otherwise there had as good be none. Now then as that punishment serves in all other cases, why may it not in this one? If it be enough in those cases, it is, when added to the particular punishment in question, more than enough in this one. Now then, if it be more than enough, it is misery in waste. It is, therefore, for the most part useless, and whenever it is not useless, it is mischievous.

2. After this, it is saying little to observe, that in respect of *equability* it is not less defective, because, to a man who has no thought about his wife or children, or has taken a dislike to them, it is at least matter of indifference to him whatever may befall

* Those who have read Lord Clarendon's History, will remember what grievous complaints that historian, in speaking of the Duke of Albemarle, makes of the duke's presbyterian wife.

them; in this case, therefore, the punishment of them is so much clear waste.

3. In respect of *frugality*, it is in a very remarkable degree defective: the quantity of evil that it is susceptible of producing is altogether boundless. Consider the chain of domestic connexion, and calculate the number of descendants that a man may have; the suffering communicates from one to another, and destroys the peace of the most extensive families. To produce a direct punishment, which may be estimated as unity, indirect and mis-seated punishment must be created equal to ten, twenty, thirty, a hundred, or perhaps a thousand, &c.

4. It is no less deficient in point of *exemplarity*. What the delinquent himself suffers is known always by the sentence: it is in many cases visible in the execution. The woman or the child who is made to suffer for his crime, languishes in secret and unavailing misery.

5. The punishment thus withdrawn from its natural course, possesses not so much as the advantage of *popularity*; it is directly adverse to the general sentiments of sympathy and antipathy. When the delinquent himself is punished, the public vengeance is satiated, and receives no satisfaction from any ulterior punishment: if he be pursued beyond the tomb, and his innocent family be offered up as victims, feelings of pity are excited; an indistinct feeling accuses the laws of injustice, humanity declares itself against them, and on all sides the respect for the laws is weakened.

§ 7. *Collective Punishments.*

I now come to another case, of which examples are to be met with in the penal dispensations of most countries — that of *collective punishment*, or the punishment of large bodies of men for the delinquencies of a part of them. Under the English law, one instance is the punishment inflicted on a whole corporation for the delinquency of some of its members.

When this mode of punishment is justifiable, it is only on the score of necessity. Now, to prove this necessity, two matters of fact must be made to appear: one is, that the guilty could not be punished without the innocent; the other is, that the suffering of the innocent, when added to that of the guilty, will not, in the whole, compose a mass of evil more than equivalent to the benefit of the punishment.

Of these two matters of fact, the first is easy enough to be judged of; the latter must be left to vague conjecture.

Of the administering this mode of punishment, there are some remarkable instances, both by common law and by statute. The above principles will enable us to form a judgment of the propriety of those several proceedings.

By the common law, it is settled that the privileges of a municipal corporation may be forfeited for the misconduct of the corporators; those privileges which are indiscriminately beneficial to all the persons who are free of the corporation, for the delinquency of the majority of any general assembly of those who form the governing part of it. The power, however, of adjudging such a forfeiture has been very rarely exercised, and the insidious and unconstitutional use that was attempted to be made of it in the reign of Charles II. has cast a stigma on the general doctrine; so that it is not likely to be ever again carried into practice. Such a mode of punishment is plainly unnecessary and inexpedient. The particular delinquents in this way may always be ascertained, and that much more easily and infallibly than in the case of ordinary offences; their acts being, in the very essence of them, public and notorious.

Our own times have exhibited several instances in which punishment, either in reality or to appearance, has been inflicted on a body of men for the misbehaviour of a part of it. I will mention them in their order.

The first I shall mention is the case of the city of Edinburgh, which happened in 1736. A very numerous mob rose up in arms, seized the city guard, possessed themselves of the city gates, and in defiance of the public authorities, put to death a Captain *Porteous*, who lay under sentence of death, but had been reprieved. This outrage occasioned an act of Parliament to be made.* By this act, a particular punishment is inflicted upon the Lord Provost of the town, for the particular neglect he is there charged with: but besides this, a fine is laid on the corporation.

Of these punishments, that on the provost, we may observe, was *in propriam personam*. The fine on the corporation was a collective punishment, falling on as many persons as might find themselves in any shape prejudiced by such fine. Now, the ground of applying this latter punishment was not the absolute impracticability of applying any punishment of the proper kind at all. The provost, as we see, was punished for the negative offence of his neglect. And it appears from another act, which immediately follows that in question, that a number of persons were actually fugitives for the principal offence. By the second act, these fugitives, in case of their not surrendering within such a time, were to suffer death, as were also those who should conceal them. If, then, they never surrendered, they remained fugitives, and were punished by banishment. If they surrendered, the presumption was, that

* 10 Geo. II. c. 34.

they would be punished with the ordinary punishment for the offence of which they were guilty; this punishment, however, was not thought sufficient for so enormous and dangerous an outrage. As a supplement, operating in the way of *ex posto facto* law, this fine upon the corporation was thought of. Now, from such a punishment, considered in itself, it is not probable that any great effects could have been expected. It served, however, to point the moral sanction against the offence, and to help to express, as in the words of the act, the "highest detestation and abhorrence" of the criminal transaction.

In this case, as in that of rebellion, what may be presumed, even though the fact be not capable of being established by evidence, is, that there was a complicity of affection, in virtue of which all the inhabitants joined in endeavouring to protect the offenders from the visitation of the law.

The next statute I shall take notice of in this view is that for punishment of the corruption that prevailed in the borough of *New Shoreham.** A society, calling itself the Christian Society, consisting of a large majority of the electors, had formed itself, and subsisted for several years, for the purpose of selling the seats in Parliament for that borough. On this account, all who were members of that society were, by name, with great propriety, laid under a perpetual incapacitation. So much, considered as a punishment, was a punishment *in proprias personas.* But the proper light in which this measure ought to be considered seems not to have been that of a punishment; for in this light it seems hardly to be justified. If it were a punishment, it was an *ex post facto* punishment, which was the less necessary, as there was already a punishment of the same kind provided by the law; to wit, incapacitation, though it be but temporary. But in truth, by much the greatest part of the efficacy which it was expected to have, was built on another ground: on it, as a measure of anticipation; calculated to prevent an evil which, but for such remedy, it was visibly in the power, and as visibly in the intention, of the parties thus disabled to introduce; viz. a succession of representatives brought in, in this corrupt and unconstitutional way. It was therefore not punishment for an evil past and gone, but self-defence against an evil still impending. Now, the expense at which this benefit was purchased for the community, could not well be less in any instance than in this. The franchise of electorship, like any other branch of public power, is not an usufructuary possession, but a trust; an article of property which a man holds not for his own benefit alone, but for that of the whole community, of which he is himself but one. Those who are in possession of it find means, it is true, of deriving from it a personal benefit to themselves: but this is in direct repugnance to the interest of the community and the end of the institution; so that, with reference to the particular interest of the possessor, it may be truly said, it is of the less value to him the more conscientiously he discharges it. In truth, I see not why, with respect to the possessor himself, it ought to be looked upon as anything.

But the legislature went farther: besides incapacitating the electors there named, who were a majority, but not the whole, it went on and communicated the right of election to all the forty-shilling freeholders within a large district, of which the borough in question was but a part. In doing this, they lessened the right of the innocent burghers who remained.† And as to such part of it, the measure, if it be to be considered as a measure of punishment, must be allowed to have been a punishment *in alienas personas.* Considered in this light, it was not expedient, since it was not necessary; for the innocent not only could be, but actually were, distinguished from the guilty. But in whatever light it may appear, considered with reference to the particular persons subjected to that trifling disadvantage, as a measure of reformation it cannot be too highly praised. It stands as the pattern and ground-work of a great plan of constitutional improvement. ‡

* 11 Geo. III. c. 55.

† The punishment, if any, that was thus inflicted on the innocent burghers, consisted in the pain of apprehension that among the new electors would be found some, and perhaps a majority of the whole, who would make an improper use of the power of which they were made partakers.

‡ One thing let me be permitted to mention, which I think would have been an improvement, and would have done all that could be wanting to reconcile the measure to the strict principles of ordinary justice. A part of the electors stood in a meritorious light; they had either the merit to withstand, or the good fortune to escape, the temptation to which their co-electors yielded. Yet by the statute in question, the condition of this meritorious part, so far from being bettered, was rendered worse than it was before. There was a method by which this might, I think, have been prevented, without the least prejudice to the reforming part of the measure, and at the same time a signal encouragement have been held out to conscientious electors. The expedient was a simple one. It was but the adding to the number of votes which each of the sound voters should have under the new constitution, in such manner that the weight of each man's suffrage should bear the same proportion to that of the rest under the new constitution as it had done under the old one. The benefit thus reserved would in such case have told for more than it was in reality. The men, by being only not punished, would have seemed to be rewarded:

§ 8. *Random Punishment.*

Random punishment is the epithet that may be applied to mis-seated punishment, in those cases in which, without previous design, it has fallen upon the innocent by some caprice of the imagination taken up at the moment, when the occasion and the pretence has come for the infliction of it—not so much as even the wretched sort of pretence, which had place in the case of extravasated punishment, having place in the present case.

For the illustration of this modification of mis-seated punishment, we may again refer to the law of forfeiture, to that of deodands, and that of the exclusion put upon testimony, when, for the punishment of an inconjecturable number of innocent persons, through the sides of one delinquent, and by wounds of every imaginable breadth and depth and nature, the fact of his delinquency forms the pretence.

When a man who has a freehold interest in any lands commits an offence, part of the punishment for which is the forfeiture of such interest, and then sells, or mortgages, or in any other manner disposes of that interest, and is afterwards attainted for the offence, the law takes it back from those in whose favour it was disposed of, without deigning to inquire whether they knew anything of his having committed it. An individual commits a secret murder, and sells you an estate: twenty years after he is discovered, prosecuted, attainted. The king, that is, somebody who assumes his name, seizes the estate. If you have devised it, charged it, sold it—if, besides yours, it has passed through fifty other hands, it makes no difference. If it was your wife who had been murdered, it would make no difference: you would lose your wife by the crime, and your fortune by the punishment.

It might be supposed that the law looked upon itself as driven to this expedient by the apprehension of fraudulent conveyances; but this is not the case. In the case of moveable and other personal property, it recognises the practicability of distinguishing fraudulent conveyances from fair: it establishes the latter; it vacates only the former. Yet it is obvious that immoveable property is much less obnoxious to such a fraud than moveable.

With all this the author of the Commentaries is perfectly well satisfied. "This *may* be hard," he says, "upon such as have unwarily engaged with the offender." But what of that? "the cruelty and reproach," continues he, "must lie on the part, *not* of the law, but of the criminal, who has thus knowingly and dishonestly involved others in his own calamities." To one who can reason in this manner, nothing that is established can come amiss. So long as there is the least particle of guilt, not only in him who is punished but in any one else, no law by which punishment is inflicted can be cruel, no law deserving of reproach.

Another instance of random punishment is that of Deodands.

You are a farmer. You employ a waggon. You send your son to drive it: he slips down, is run over and killed. The king, or somebody in his name, is to have your waggon. This is the consolation which the law of England gives you for your loss.

This idea might be improved upon. Let it be a law that when a man happens to break his neck, the people of his parish shall draw lots who shall be hanged to keep him company. The punishment would be greater, but the reason for punishment would be the same.

If, instead of a waggon, it had been a ship that was moving to your son's death, it would make no difference: though the ship were laden with the treasure of the Indies, it would make no difference; the ship and its lading would be the king's.

The source from whence this institution flowed is pretty generally known: but it is not perhaps so generally observed that the institution is not a just consequence, even from the ideas then received. It was established, it is not easy to say how early, but however, in the days of Catholicism. In those days, as soon as a man's soul had left its body, it used to go to a place called Purgatory, there to be broiled for 20,000 years. Now in this life some souls love music, others not. But in that post life which was then to come, all souls were fond of it alike. Luther himself, who ought to know, is positive of it.* Not that all music was to their taste: it was only a particular kind of music, such as only priests know how to sing. But it was not reasonable that priests should sing unless they were paid for it; for the labourer is worthy of his hire. Now when a man died thus suddenly, it was not probable that he should have made any provision by

they certainly would have been rewarded in point of honour. If a religious attention were constantly to be paid to private subsisting interests, which being temporary may always be provided for at a small expense, reformation would be delivered from much of that opposition which it is at present apt to meet with. One may say to reformers, *serve the whole, but forget not that each member is a part of it.*

Strictly speaking, it is true that the electors have no reason to complain, except as above, upon the occasion of an extension of the elective franchise. The dilemma is clear: if you do not mean to discharge it conscientiously, you ought not to be trusted with it; if you do, it is of no benefit to you, and you can have no ground to complain of its being taken from you for the benefit of the State.

* See Sir J. Hawkins' History of Music.

his will for paying them. Therefore it was necessary that somebody else should pay them. So far was in order. But why resort to any other fund than the man's own property? Was he the poorer for having died a violent death, than if he had died a natural one? or for dying by the effect of a thing in motion, than if he had died by a fall from a thing at rest? And if, after all, he had nothing to pay for himself, could not the parish, or the hundred, or the next abbey, have paid for him?

I would not swear but the sages who invented this notable institution might think to do a spite to the thing, the waggon, the ship, or whatever it was, by making it forfeited; as the Athenians exterminated a stone that struck a man and killed him, that is, carried it out of their country and threw it into another. Many a public institution, which the lawyer admires with humble deference, has had no better ground.

The next instance of random punishment which I would give, consists in the exclusion put upon testimony.

I could wish to give the reader a precise list of the offences to which this punishment is annexed, but this I find to be impossible. Every principle delivered on this subject teems with contradiction. The enumeration which is sometimes made includes nearly every principal crime, comprehending treason, perjury, forgery, and *such like crimes*, theft, all crimes considered infamous, and felony. As to felony, this is spoken of as if it were a particular species of crime: the case is, that felony is a collection of crimes as heterogeneous as can be conceived, and which have nothing in common between them but the accidental circumstance of being punished with the same punishment. Crimes of mere resentment, or malicious mischief, are by scores of statutes made felonies. Homicide intentional, in the heat of passion; or unintentional, by an unlucky blow, is felony: rape is felony: crimes of lewdness are felonies. What is not felony? The evidence of persons excommunicated is not received: the reason annexed by some has been, that these individuals, not being under the influence of religion, cannot be believed on their oath. By others it has been generally said, that those who converse with excommunicated persons are excommunicated with them, and consequently they cannot be admitted to receive any questions from a court of justice. Of this nature are the reasons frequently given for existing laws in the books of English jurisprudence.

Without longer stopping, therefore, to ascertain in what cases testimony is refused, let us proceed to examine if this be a proper punishment; that is to say, if there be any case in which, because a man has committed a crime, his testimony ought to be rejected.

The only reason there can be for rejecting a witness is this, that it appears more probable that after every expedient that can be put in practice to get the truth of him, the account he gives of the matter would rather mislead those who are to judge, than set them right. I say mislead the judges; I do not say be a false one: for whether it be true or not, is what to the purposes of justice is a matter of indifference. The point is for them to (be enabled to) form such a notion of the fact in dispute as shall prove a true one: by what means they come at it is no matter. He would commit perjury indeed; but that is quite another evil, and an evil for which there is another and more proper remedy than that of prematurely repelling his evidence. This want of veracity, therefore, is no objection to him, unless he has the faculty of maintaining to the last, such a degree of consistency and plausibility as shall enable him to conceal it.

As to want of veracity, it should be considered that the greatest liar in the universe rarely swerves from truth (I mean what to him seems truth) in one instance out a hundred. The natural bent of all mankind is to speak truth: it requires the force of some particular interest, real or imaginary, to overbalance that propensity. Some men, it is true, are made to deviate from it by very slender motives, but nobody tells a lie absolutely without a motive.

Now then, do but suppose him absolutely without any interest to give a false account, and the most abandoned criminal that ever was upon the earth might be trusted to as safely as the man of the most consummate virtue. Where, then, lies the difference? In this, that the profligate man may easily be made to fancy he has such an interest in telling falsehood, as shall preponderate over the interest he fancies he has in speaking truth; the easier, the more profligate he is: the man of virtue, not without difficulty: the more difficulty, the more he is confirmed in virtue.

Now a motive to speak truth, in cases where he is called upon by law to give his testimony, is what every man has, and unless he be insane, must conceive himself to have: he has it from the political sanction, in the penalties which the law denounces against falsehood in such cases: he has it from the moral sanction, in the infamy annexed by men in general to such a conduct: he has it from the religious sanction, unless he be an atheist, and except in as far as dispensations or absolutions may intervene to take it off.

The interest which a man may have, on the other hand, to speak falsehood in such a case, may be distinguished into a natural interest, and an artificial one. What I mean by a natural interest need not be explained. I call

that an artificial interest, which he may derive in the way of reward, by the express act of him who has some natural interest. If you are at law for an estate, you have a natural interest in my telling any story, true or false, that may serve to establish your title. If you give me a reward for telling such a story, I have an artificial one, which is raised up in me by you.

Now, whether a man have a natural interest or no in the fate of a contest, is in general pretty easy to be known; it is a question of itself: and if determined in the affirmative, the tendency of the law is, to reject a man as a witness, upon that distinct ground, and without regard to his probity or improbity.

The question is here concerning an artificial interest, the existence, or non-existence of which does not so readily lie within proof; but the lights that are to be had, are to be drawn from such circumstances as may appear to affect the description of a man's general character. Thus much only is certain, that in proportion as a man is more or less confirmed in virtue, the less or the more likely is any artificial motive which may be presented to him, to preponderate over the motives he has to speak truth, and be effective, so as to determine him to speak falsehood.

It is here proper to be upon our guard against a vulgar error. Men of narrow experience, of hasty judgment, and of small reflection — in a word, the bulk of mankind, have in a manner but two classes in which to stow a man, in respect of merit: they know but of two characters, the good man and the bad man. If, then, they happen to view a man's conduct, in any instance, in a favourable light, up he goes among the good men; if in an unfavourable, down he goes among the bad men; and they fix a great gulph between the two. If their opinion, with respect to either come to change, as they have no intermediate stages, he is removed from his station, with the same violence as he was at first placed in it. But men of observation and cool reflection, who have had patience and sagacity to make a narrow search into human nature, learn to correct the errors of this indolent and hasty system; they know that, in the scale of merit, men's characters rise one above the other, by infinite and imperceptible degrees; and, at the same time, that the highest is distant from the lowest, by a much less space than is commonly imagined.

Those who admit the truth of these observations will see how precarious and ill-contrived a means the law takes to come at truth, by giving into the error above noticed; by making one class of men which it will hear, and another of men whom it will not suffer to be heard in any case, or on any account. In a word, (for this is the sum of the argument) they will see, that while the law enjoins the exclusion of any class of persons, at all events, in order to avoid a *small* degree of *possible* inconvenience, it embraces a *great* degree of *certain* inconvenience.

It is manifest, that the smaller the number of persons is whom it guards against, in proportion to those from whom it remains still exposed to danger, the less is the advantage gained by it. Whom, then, does it guard against? a few hundreds, perhaps, in a nation. And from whom does it remain exposed to danger? the rest of the nation. For who is it from whom it does not stand exposed, in any case, to a danger of this kind, I declare is more than I can imagine. If there be any man now living that can lay his hand upon his heart, and solemnly declare, that in no instance, trivial or important, has he ever departed from the rigid line of truth, upon the prospect of advantage, he has either more hypocrisy than I would wish to impute to any man, or more virtue than I can persuade myself to exist in any man. The only person about whom I can be sure, and who yet would not willingly yield the palm of integrity to any one that lives, nor barter any atom of it for any other honour the world has to bestow, is far, I know, from the thoughts of making any such pretensions.

There are cases in which the best man alive could scarcely be credited without danger: there are cases in abundance, in which the worst man alive might be believed with safety. Such are all those, where the circumstances of the case afford the witness no natural motive to speak falsely; and the circumstances of the parties are such as can afford him no artificial one. I am, for instance, as bad a man as, for the supposition's sake, you would choose to have me. I happen to see one man beating another, who afterwards seeks his remedy at law against the oppressor, and calls me as a witness, and the only witness. Now it has happened, that I have been convicted of perjury, over and over again, as many times as you please: I would swear my father's life away for a penny. But the parties are, both of them, miserably poor; they neither of them have a penny to tempt me with. What, then, is there to induce me to give a false account of the matter? nothing. What, then, is the danger of admitting me? none at all. What the consequence of rejecting me? the triumph of oppression. Now, in a case like this, there is nothing singular nor improbable; a thousand such might a man figure to himself with ease.

Having proceeded thus far, I will venture to advance this position, that a man's testimony ought not to be rejected at all events, even for the crime of perjury: if not for perjury, it will follow, *à fortiori*, not for any

other crime. I will just offer a farther consideration or two, in support of this opinion; I will then give a short sketch of the evil consequences that result from such an absolute rejection; I will, thirdly, offer an expedient, which, I think, would answer every good purpose of it; and, lastly, I will state the different degrees of reason there may be for extending the incapacity to the different crimes that may be proposed.

Now, then, let the crime of which the witness has been convicted be that of perjury. He has, however, no natural interest to speak false: if he have, that forms another ground of disability, which is not here in question. If, then, he have an artificial interest, it is the party that must give it him. But in this case, the party must be a suborner: unless, then, he stand already convicted of subornation on a former occasion, there can be no ground for repelling the perjured witness, without peremptorily attributing to another man, whose character stands unimpeached, a crime of a similar complexion — a supposition which no rule, either of law or reason, seems to warrant.

I cannot help thinking, that these rules of peremptory incompetency would never have been laid down, had those who first started them gone deliberately and circumspectly to work, and carefully examined the consequences on both sides of the question. The evil consequences of the rule, they seemed scarcely to have cast their eyes on. They seem to have gone to work, as if they had witnesses enough in every case to pick and choose out of; on which supposition, certainly, they would do well to discard the worst, to pick out and retain none but the best, and such as should be proof against all exception. All this was mighty well, provided there was no danger on the other side. But the danger on the other side is terrible. It is a truth, however, which I can scarce help looking upon as very obvious, and certainly it is an important one, that to mark any man out as disabled from witnessing at all events, is to grant all men a license to do to him and before him all manner of mischief whatsoever. Now, as to what may be done *to* him, that indeed may be taken as so much punishment of the proper kind, though it would be a strange, loose, and inconsiderate method of laying a man under proscription. *

But as to mischief that may be done to others in his presence, or which, in any other way, others may suffer for want of his evidence, — the case of Pendoch and Mackendar† may serve as an example. By the statute which is called the Statute of Frauds and Perjuries, three witnesses are necessary to a will of land. In this case, the will had three witnesses, as it ought to have. Two stood unimpeached; but it was found out that the other, once upon a time, had been convicted of petty larceny, and been whipt. This was before the attestation — how long, it does not appear. The suit was commenced five years afterwards. This man being deemed a bad witness (and as such, not to be heard,) there wanted the requisite number, and the man, in whose favour the will had been made, lost the estate. One may imagine the shock to a person, who thought he had all the security for his estate which the law could give him; one may imagine the surprise and indignation the testator, were he to arise out of his grave, must feel, at seeing his disposition vacated by an incident, which common prudence could never have prompted him to guard against, unless, by looking in a man's face, he could have told that once in his life he had been guilty of a trifling breach of honesty, and been whipt for it.

The limits of this design will not permit me to expatiate upon this subject any further, by suggesting cases of like mischief that are liable to happen, or collecting such as are known actually to have happened. This general sketch of them being given, the intelligent reader will readily excuse me from entering into the detail.

Because a woman has been guilty of perjury, or any other offence which has rendered her testimony inadmissible, it is just that she should be punished; but is it just, is it proper, that she should be delivered over to the lust of every man to whom her beauty may become an object of desire? If the law were known to be, in this respect, as it is said to be, the nation would become a scene of lust, cruelty, and rapine; but it happens here, as it will sometimes happen in other instances, one mischief operates as a palliative to another: the extreme absurdity of the law is veiled by men's utter ignorance of its contents.

Let us turn back and look on the other side. What, then, would be the mischief of admitting the testimony of a man thus stigmatized? I see none: none at least that can for a moment stand in competition with the mischief on the other side. "But the person so stigmatized does not deserve to be believed!" Does he not? why am I to think so? because you say so? No; but because men in general will say so too! And will they then? Yes, surely will they. I do believe it, and therefore it is I say there is no danger. Let him be known for what he is, and a jury will be under the strongest bias not to believe him. Their prejudice will bear strong against him; nor will any thing less than the strongest degree of probability, and the most perfect consistency in the whole

* It would be worse, in some respects, than forfeiture of reputation.

† 2 Wils. 18.

narration, be sufficient to induce them to believe it. I see not what it is that should justify the extreme distrust which judges have shown of juries in establishing this rule; especially as, in case of a conviction of an innocent person, which is the greatest danger the case is open to, it is so entirely in the power of the judge to save the convict. The general prejudice of mankind, as we have before observed, leads them to exaggeration in the judgment they pronounce of the general tenor of a man's character from a single action; in particular, to spread the stain that a single act of delinquency brings upon a man's character, farther than, according to reason, it ought to go. It is from having been the dupes, as I take it, of this prejudice, that even judges — the ancient judges who first laid down the law upon this point, first broached this rule. It may always be expected to work, at least as strongly as it ought to work, upon juries taken from the body of the people.

Were it then abolished, the conduct of juries then, you think, would nearly be the same as if it subsisted? I think it probable. What advantage, then, would you gain by the abolition? This great one: the chance that a delinquent might have of impunity in such a case, would no longer be visible upon paper; he would no longer see a formal licence given him, by the letter of the law, to commit all manner of wickedness in presence of an object circumstanced like the party in question: if a guilty person were acquitted upon that ground, it would appear as if, upon the whole, the story was not credible, and that, in fact, no such crime was committed as was charged; not that, having been committed, it was suffered to go unpunished. This, then, is the advantage; and I think a more conclusive one cannot well be required to justify any institution.

All that prudence requires in such a case is, that the character of the witness, that is to say, the offence of which he was formerly guilty, should be known, that those who are called upon to weigh his testimony may be able to judge how far he is to be believed.

Suppose the party has been guilty of perjury: this crime most particularly affects his credibility. There is a great difference to be observed in the quality of the crime when committed in self-defence, in one's own cause, and when committed on the subornation of a stranger, and in an attack upon the life of an innocent person. Such distinctions are most important, and readily offer themselves to those who consult the dictates of common sense, and do not suffer their eyes to be blinded by the mist of technical jargon.

The time which has elapsed since the offence was committed, is a consideration of importance. A man in his youth, at fourteen or fifteen years of age, was led to take a false oath, and was convicted: he becomes reformed; during thirty or forty years he maintains an unimpeachable character. His reformation is of no consequence: the record of his forgotten crime is dragged from the dust with which it had been covered; in accordance with this rule, his testimony must be rejected: upon every principle of common sense and of utility, it would have been equally admissible with any other.

In the prosecution of criminals, the testimony of those who have a manifest interest in their condemnation is not refused, whether that interest be pecuniary, or arising from a desire of vengeance. Such testimony is, however, received with distrust and caution. This is well; — be equally distrustful of a witness, whose previous conduct has rendered him suspected; but hear him, and examine whether the circumstances of his crime are of a nature to affect his credibility on each particular occasion.

§ 8. *Cause of the Frequency of Mis-seated Punishment.*

As to the cause of the abuse thus made of punishment, it lies not very deep below the surface. It lies partly in the strength of the self-regarding and dissocial passions; partly in the weakness of the intellectual faculties on the part of legislators, and of judges acting in the place of legislators.

It lies more particularly in the strength of the dissocial passions, and in that one of the false principles, rivals to the principle of utility, viz. in the principle of sympathy and antipathy, in the production of which the dissocial affections, influenced and swollen to that pitch in which they assume the name of passion, have so large a share.

Urged on by the dissocial passion of antipathy, misguided by the principle of sympathy and antipathy, men in power have punished, because they hated; taking as a sufficient warrant for the infliction of the sufferings which they proposed to themselves to inflict, the existence of that hatred, of which, as towards the person in question, in consideration of the act in question, the existence was demonstrated to them by their own feelings.

That which was the cause, became naturally the measure of what was done: punishing, because of his hate, it was, to the man with the strong hand, matter of course to punish in proportion to his hate.

A lot of punishment, in which so much suffering, and no more, would fall upon the innocent, as, consistently with the application of punishment to the guilty, was unavoidable, sufficed not for the gratification of his hate: of that satisfaction which consists in his contemplation of another's suffering, he would have as much more as was to be had; and

frequently there was scarce a price, so as it was at the expense of others only that that price was made up, and not any part at his expense — there was scarce a price at which he was not content to purchase it.

BOOK V.

OF COMPLEX PUNISHMENTS.

CHAPTER I.

INCONVENIENCES OF COMPLEX PUNISHMENTS.

WE have before observed, that a penal act is not simple in its effects, does not produce one single evil; that it produces many masses of evil at once. A punishment, considered as an act, may be simple — considered in its effects, complex.

A man is imprisoned: here is a simple punishment, as respects the act on the part of the judge, but as respects the individual, the evils resulting from it may be very various, affecting, in different ways, his fortune, his person, his reputation, and his condition in life.

A simple punishment is that which is produced by a single act of punishment; a compound punishment is that which requires more than one operation. The punishment for an offence may include imprisonment, a fine, a mark of infamy, &c.: if all these are announced by the law — if each of these punishments is expressed by a clear and familiar term, the punishment, though compound or complex, may be a good one.

Improper complex punishments are those of which the integral parts are not known, those which include evils that the law does not announce, which are only expressed by obscure and enigmatical names, which do not exhibit their penal nature in clear characters, and which are only understood by lawyers: of this kind are transportation, felony with and without benefit of clergy, præmunire, outlawry, excommunication, incompetency as a witness, and many others.

Everything which is uncertain, everything which is obscure, offends against the first condition in framing a good law.

The inconveniences attached to complex punishments, when thus defined, are very great, but they may be explained in a few words: the legislator knows not what he does; the subject knows not what is meant by the punishment threatened. It becomes impossible for the legislator to do what is proper in each case; he therefore does either too much or too little: every obscure expression veils from his eyes the nature of the punishment or punishments he employs; he strikes blindfolded, and scatters suffering at hazard. The jury and the judges who witness the inconveniences of the law in each particular case, allow themselves to employ all possible means to avoid them; they usurp the authority of the legislator, and perjury becomes the habitual palliative of his injustice or improvidence.

If the law is executed, what happens? — the judge, in inflicting one useful punishment, is obliged to inflict a multitude of useless punishments — punishments of which the offenders had only an imperfect idea, which produce mischief in pure waste: oftentimes the mischief spreads over persons who are entire strangers to the offence, and the consequences are such, that the legislator would have trembled had he foreseen them.

We have already spoken of incompetency as a witness: we shall now direct our attention to the other punishments above named.

CHAPTER II.

OF TRANSPORTATION.

AMONG the advantages which the North Americans have derived from their independence, there is one which cannot fail to strike every man who has any feeling of national pride: it has saved them from the humiliating obligation of receiving every year an importation of the refuse of the British population; of serving as an outlet for the prisons of the mother country, whereby the morals of their rising people were exposed to injury, by a mixture with all possible kinds of depravity. North America, after having been exposed to this scourge for upwards of a century, no longer serves as a receptacle for these living nuisances: but can any limits be assigned to the moral effects that may have been produced by this early inoculation of vice?

I shall have occasion again to recur to this important topic, when, in speaking of the colony at New South Wales, and of the population now forming there, I shall point out the inconveniences which result from sending thither these periodical harvests of malefactors.

The present object is to show that the system of transportation, as now managed, is essentially different from what it was under the old system, and that, with the change of scene, the punishment itself has in many respects been materially altered: in some respects for the better; in many others for the worse.

Under the old system of transportation to America, power being given for that purpose by Parliament, the convicts destined for transportation were made over by the government to a contractor, who, for the profit to be made by selling their services for the penal

term to a master in America, engaged to convey them to the scene of banishment. To banishment — the banishment prescribed by law—was thus added, in all cases in which the individuals were not able to purchase their liberty, the ulterior and perfectly distinct punishment of *bondage*. But wherever it happened, that, through the medium of a friend or otherwise, the convict could bid more for himself than would be given for his services by a stranger, he was set at liberty in the first port at which he arrived. The punishment was limited, as respected him, to simple banishment: the individual was therefore punished with bondage, rather for his poverty than for the crime he had committed. Thus the most culpable—those who had committed great crimes, and who had contrived to secure the profits of their crimes, were least punished. The minor thieves, novices, and inexperienced malefactors, who had not secured their plunder, bore the double chain of banishment and slavery.

Under the system of transportation to Botany Bay, the whole expense is borne by the government. The governor of the colony always retains an authority over the convicts, and acts as their goaler; he provides them with habitations, employment, and food; they are placed under his sole controul; he may employ them either in public or private works. Hard labour, with some few exceptions, is the lot of all; exemption from it cannot be purchased by money. In this respect, the inequality above spoken of has been greatly corrected, and the punishment having been rendered more certain, is consequently more efficacious.

Transportation to America was attended with another inconvenience: that country presented too many facilities for the return of the convicts. A great number of them availed themselves of these opportunities, and returned to the mother country to exercise their fatal talents with superior skill — some when their terms of banishment had expired, many before that period had arrived. As to the latter, the facility of return was one among the disadvantages attending transportation to America: as to the others, in the eyes at least of those who conceive that the commission of one offence ought not to operate as a forfeiture of all title to justice, this facility of return could not fail to appear as an advantage. On the other hand, the distance of Botany Bay afforded a better security against illegal returns: being situated at the antipodes of Britain, with scarcely any existing commerce when first selected, the return of any of the convict population was an event hardly to be looked for. Whilst, however, a security thus effectual was provided against the return of convicts whose terms had not expired, an equally effectual barrier was raised against the return of those whose terms had expired; and thus, at one stroke, all inferior degrees of this punishment were, in nearly all cases, indiscriminately converted into the highest. Whether such an effect was intended or not, is is needless to inquire; but that such was the effect, is indisputable.

Transportation, under the present system, is a complex punishment, composed, first, of banishment, and second, of hard labour: — banishment, a punishment eminently defective, particularly in respect of its inequality; hard labour, a punishment in itself eminently salutary, but, when connected with banishment, and, as in this case, carried on under every possible disadvantage, failing altogether to produce any beneficial effects.

In order to show how completely adverse the system of transportation to New South Wales is to the attainment of the several objects or ends of penal justice, it will be necessary shortly to recapitulate what those ends or objects are, and then to show, from the accounts which have been furnished respecting the state of the convict population of that colony, in what degree these ends or objects have been respectively fulfilled.

I. The main object or end of penal justice is *example*—prevention of similar offences, on the part of individuals at large, by the influence exerted by the punishment on the minds of bystanders, from the apprehension of similar suffering in case of similar delinquency. Of this property, transportation is almost destitute: this is its radical and incurable defect. The punishment is not seen by—it is hidden, abstracted from, the eyes of those upon whom it is desirable it should operate in the way of example. Punishments which are inflicted at the antipodes — in a country of which so little is known, and with which communication was so rare, could make only a transient impression upon the minds of people in this country. "The people," says an author who had deeply considered the effects of imagination, "the mass of the people make no distinction between an interval of a thousand years and of a thousand miles." It has been already said, but cannot be too often repeated and enforced, that the utility and effect of example is not determined by the amount of suffering the delinquent is made to endure, but by the amount of apparent suffering he undergoes. It is that part of his suffering which strikes the eyes of beholders, and which fastens on their imagination, which leaves an impression strong enough to counteract the temptation to offend. However deficient they may be in respect of exemplarity, the sufferings inflicted on persons condemned to this mode of punishment are not the less substantial and severe: confinement for an unlimited time in prisons or

in the hulks — a voyage of from six to eight months, itself a state of constant sufferance from the crowded state of the ships and the necessary restraint to which convicts are subjected — the dangers of the sea — exposure to contagious diseases, which are often attended with the most fatal consequences. Such are some of the concomitants of the system of punishment in question, which serves as the introduction to a state of banishment and bondage in a distant region, in which the means of subsistence have been extremely precarious, and where, by delay in the arrival of a vessel, the whole colony has been repeatedly exposed to all the horrors of famine. It is scarcely possible to conceive a situation more deplorable than that to which the convicts thus transported have been exposed. Constant hard labour, and exposure to depredation, (if they have anything of which they can be plundered,) and occasional starvation, without the means of mending their condition while they remain there, without the hope of ever leaving it: such has been the condition to which persons banished to this colony, for periods that in pretence were limited, have found themselves exposed. Here, then, is punishment, partly intentional, partly accidental, dealt out with the most lavish profuseness; but compared with its effects in the way of example, it may be considered as so much gratuitous suffering, inflicted without end or object. A sea of oblivion flows between that country and this. It is not the hundredth, nor even the thousandth part of this mass of punishment, that makes any impression on the people of the mother country — upon that class of people who are most likely to commit offences, who neither read nor reflect, and whose feelings are capable of being excited, not by the description, but by the exhibition of sufferings. The system of transportation has, moreover, this additional disadvantage, which not merely neutralizes its effects in the discouragement of offences, but renders it, in many cases, an instrument of positive encouragement to the commission of offences: A variety of pleasing illusions will, in the minds of many persons, be connected with the idea of transportation, which will not merely supplant all painful reflections, but will be replaced by the most agreeable anticipations.* It requires but a very superficial knowledge of mankind in general, and more especially of the youth of this country, not to perceive that a distant voyage, a new country, numerous associates, hope of future independence, and agreeable adventures, will be sufficiently captivating to withdraw the mind from the contemplation of the painful part of the picture, and to give uncontrouled sway to ideas of licentious fascinating enjoyment.

II. The second end or object of punishment is *reformation* — prevention of similar offences on the part of the *particular individual* punished in each instance, by taking from him the *will* to commit the like in future. Under this head, what has been done in the colony of New South Wales? By referring to facts, we shall find, not only that in this respect it has been hitherto radically defective, but that, from the nature of things, it ever must remain so.

Connected with the system of transportation to the American colonies, there were two circumstances highly conducive to the reformation of the convicts transported: their admission, upon landing in the country, into families composed of men of thrift and probity; their separation from each other.

When a master in America had engaged a convict in his service, all the members of the family became interested in watching his behaviour. Working under the eye of his master, he had neither the inducements nor the means of giving loose to his vicious propensities. The state of dependence in which he was placed gave him an obvious interest in cultivating the good-will of those under whose authority he found himself placed; and if he still retained any principle of honesty, it could scarcely fail to be invigorated and developed under the encouragement that it would find in the society with which he was surrounded.

Thus it was in America. How is it in New South Wales? To receive the convicts upon their landing, a set of brutes in human shape, a species of society beyond comparison less favourable to colonization than utter solitude — few other inhabitants, but the very profligates themselves, who are sent by thousands from British goals, to be turned loose to mix with one another in this desert—together with the few taskmasters who superintend their work in the open wilderness, and the military men who are sent out with them, in large but still unequal numbers, to help to keep within bounds the mischief they would otherwise be sure to occupy themselves with when thus let loose. Here, then, there were not, as in America, any families to receive the convicts, any means of constantly separating them from each other; no constant and steady inspection. *Field-husbandry* is, under this system, the principal employment; hence general dispersion—field-husbandry carried on by individuals or heads of families, each occupying a distinct dwelling, the interior of which is altogether

* Not many years ago, two young men, the one about 14, the other about 16 years of age, were condemned, for a petty theft, to be transported. Upon hearing this unlooked for sentence, the youngest began to cry. "Coward," said his companion, with an air of triumph, "who ever cried because he had to set out upon the grand tour?" This fact was mentioned to me by a gentleman who was witness to this scene, and was much struck with it.

out of the habitual reach of every *inspecting* eye. It is true that the police officers occasionally go their rounds to maintain order and keep the convicts to their work: but what is to be expected from a system of inspection at long intervals, and which is as disgusting to the inspectors as to the inspected? Can this be regarded as a sufficient check against sloth, gaming, drunkenness, incontinence, profaneness, quarrelling, improvidence, and the absence of all honourable feeling? Immediately the back of the inspector is turned, all the disorder which his actual presence had suspended, is renewed. It may easily be imagined how completely all controul may be set at defiance by a set of men who have regularly organized among themselves a system of complicity, and who make it a matter of triumph and agreeable pastime to assist each other in escaping from inspection.

On this subject, the public have long been in the possession of a very valuable document: it is a complete history of the first sixteen years since the establishment of this colony, which, in respect of fidelity, possesses every title to confidence, and which states the events as they happened, in the form of a journal, accompanied with the necessary details. What gives the work the highest claim to confidence is, that the historiographer is also the panegyrist, the professed panegyrist of the establishment—a character which, when accompanied, as in this instance, with that candour and those internal marks of veracity, with which it is so rare for it to be accompanied, renders the testimony, in this point of view, more than doubly valuable.

The general impression left by a perusal of this work is one of sadness and disgust: it is a history of human nature in its most degraded and depraved state—an unmixed detail of crimes and punishments;—the men constantly engaged in conspiracies against the government, always forming plans for deceiving and disobeying their taskmasters, forming among themselves a society of refractory and wily profligates—a society of wolves and foxes;—the women, everywhere else the best part of humanity, prove in New South Wales a remarkable exception to this general rule. The late chief magistrate says, "The women are worse than the men, and are generally found at the bottom of every infamous transaction that is committed in the colony."* His work abounds with passages to the same effect. Of such materials is it that the foundation of the colony is formed. From such a stock, and under such auspices, is it that the rising generation is to be produced.

The historian has not confined himself to vague imputations of general immorality and profligacy, but has particularized the acts of delinquency on which those imputations rest. The crimes that are committed at New South Wales, in spite of the alertness of the government and the summary administration of justice, surpass, in the skill and cunning with which they are managed, every thing that has been ever witnessed in this country. Almost every page of his work contains the description of offences against persons, or against property, either of individuals or of the public. Gaming and drunkenness produce perpetual quarrels, which usually end in murder. The crime of incendiarism is there practised to an extent altogether unexampled in any other country. Churches, prisons, public and private property, are all alike subjected to the devouring element, without any regard to the extent of the loss that may be occasioned, or the number of lives that may be sacrificed. "When the public gaol was set on fire," says the historian, "it will be read with horror, that at the time there were confined within the walls twenty prisoners, most of whom were loaded with irons, and who with difficulty were snatched from the flames. Feeling for each other was never imputed to these miscreants; and yet, if several were engaged in the commission of a crime, they have seldom been known to betray their companions in iniquity."† The bond of connexion is not sympathy for each other, but antipathy to the government, the common enemy. For the natives they manifest as little feeling, as towards each other. Spite of the rigour of the law, these European savages are guilty of the most wanton acts of barbarity towards the natives of the country; instead of cultivating a good understanding with them, which might have been attended with many advantages, they have converted them into the most determined enemies.

So far from exhibiting any symptoms of reformation, the longer they are subjected to the discipline of the colony, the worse they become. Whatever may be the degree of viciousness ascribed by the historian to the convicts during the continuance of their term, they appear in his history to be in a certain degree honest, sober, and orderly, in comparison with those whose term is expired, and who afterwards become settlers: they then become the prime instigators of all the crimes committed in the colony, and constitute the principal source of the embarrassment to which the government is subjected.

In proof of this assertion, the historian furnishes a most satisfactory piece of evidence. During the first five years subsequent to the establishment of the colony, and when there were no convicts whose terms had expired, the conduct of the convicts was in general orderly, and such as to give hopes of a disposition to reformation: but in proportion as, by the expiration of their respective terms,

* Collins, vol. ii. p. 218.

† Collins, vol. ii. p. 197.

the number of the emancipated colonists increased, the most ungovernable licentiousness was introduced: not only those that were thus recently emancipated, as if to make up for the time they had lost, abandoned themselves to every species of excess, but they encouraged the natural viciousness of those who still remained in a state of bondage. — The convicts finding among these independent settlers, who were their old companions and associates, receivers of stolen property, and protectors from the punishments denounced by the law, always ready to receive them in their retreat from justice, and to conceal them from detection, became more insolent and refractory, anxiously waiting for the time when they also would be entitled to assume this stage of savage independence.

What possible means can be devised to neutralize this perpetually increasing influx of vice? All the expedients that have hitherto been employed have proved completely fruitless, and there would be no difficulty in showing that so they must ever be. Instruction, moral and religious, seems almost altogether vain: the very nature of the population bids defiance to the establishment of an effectual system of police, or to an uniform administration of the laws: *rewards* were found as inefficient as good-will in procuring evidence: the enormous consumption of spirituous liquors, the principal cause of all the disorders in the colony, has, from local circumstances, hitherto been found altogether irrepressible. Under each of these heads a few remarks may suffice.

With respect to religious instruction, little could be expected from two or three chaplains for a colony divided into eight or ten stations, each to appearance at too great a distance from the rest to send auditors to any other. To minds so disposed as those of the convicts, of what advantage was the attendance on divine service for one or two hours on one day in the week? And with what profit could religious instruction be expected to be received by men who were "*made* (as the historian expresses it*) to attend divine service?" To rid themselves of the occasional listlessness they were thus *made* to endure, the church was got rid of by an incendiary plot. To punish them (if by accident another building fit for the purpose had not been already in existence) they were to have been employed on the Sunday in the erecting another building for the purpose.† To work on Sunday they might be made; but will they ever be made to lend an attentive ear and a docile heart to authorative instruction? Even the women, says the historian, were extremely remiss in their attendance on divine service, and were never at a loss for mendacious pretences for excusing themselves. In short, instead of being observed as a day dedicated to religious duties, Sunday appears in that colony to have been distinguished only by the riot and debauchery with which it was marked—those who did not attend divine service, taking advantage of the absence of those who did, to plunder their dwellings and destroy their crops.

It has just been seen with how very sparing a hand religious instruction for the Protestant part of the establishment was supplied. For the spiritual instruction of the Catholic part of the colony, which, from the large importations made from Ireland, must now have become very numerous, it does not appear that any provision whatever was made. It is true, that in one of the importations of convicts from Ireland, a priest of the Catholic persuasion, whose offence was sedition, was comprised.‡ If, instead of a seditious clergyman, would not the expense have been well bestowed in sending out a loyalist clergyman of the same religious persuasion?‖

As to the police, it is necessarily in an extreme degree debilitated by the corrupt state of the subordinate class of public functionaries. In a population that warranted the utmost distrust on the part of the government, it was found necessary to restrain the free intercourse between the several parts of the colony. *All persons*, officers excepted, were forbidden to travel from one district of the settlement to another without passports. These regulations proved, however, altogether nugatory: the constables whose duty it was to inspect these passports,§ either from fear or corruption, neglected to do their duty. whilst, as has been already mentioned, a most effectual bar to the preservation of any well-regulated system of police, was found in those convicts whose terms had expired, and who were ever ready to give protection and assistance to the criminal and turbulent.

With regard to all classes of offences committed in this colony, justice was paralyzed by a principle which ensured impunity, and which it seems impossible to eradicate. With the historian, who was also Judge Advocate, it is a matter of perpetual complaint, that it

* Collins, vol. ii. p. 122. † Ibid p. 129

‡ Collins, vol. ii. p. 293.

‖ There is a passage in Collins (II. p. 51,) highly characteristic of the light in which the securing the means of attendance, and thence attendance itself on divine worship, on the part of the convicts, was regarded by the constituted authorities. A church-clock having been brought to the settlement in "The Reliance," and no building fit for its reception having been since erected, preparations were now making for constructing a tower fit for the purpose, *to which might be added a church*, whenever at a future day the increase of labourers might enable the governor to direct such an edifice to be built.

§ Collins, vol. ii. p. 139.

was scarcely possible to convict an offender who was not taken in the very act of committing an offence. Evidence was on almost all occasions altogether as inaccessible as if there had been a combination and tacit agreement among the majority of the inhabitants of the colony to paralyze the arm of justice, by a refusal to bear testimony. He speaks of five murders in one year* (1796,) which were left unpunished, notwithstanding the strong presumptions which indicated the guilty parties, because the necessary witnesses would not come forward, even though extraordinary rewards were offered. One such fact is sufficient: it is superfluous to cite others of the same nature.

The most prominent cause of this state of abandoned profligacy, is the universal and immoderate passion for spirituous liquors: it is the exciting cause which leads to every species of vice — gaming, dissoluteness, depredation, and murder. Servants, soldiers, labourers, women, the youth of both sexes, prisoners and their gaolers, are all alike corrupted by it: it was carried to such a pitch, that numbers of the settlers were in the practice of selling the whole of their crops, as soon as they were gathered, in order to purchase their favourite liquor. The attempts made from time to time by the government, to check this practice, have proved altogether unavailing. The policy of the government upon this point appears not to have been quite steady: sometimes it has allowed the trade in spirituous liquors, at other times it has been forbidden. But whatever may be the policy of the government, experience shows, that from the diffusiveness of the population, as well as from other causes, no precautions within its power will ever diminish the quantity of this liquid poison consumed in any part of the colony. The greater the population, and the more distant the stations from the seat of government, the more easy will it be to carry on private distilleries, and to prevent them from being detected. And even if the supply thus produced were unequal to the demand, it would be impossible to prevent smuggling on an extent of coast which the whole navy of England would be unequal to guard. If it were found impossible to restrain this evil when the colony was confined to a single station, and a single harbour, can any better success be looked for now that the settlements are spread wide over the face of the country, when there are numerous settlers constantly employed in the manufacture of this article, and every ship that arrives is provided with an abundant supply, the sale of it being more certain and more profitable than that of any other commodity.

* Collins, vol. ii. p. 4.

Such has been the state of the convict population of this colony — past reformation none — future reformation still more hopeless. We have perhaps dwelt too long upon this part of the subject: fortunately the topics which remain may be compressed into a narrower compass.

III. The third object or end of punishment is *incapacitation* — taking from the delinquent the power of committing the same crimes.

Transportation accomplishes this object, with relation to a *certain place*. The convict, whilst in New South Wales, cannot commit crimes in England; the distance between the two places in a considerable degree precludes his illegal return, and this is the sum of the advantage.

Whilst the convict is at Botany Bay, he need not be dreaded in England: but his character remains the same, and the crimes which are mischievous in the mother country are mischievous in the colony; we ought not, therefore, to attribute to this punishment an advantage which it does not possess. That an inhabitant of London should rejoice in the removal to a distance of a dangerous character, is easily comprehended: his particular interest is touched. But a punishment ought not to meet the approbation of a legislature, which, without diminishing the number of crimes committed, only changes the place of their commission.

The security, great as it may appear to be, against returns both legal and illegal, has not been so effectual as might have been expected. The number of convicts who left the colony between the years 1790 and 1796, the accounts of which are scattered over the whole of Collins' work, amount in the whole to 166, of which 89 consisted of those whose terms had expired, and 76 of those whose terms had not expired. This is, however, very far from being the total amount of either description of those that had quitted the colony, with or without permission. Escapes are in various parts of the work mentioned as being made in clusters, and the numbers composing each cluster not being stated, could not be carried to the above account.

The number of escapes will, most probably, increase as commerce extends, and as the convicts become more numerous, and consequently possess greater facilities for escaping.

IV. The fourth end or object of punishment is the making *compensation* or *satisfaction* to the party injured.

On this head, there is but one word to be said: — The system of transportation is altogether destitute of this quality. It is true, that this objection has no weight, except in comparison with a system of punishment in which provision is made, out of the labour of

the offender, for compensation to the party injured.

V. The fifth end or object proper to be kept in view in a system of penal legislation, is the collateral object of *economy*.

If it could be said of the system in question, that it possessed all the several qualities desirable in a plan of penal legislation, its being attended with a certain greater degree of expense would not afford a very serious objection to it; but in this case, this system, the most defective in itself, is at the same time carried on at a most enormous expense.

Upon this subject, the 28th Report of the Committee of Finance contains the most accurate and minute information. From that report it appears, that the total expense incurred during the ten or eleven first years of the establishment, ending in the year 1798, amounted to £1,037,000, which sum being divided by the number of convicts, will be found to amount to about £46 a-head. A possible reduction is in that report contemplated, which might in time cut down the expense to about £37 per head. To this expense, however, must be added the value of each man's labour, since, if not considered as thrown away, the value ought to be added to the account of expense.

Consider New South Wales as a large manufacturing establishment: the master manufacturer, on balancing his accounts, would find himself *minus* £46 for every workman that he employed.

What enhances the expense of this manufacturing establishment beyond what it would be in the mother country, are—1. The expense incurred in conveying the workmen to a distance of between two and three thousand leagues; 2. The maintenance of the civil establishment, consisting of governors, judges, inspectors, police officers, &c.; 3. The maintenance of a military establishment, the sole object of which is to preserve subordination and peace in the colony; 4. The wide separation of the workmen, their untrustworthiness, their profligacy, favoured by the local circumstances of the colony, and the trifling value of the labour that can be extracted by compulsion from men who have no interest in the produce of their labour; 5. The high price of all the tools and raw materials employed in carrying on the manufactory, which are brought from Europe at the risk and expense of a long voyage.

If it be impossible to find a single clerk in Manchester or Liverpool, who would not have taken all these circumstances into his consideration, in making such a calculation as that in question, and if, after, or without having made it, there is not one man of common sense who would have undertaken such a scheme, a necessary conclusion is, that the arithmetic of those who risk their own property, is very different from that of those who speculate at the expense of the public.

In addition to the evils above enumerated, as attending the system of transportation to New South Wales, the punishment thus inflicted is liable to be attended with various species of aggravation, making so much clear addition to the punishment pronounced by the legislator.

When a punishment is denounced by the legislature, it ought to be selected as the one best adapted to the nature of the offence: his will ought to be, that the punishment inflicted should be such as he has directed; he regards it as sufficient; his will is, that it should not be made either more lenient or more severe: he reckons that a certain punishment, when inflicted, produces a given effect, but that another punishment, if by accident coupled with the principal one, whether from negligence or interest on the part of subordinates, exceeding the intention of the law, is so much injustice, and being nugatory in the way of example, produces so much uncompensated evil.

The punishment of transportation, which, according to the intention of the legislator, is designed as a comparatively lenient punishment, and is rarely directed to exceed a term of from seven to fourteen years, under the system in question is, in point of fact, frequently converted into capital punishment. What is the more to be lamented is, that this monstrous aggravation will, in general, be found to fall almost exclusively upon the least robust and least noxious class of offenders — those who, by their sensibility, former habits of life, sex and age, are least able to contend against the terrible visitation to which they are exposed during the course of a long and perilous voyage. Upon this subject the facts are as authentic as they are lamentable.

In a period of above eight years and a half, viz. from the 8th of May 1787, to the 31st December 1795, of five thousand one hundred and ninety-six embarked, five hundred and twenty-two perished in the course of the voyage; nor is this all, the accounts being incomplete. Out of twenty-eight vessels, in twenty-three of which the mortality just spoken of is stated to have taken place, there are five in respect of which the number of deaths is not mentioned.*

A voyage, however long it may be, does not necessarily shorten human existence. Captain Cook went round the world, and returned without the loss of a single man. It necessarily follows, therefore, that a voyage which

* The mortality attendant upon these first voyages to New South Wales appears greatly to have originated in negligence. Cargoes of convicts have in many latter instances been carried out without a single death occurring.

decimates those that are sent upon it, must be attended with some very peculiar circumstances. In the present case, it is very clear that the mortality that thus prevailed arose partly from the state of the convicts, partly from the discipline to which they were subjected. Allow them to come on deck, everything is to be apprehended from their turbulent dispositions: confine them in the hold, and they contract the most dangerous diseases. If the merchant, who contracts for their transportation, or the captain of the ship that is employed by him, happen to be unfeeling and rapacious, the provisions are scanty and of a bad quality. If a single prisoner happen to bring with him the seeds of an infectious disorder, the contagion spreads over the whole ship. A ship *(The Hillsborough)* which, in the year 1799, was employed in the conveyance of convicts, out of a population of 300 lost 101.* It was not, says Colonel Collins, a neglect of any of the requisite precautions, but the gaol fever, which had been introduced by one of the prisoners, that caused this dreadful ravage.

Whatever may be the precautions employed, by any single accident or act of negligence, death, under its most terrific forms, is at all times liable to be introduced into these floating prisons, which have to traverse half the surface of the globe, with daily accumulating causes of destruction within them, before the diseased and dying can be separated from those who, having escaped infection, will have to drag out a debilitated existence in a state of bondage and exile.

Can the intention of the legislator be recognised in these accumulated aggravations to the punishment denounced? Can he be said to be aware of what he is doing, when he denounces a punishment, the infliction of which is withdrawn altogether from his controul — which is subjected to a multiplicity of accidents — the nature of which is different from what it is pronounced to be — and in its execution bears scarce any resemblance to what he had the intention of inflicting? Justice, of which the most sacred attributes are certainty and precision—which ought to weigh with the most scrupulous nicety the evils which it distributes—becomes, under the system in question, a sort of lottery, the pains of which fall into the hands of those that are least deserving of them. Translate this complication of chances, and see what the result will be: "I sentence you," says the judge, "but to what I know not — perhaps to storm and shipwreck — perhaps to infectious disorders — perhaps to famine — perhaps to be massacred by savages — perhaps to be devoured by wild beasts. Away — take your chance—perish or prosper—suffer or enjoy: I rid myself of the sight of you: the ship that bears you away saves me from witnessing your sufferings — I shall give myself no more trouble about you."

But it may perhaps be said, that however deficient in a penal view, New South Wales possesses great political advantages: it is an infant colony; the population will by degrees increase; the successively rising generations will become more enlightened and more moral; and after the lapse of a certain number of centuries, it will become a dependent settlement, of the highest political importance.

The first answer to this is, if it be thought to require any, that of all the expedients that could have been devised for founding a new colony in this or in any other place, the most expensive and the most hopeless was the sending out, as the embryo stock, a set of men of stigmatized character and dissolute habits of life. If there be any one situation more than another that requires patience, sobriety, industry, fortitude, intelligence, it is that of a set of colonists transported to a distance from their native country, constantly exposed to all sorts of privations, who have everything to create, and who, in a newly-formed establishment, have to conciliate a set of savage and ferocious barbarians, justly dreading an invasion on their lives and property. Even an old-established and well-organized community would be exposed to destruction, from an infusion of vicious and profligate malefactors, if effectual remedies were not employed to repress them: such characters are destitute of all qualities, both moral and physical, that are essential in the establishing a colony, or that would enable them to subdue the obstacles opposed by nature in its rude and uncultivated state.

Where colonization has succeeded, the character of the infant population has been far different. The founders of the most successful colonies have consisted of a set of benevolent and pacific *Quakers* — of men of religious scruples, who have transported themselves to another hemisphere, in order that they might enjoy undisturbed liberty of conscience — of poor and honest labourers accustomed to frugal and industrious habits.†

* Collins, vol. ii. p. 222.

† That New South Wales has, since these papers were written, become a flourishing colony, is owing not so much to convict transportation, but to the admission of free settlers. The evils above pointed out continue to exist, but their influence is lessened by the infusion of honest and industrious settlers.

The following quotation confirms the reasoning of Mr. Bentham, and shows that the greater portion of the evils he points out continue unabated. — *Ed.*

"If convicts are still to be transported hither, the only chance of their reformation consists in scattering them widely over the country, and giving them pastoral habits. Convict transpor-

CHAPTER III.

PANOPTICON PENITENTIARY.

THE plans of Mr. Bentham upon this subject are already before the public: for the purpose of the present work, it will be only necessarily shortly to explain the three fundamental ideas which he lays down: —

I. *A Circular, or Polygonal Building*, with cells on each story in the circumference; in the centre, a lodge for the inspector, from which he may see all the prisoners, without being himself seen, and from whence he may issue all his directions, without being obliged to quit his post.

II. *Management by Contract.* — The contractor undertaking the whole concern at a certain price for each prisoner, reserving to himself the disposal of all the profit which may arise from their labours, the species of which is left to his choice.

Under this system, the interest of the governor is, as far as possible, identified with his duty. The more orderly and industrious the prisoners, the greater the amount of his profits. He will, therefore, teach them the most profitable trades, and give them such portion of the profits as shall excite them to labour. He unites in himself the characters of magistrate, inspector, head of a manufactory and of a family, and is urged on by the strongest motives faithfully to discharge all these duties.

III. *Responsibility of the Manager.* — He is bound to assure the lives of his prisoners. A calculation is made of the average number of deaths in the year, among the mixed multitude committed to his care, and a certain sum is allowed to him for each; but at the end of the year, he is required to pay a similar sum for every one lost by death or escape. He is therefore constituted the assurer of the lives and safe custody of his prisoners; but to assure their lives, is at the same time to secure the multitude of cares and attentions, on which their health and well-being depend.

Publicity is the effectual preservative against abuses. Under the present system, prisons are covered with an impenetrable veil: the Panopticon, on the contrary, would be, so to speak, transparent — accessible, at all hours, to properly authorized magistrates — accessible to everybody, at properly regulated hours, or days. The spectator, introduced into the central lodge, would behold the whole of the interior, and would be a witness to the detention of the prisoners, and a judge of their condition.

Some individuals, pretending to a high degree of sensibility, have considered this *continual inspection*, which constitutes the peculiar merit of Mr. Bentham's plan, as objectionable. It has appeared to them as a restraint more terrible than any other tyranny: they have depicted an establishment of this kind as a place of torment. In so doing, these men of sensibility have forgotten the state of most other prisons, in which the prisoners, heaped together, can enjoy tranquillity neither day nor night. They forget, that under this system of continual inspection, a greater degree of liberty and ease can be allowed — that chains and shackles may be suppressed — that the prisoners may be allowed to associate in small companies — that all quarrels, tumults, and noise, bitter sources of vexation, will be prevented — that the prisoners will be protected against the caprices of their gaolers, and the brutality of their companions; whilst those frequent and cruel instances of neglect which have occurred, will be prevented by the facility of appeal which will be afforded to the principal authority. These real advantages are overlooked by a fantastic sensibility which never reasons.

Let us suppose a prison established upon this plan; and then observe in what manner it contributes to the several ends of punishment: —

FIRST END — *Example.*

It would be placed in the neighbourhood of the metropolis, where the greatest number of persons are collected together, and especially of those who require to be reminded, by penal exhibitions, of the consequences of crime. The appearance of the building, the singularity of its shape, the walls and ditches by which it would be surrounded, the guards stationed at its gates, would all excite ideas of restraint and punishment; whilst the faci-

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tation is at best a bad system of colonization; and Governor Macquarrie, by his preference of the convict to the free, made it worse for the plantation, and totally inoperative as the penalty of felony, or the penitentiary of vice.

"The evils and expense of the transportation system would certainly be lessened by placing the convicts more in the service of farming and grazing settlers, out of the reach of the temptations and evil communications of large towns, the establishment of which was too much the policy of the late Governor. The salutary life of a shepherd or a stockman, would gradually soften the heart of the most hardened convict; but instead of this, Governor Macquarrie's system was to keep them congregated in barracks, and employed, at a ration of a pound and a half of meat and the same quantity of flour per diem, upon showy public buildings. Of wretches possessed of no better means of reformation than these, it could not be expected that industrious colonists should ever be made. When their period of transportation expired, or was remitted by favour, they would therefore take their grant of land and allowances for settling, and sell them the next hour for spirits."—*Journal of an Excursion across the Blue Mountains of New South Wales*, edited by Baron Field, p. 457. Lond. 1825.

lity which would be given to admission would scarcely fail to attract a multitude of visitors. And what would they see? — a set of persons deprived of liberty which they have misused — compelled to engage in labour, which was formerly their aversion — and restrained from riot and intemperance, in which they formerly delighted; the whole of them clothed in a particular dress, indicating the infamy of their crimes. What scene could be more instructive to the great proportion of the spectators? What a source of conversation, of allusion, of domestic instruction! How naturally would the aspect of this prison lead to a comparison between the labour of the free man and the prisoner — between the enjoyments of the innocent, and the privations of the criminal! And, at the same time, the *real* punishment would be less than the apparent: — the spectators, who would have only a momentary view of this doleful spectacle, would not perceive all the circumstances which would effectively soften the rigours of this prison. The punishment would be visible, and the imagination would exaggerate its amount; its relaxations would be out of sight; no portion of the suffering inflicted would be lost. The greater number even of the prisoners, being taken from the class of unfortunate and suffering individuals, would be in a state of comfort; whilst *ennui*, the scourge of ordinary prisons, would be banished.

Second Object — *Reformation.*

Idleness, intemperance, and vicious connexions, are the three principal causes of corruption among the poor. When habits of this nature have become to such a degree inveterate, as to surmount the tutelary motives, and to lead to the commission of crimes, no hope of reformation can be entertained but by a new course of education — an education that shall place the patient in a situation in which he will find it impossible to gratify his vicious propensities, and where every surrounding object will tend to give birth to habits and inclinations of a nature altogether opposite. The principal instrument which can be employed on this occasion is perpetual superintendence. Delinquents are a peculiar race of beings, who require unremitted inspection. Their weakness consists in yielding to the seductions of the passing moment. Their minds are weak and disordered, and though their disease is neither so clearly marked nor so incurable as that of idiots and lunatics, like these they require to be kept under restraints, and they cannot, without danger, be left to themselves.

Under the safeguard of this continual inspection, without which success is not to be expected, the penitentiary house described includes all the causes which are calculated to destroy the seeds of vice, and to rear those of virtue.

1. *Labour.* — It is admitted that constraint, instead of inspiring a taste for labour, is calculated to augment the aversion to it. It must, however, be recollected that, in this case, labour is the only resource against ennui — that being imposed upon all, it will be encouraged by example, and rendered more agreeable by being carried on in the company of others; it will be followed by immediate reward, and the individual being allowed a share in the profits, it will lose the character of servitude, by his being rendered, in some measure, a partner in the concern. Those who formerly understood no lucrative business, will, in this new course of education, obtain new faculties and new enjoyments; and when they shall be set free, will have learned a trade, the profits of which are greater than those of fraud and rapine.

2. *Temperance.* — We have already had occasion to show that nearly all the crimes committed at Botany Bay either originate or are increased by the use of spirituous liquors, and that it is impossible to prevent their use. Here the evil is arrested in its source: it will not be possible to smuggle in a drop of this poison; transgressions will therefore be impossible. Man yields to necessity: difficulties may stimulate his desires, but an absolute impossibility of satisfying them destroys them, when they are not supported by long established habits. There is much humanity in a strict rule, which prevents not only faults and chastisements, but temptations also.

3. *Separation into Classes.* — The Panopticon is the only practicable plan which admits of the prisoners being divided into little societies, in such manner as to separate those whose vicious propensities are most contagious. These associations can hardly fail to afford opportunities for the performance of reciprocal services, for the exercise of the affections, and the formation of habits favourable to reformation. The relation of master and scholar will gradually be formed among them; opportunities will thus be given for bestowing rewards for instruction — for exciting emulation in learning, and the creation of a sentiment of honour and self-esteem, which will be among the first fruits of application. Ideas of improvement and lawful gains will, by degrees, supplant those of licentiousness and fraudulent acquisition. All these advantages arise out of the very nature of the establishment.

Why should not unmarried prisoners be allowed to intermarry? It would operate as a powerful spur to those who aimed at attaining this reward, which should only be bestowed on account of orderly conduct and industry.

These little societies present an additional

security, arising from their mutual responsibility. It is both just and natural to say to them, "You live together, you act together; you were able to have prevented this crime, and if you have not so done, you are accomplices in it." Thus the prisoners would be converted into guardians and inspectors of each other. Each cell would be interested in the good conduct of every one of its members. If any one of them should be distinguished for its good order, some distinction might be bestowed upon it, which should be visible to all. By such means, a feeling of honour might be excited even in the abode of ignominy.

4. *Instruction.* — Indigence and ignorance are the parents of crime. The instruction of those prisoners who are not too old to learn, confers upon them many benefits at once: it affords great assistance in changing the habits of the mind, and elevating them, in their own estimation, from the class of beings who are degraded on account of the inferiority of their education. Different studies may usefully fill up the intervals of time, when mechanical operations are suspended—both prudence and humanity dictating the occupation of those intervals, instead of abandoning to themselves minds to whom idleness is a burthen difficult to bear. But the object is much more important, especially with regard to young offenders, who form the largest proportion of the whole. The prison should be their school, in which they should learn those habits, which should prevent their ever entering it again.

The services of religion ought to be rendered attractive, in order that they may be efficacious. They may be performed in the centre of the building, without the prisoners quitting their cells. The central lodge may be opened for the admission of the public; the worship adapted to the nature of the establishment may be accompanied with solemn music, to add to its solemnity. The chaplain engaged in its performance would not be a stranger to the prisoners: his instructions should be adapted to the wants of those to whom they are addressed: he would be known to them as their daily benefactor, who watches over the progress of their amendment, who is the interpreter of their wishes, and their witness before their superiors. As their protector and instructor, as a friend who consoles and who enlightens them, he would unite all the titles which can render him an object of respect and affection. How many sensible and virtuous men would seek a situation which presents, to a religious mind, opportunities for conquests more interesting than the savage regions of Africa and Canada!

There is, at all times, great reason for distrusting the reformation of criminals. Experience too often justifies the maxim of the poet,

"L'honneur est comme une île escarpée et sans bords: On n'y peut plus rentrer dès qu'on en est dehors."

But those who are most distrustful and incredulous of good, must acknowledge at least that there is a great difference to be made in this respect, on account of the age of the delinquents and the nature of their offences. Youth may be moulded like soft wax, whilst advanced age will not yield to new impressions: many crimes are not deeply rooted in the heart, but spring up there from seduction, example, and above all, indigence and hunger. Some are sudden acts of vengeance, which do not imply habitual perversity. These distinctions are just, and not controverted. It must also be admitted, that the plan we have described presents the most efficacious means for the amendment of those who have preserved some remains of honest principle.

THIRD OBJECT — *Suppression of Power to injure.*

Whatever may be its effects in producing internal reformation and correcting the will, the Panopticon unites all the conditions requisite for the prevention of the commission of new offences.

Under this head, the prisoners may be considered at two periods — the period of their imprisonment; the period posterior to their liberation.

During the first, suppose them as wicked as you will, what crimes can they commit whilst under uninterrupted inspection — divided by cells at all times sufficiently strong to resist a revolt — unable to unite or to conspire without being seen—responsible the one for the other — deprived of all communication with the exterior—deprived of all intoxicating liquors (those stimulants to dangerous enterprises) — and in the hand of a governor who could immediately isolate the dangerous individual? The simple enumeration of these circumstances inspires a feeling of perfect security. When we recall the picture of Botany Bay, the contrast becomes as striking as it can be rendered.

The prevention of crimes on the part of delinquent prisoners is also in proportion to the difficulty of their escape; and what system affords in this respect a security comparable to that of the Panopticon?

With respect to discharged prisoners, the only absolute guarantee is in their reformation.

Independently of this happy effect, which may be expected in this plan more than upon any other, the liberated prisoners would, for the most part, have acquired, by the savings made for them out of their part of the profit of their labour, a stock which will secure them from the immediate temptations of want, and give them time to avail themselves

of those resources of industry, which they have acquired during their captivity.

But this is not all. I have reserved for this chapter the mention of an ingenious plan, which the author of the Panopticon has proposed as a supplement to this scheme of punishment. He has paid particular attention to the dangerous and critical situation of discharged prisoners, when re-entering the world after a detention, perhaps, for many years: they have no friends to receive them—without reputation to recommend them — with characters open to suspicion; and many times, perhaps, in the first transports of joy for recovered liberty, as little qualified to use it with discretion, as the slaves who have broken their fetters. By these considerations, the author was led to the idea of an auxiliary establishment, into which the discharged prisoners might be admitted when they left the Panopticon, and be allowed to continue for a longer or shorter period, according to the nature of their crimes, and their previous conduct. The details of the plan would be foreign to the present subject. It must suffice to say, that in this privileged asylum they would have different degrees of liberty, the choice of their occupations, the entire profit of their labour, with fixed and moderate charges for their board and lodging, and the right of going and returning, on leaving a certain sum as a security; they would wear no prisoner's uniform, no humiliating badge. The greater number, in the first moment of their embarrassment, whilst they have no certain object in view, would themselves choose a retreat so suitable to their situation. This transient sojourn, this noviciate, would serve to conduct them by degrees to their entire liberty; it would be an intermediate state between captivity and independence, and afford a proof of the sincerity of their amendment; it would afford a just precaution against individuals in whom an immediate and absolute confidence could not be reposed without danger.

Fourth Object — *Compensation to the party injured.*

In most systems of jurisprudence, when a delinquent has been corporally punished, justice is thought to have been satisfied: it is not in general required that he should make compensation to the party injured.

It is true, that in the greater number of cases, compensation could not be exacted of him: delinquents are commonly of the poorer class,—*ex nihilo, nihil fit.*

If they are idle during their imprisonment, far from being able to render satisfaction, they constitute a charge upon society.

If they are condemned to public works, these works, rarely sufficiently lucrative to cover the expense of undertaking them, cannot furnish any surplus.

It is only in a plan like the Panopticon, in which, by the combination of labour and economy in the administration, it is possible to obtain a profit sufficiently great to offer at least some portion of indemnity to the parties injured. Mr. Bentham had made engagements upon this head in his contract with the Ministers. In the prisons of Philadelphia, they levy upon the portion of profit allowed to the prisoner, the expenses of his detection and prosecution. One step more, and they will grant indemnity to the parties injured.

Fifth Object — *Economy.*

To say that, of two plans of equal merit, the most economical ought to be preferred, is to advance a proposition which must appear trivial to all those who do not know that the expense of an enterprise is often its secret recommendation, and that economy is a virtue against which there exists a general conspiracy.

In the contract for the Panopticon, one thousand convicts were to have cost the state £12 per head, without including the expense of constructing the prison, which was estimated at £12,000, and the ground at £10,000; upon which, reckoning interest at £5 per cent., £1: 10s. ought to be added for the annual expense of each, making the total expense of each individual, £13: 10s. per annum.

It should be recollected, that at this time the average expense of each convict in New Holland, was £37 per annum, nearly three times as much. Besides, the author of the panopticon assured —

1. An indemnity to the parties injured.
2. He allowed a fourth part of the profits of their labour to the prisoners.
3. He was to make a future reduction in the expense to government.

A new undertaking, like that of the Panopticon, intended to embrace many branches of industry, would not yield its greatest profits at first; it would be expensive at first, and only become profitable by degrees. Time would be required for establishing its manufactories, and for the cultivation of the grounds applicable to the support of the establishment; for forming its pupils, and regulating their habits; in a word, bringing to perfection the whole economy of its system. Mr. Bentham had expressly stipulated for the publicity of his accounts; and if the advantages, as was expected, had become considerable, the government would have been enabled to take advantage of them in obtaining more favourable terms in its subsequent contracts. Mr. Bentham reckoned, from the calculations he had made, and respecting which he had consulted experienced persons, that after a short time the convicts would cost the government nothing.

Laying aside everything hypothetical, it is clear that a penitentiary at home ought to be less expensive than a colonial establishment. The reasons for this opinion have been given when speaking of transportation to Botany Bay.

I have shown the excellence of this plan with reference to all the ends of punishment: it remains to be observed, that it attains its object without producing any of those collateral inconveniences which abound in colonial transportation. There is no prolonged sojourn in the hulks — none of the dangers of a long sea voyage — no promiscuous intercourse of prisoners — no contagious sickness — no danger of famine — no warfare with the savage natives — no rebellions — no abuse of power by the persons in authority — in short, an entire absence of the accidental and accessory evils, of which every page of the history of the penal colony affords an example. What an immense economy in the employment of punishment! It will no longer be dissipated and lost upon barren rocks, and amid far distant deserts: it will always preserve the nature of legal punishment—of just and merited suffering, without being converted into evils of every description, which excite only pity. The whole of it will be seen: it will all be useful; it will not depend upon chance; its execution will not be abandoned to subordinate and mercenary hands; the legislator who appoints it, may incessantly watch over its administration.

The success which may be obtained from a well-regulated penitentiary is no longer a simple probability founded upon reasoning. The trial has been made; it has succeeded even beyond what has been hoped. The quakers of Pensylvania have the honour of making the attempt: it is one of the most beauteous ornaments of the crown of humanity which distinguishes them among all other societies of christians. They had for a long time to struggle with the ordinary obstacles of prejudice and indifference on the part of the public—the routine of the tribunals, and the repulsive incredulity of frigid reasoners.

The penitentiary house at Philadelphia is described, not only in the official reports of its governor, but also in the accounts of two disinterested observers, whose agreement is the more striking, as they brought to its examination neither the same prejudices nor views. The one was a Frenchman, the Duke de Liancourt, well acquainted with the arrangements of hospitals and prisons; — the other an Englishman, Captain Turnbull, more occupied with maritime affairs than politics or jurisprudence.

Both of them represent the interior of this prison as a scene of peaceful and regular activity. Hauteur and rigour are not displayed on the part of the gaolers, nor insolence nor baseness on the part of the prisoners. Their language is gentle; a harsh expression is not permitted. If any fault is committed, the punishment is solitary confinement, and the registration of the fault in a book, in which every one has an account opened, as well for good as for evil. Health, decency, and propriety, reign throughout. There is nothing to offend the most delicate of the senses; no noise, no boisterous songs nor tumultuous conversation. Every one, engaged with his own work, fears to interrupt the labours of others. This external peace is maintained as favourable to reflection and labour, and well calculated to prevent that state of irritation so common elsewhere among prisoners and their keepers.

"I was surprised," said Captain Turnbull, "at finding a woman exercising the functions of gaoler. This circumstance having excited my curiosity, I was informed that the husband having filled the same situation before her, amidst the attentions he was paying to his daughter, he was seized with the yellow fever and died, leaving the prisoners to regret that they had lost a friend and protector. In consideration of his services, his widow was chosen to succeed him. She has discharged all the duties with equal attention and humanity."

Where shall we find similar traits in the registers of a prison? They call up the pictures of a future golden age depicted by the prophet, when "the wolf shall lie down with the lamb, and a little child shall lead them."

I cannot refuse to transcribe two other facts, which do not stand in need of any commentary: — "During the yellow fever in 1793, there was much difficulty in obtaining nurses for the sick in the hospitals at Bush Hill. Recourse was had to the prison. The question was asked; the danger of the service was explained to the convicts; as many offered themselves as were wanted. They discharged their duties faithfully till the conclusion of that tragic scene, and none of them demanded any wages till the period of their discharge."

The females gave another proof of good conduct during the course of the contagion. They were requested to give up their bedsteads for the use of the hospital: they willingly offered their beds also.

Oh Virtue! where wilt thou hide thyself? exclaimed the philosopher, upon witnessing an act of probity on the part of a beggar. Would he have been less surprised at this act of heroic benevolence in a criminal prison?

Had this good conduct of the prisoners been only a simple suspension of their vices and crimes, it would have been a great point gained; but it extended much further: —

"Of all the criminals who have been found

guilty," says Turnbull, "there has not been five in each hundred who have been in the prison before."

At New York, although the result has not been so favourable, it exhibits the good effects of the system: — "During the five years ending in 1801," says Mr. Eddy, the principal governor of the Penitentiary, in the account rendered to his fellow-citizens, "of three hundred and forty-nine prisoners who have been set at liberty at the expiration of their sentences, or by pardons, twenty-nine only have been convicted of new offences; and of this twenty-nine, sixteen were foreigners. Of eighty-six pardoned, eight have been apprehended for new offences; and of this eight, five were foreigners."

It must, however, be remembered, that we may guard against exaggeration, that of these liberated prisoners, many may have expatriated themselves, and committed crimes in the neighbouring States, being unwilling to expose themselves to the austere imprisonment of New York or Philadelphia; for it is a fact, that the risk of death is less frightful to men of this temper, than laborious captivity.

The success of these establishments is, without doubt, owing in great measure to the enlightened zeal of their founders and inspectors; but it has permanent causes in the sobriety and industry established, and the rewards bestowed for good conduct.

The rule which has ensured sobriety, has been the entire exclusion of strong liquors: no fermented liquor is allowed, not even small beer. It has been found more easy to insure abstinence than moderation. Experience has proved that the stimulus of strong liquors has only a transitory effect, and that an abundant and simple nourishment, with water for the only drink, fits men for the performance of continued labours. Many of those who entered the prison of New York with constitutions enfeebled by intemperance and debauchery, have regained, in a short time, under this regime, their health and vigour.

The Duke de Liancourt and Captain Turnbull have entered into more precise details. We learn from them, that since the adoption of this system, the charge for medicines, which amounted annually to more than twelve hundred dollars, has been reduced to one hundred and sixty. This fact affords a still stronger proof of the salubrity of this prison.

This exposition, in which I have omitted many favourable circumstances, without suppressing anything of a contrary nature, is sufficient to show the superiority of penitentiaries over the system of transportation. If the results have been so advantageous in America, why should they be less so in England? The nature of man is uniform: criminals are not more obstinate in the one place than the other: the motives which may be employed are equally powerful. The new plan proposed by the author of the Panopticon, presents a sensible improvement upon the American methods: — the inspection is more complete — the instruction more extended — escape more difficult; publicity is increased in every respect; the distribution of the prisoners, by means of cells and classes, obviates the inconvenient association which subsists in the Penitentiary at Philadelphia. But what is worth more than all the rest is, that the responsibility of the governor in the Panopticon system is connected with his personal interest in such manner, that he cannot neglect one of his duties, without being the first to suffer; whilst all the good he does to his prisoners redounds to his own advantage. Religion and humanity animated the founders of the American Penitentiaries: will these generous principles be less powerful when united with the interests of reputation and fortune? the two grand securities of every public establishment — the only ones upon which a politician can constantly rely — the only ones whose operation is not subject to relaxation—the only ones which, always being in accordance with virtue, may perform its part, and even replace it when it is wanting.

CHAPTER IV.

FELONY.

Felony is a word of which the signification seems to have undergone various revolutions. It seems at first to have been vaguely applied to a very extensive mode of delinquency, or rather for delinquency in general, at a time when the laws scarce knew of any other species of delinquency cognizable by fixed rules, than the breach of a political engagement, and when all political engagements were comprised in one, that of feudal obligation. Upon feudal principles, everything that was possessed by a subject, and was considered as a permanent source of property and power, was considered as a gift, by the acceptance of which the acquirer contracted a loose and indefinite kind of engagement, the nature of which was never accurately explained, but was understood to be to this effect: that the acceptor should render certain stipulated services to the donor, and should, in general, refrain from everything that was prejudicial to his interests. It was this principle of subjection, in its nature rather moral than political, which at the first partition of conquered countries, bound the different ranks of men, by whatever names distinguished, to each other — as the barons to the prince, the knights to the barons, and the peasants to the knights. If, then, the acceptor failed in any of these points — if in any one of his steps he fell from the line which

had been traced for him, and which at that time was the only line of duty, he was not such a man as his benefactor took him for; the motive for the benefaction ceased. He lost his fief, the only source of his political importance, and with it all that was worth living for. He was thrust down among the ignoble and defenceless crowd of needy retainers, whose persons and precarious properties were subject to the arbitrary disposal of the hand that fed them. So striking and impressive a figure did such a catastrophe make in the imaginations of men, that the punishment of death, when, in course of time, it came in various instances to be superadded to the other, showed itself only in the light of an appendage.* It came in by custom, rather than by any regular and positive institution: it seemed to follow rather as a natural effect of the impotence to which the inferior was reduced, than in consequence of any regular exertion of the public will of the community.

This seems to have been the aspect of the times at the first dawnings of the feudal polity; but it was impossible things should long remain in so unsettled a state. It is in such times, however, that we are to look for the origin of a word which, sometimes as the name of a crime, sometimes as a punishment, is to be met with in the earliest memorials that are extant of the feudal law.

Some etymologists, to show they understood Greek, have derived it from the Greek: if they had happened to have understood Arabic, they would have derived it from the Arabic. Sir Edward Coke, knowing nothing of Greek, but having a little stock of Latin learning, which he loses no opportunity of displaying, derives it from *fel*, gall. Spelman, who has the good sense to perceive that the origin of an old northern word is to be looked for in an old northern language, rejecting the Greek, and saying nothing of the Latin, proposes various etymologies. According to one of them, it is derived from two words—*fee*, which in ancient Anglo-Saxon had, and in modern English has, a meaning which approaches to that of property or money; and *lon*, which in modern German, he says, means *price*: fee lon is therefore *pretium feudi*. This etymology, the author of the Commentaries adopts, and justifies by observing, that it is a common phrase to say, such an act is as much as your life or estate is worth. But *felony*, in mixed Latin *felonia*, is a word that imports action. I should therefore rather be inclined to derive it from some verb, than from two substantives, which, when put together, and declined in the most convenient manner, import not any such meaning.

The verb *to fall*, as well as *to fail*, which probably was in its origin the same as the other, by an obvious enough metaphysical extension, is well known to have acquired the signification of *to offend*; the same figure is adopted in the French, and probably in every other language.†

In Anglo-Saxon there is such a word as *feallan*,‡ the evident root of the English word now in use. In German, there is such a word as *faellen*, which has the same signification. This derivation, therefore, which is one of Spelman's, is what seems to be the most natural. So much for the origin of the word: not that it is of any consequence whence it came, so it were but gone.

As the rigours of the feudal polity were relaxed, and fiefs became permanent and descendible, the resumption of the fief upon every instance of trivial delinquency became less and less of course. A feudatory might commit an offence that was not a felony. On the other hand, it was found, too, that for many offences the mere resumption of the feud was not by any means a sufficient punishment; for a man might hold different feuds of as many different persons. The Sovereign, too, interposed his claim on behalf of himself and the whole community, and exacted punishments for offences which, to the immediate lord of the feudatory, might happen not to be obnoxious. In this way, for various offences, pecuniary and corporal punishments in various degrees, and even death itself, came in some instances to be substituted—in others, to be superadded, by positive laws to that original indiscriminating punishment, which used at first to follow from almost every offence. That punishment remained still inseparably annexed to all those offences which were marked by the highest degree of corporal punishment, the punishment of death; partly with a view of giving the lord an opportunity of ridding himself of a race of vassals tainted by an hereditary stain; partly in order to complete the destruction of the delinquent's political as well as natural existence. The punishment of forfeiture, being the original punishment, still continued to give denomination to the complex mass of punishment of which it now constituted but a part. The word felony now came to signify a punishment, viz. the complex mode of punishment, of which

* Blackst. Com. 95.

† We say, he fell, as well as he swerved, from the line of duty: he fell from his allegiance. The original sin of man is called the fall of man. Lord Clarendon says somewhere, he fell from his duty and all his former friends. Let him who standeth, says the Gospel, take heed lest he fall. In ecclesiastical jurisprudence, a heretic relapsed, is one who, having once been convicted of heresy, *falls* into the same offence a second time.

‡ *An* is nothing but the common termination of the infinitive mood.

that simple mode of punishment, which anciently stood annexed to every delinquency a feudatory could incur, was a main ingredient.

At this period of its history, when the above was its signification, the word felony was, as a part of the Norman jurisprudence, imported into this country by the Norman conquerors; for among the Saxons there are no traces of its having been in use. At this period, it stood annexed only to a few crimes of the grossest nature—of a nature the fittest to strike the imagination of rude and unreflecting minds, and these not very heterogeneous. Theft, robbery, devastation when committed by the ruinous instrument of fire, or upon the whole face of a country with an armed force; these, and homicide, the natural consequences of such enterprises, or of the spirit of hostility which dictated them, were included by it. At this time, the import of the word felony was not, either as the name of a punishment or as the name of an offence, as yet immeasurably extensive. But lawyers, by various subtleties, went on adding to the mass of punishment, still keeping to the same name. At the same time, legislators, compelled by various exigencies, went on adding to the list of offences punishable by the punishment of that name; till at length it became the name not of one, but of an incomprehensible heap of punishments; nor of one offence only, but of as many sorts of offences almost as can be conceived. Tell me now that a man has committed a felony, I am not a whit the nearer knowing what is his offence: all I can possibly learn from it is, what he is to suffer. He may have committed an offence against individuals, against a neighbourhood, or against the state. Under any natural principle of arrangement, upon any other than that which is governed by the mere accidental and mutable circumstance of punishment, it may be an offence of any class, and almost of every order of each class. The delinquents are all huddled together under one name, and pelted with an indiscriminating volley of incongruous, and many of them, unavailing punishments.

Felony, considered as a complex mode of punishment, stands at present divided into two kinds: the one styled *Felony without benefit of Clergy*, or, in a shorter way, *Felony without Clergy*, or as capital punishment is one ingredient in it, *Capital Felony;* the other, Felony within benefit of Clergy, Felony within Clergy, or *Clergyable Felony*. The first may be styled the greater—the latter, the lesser felony. There are other punishments to which these are more analogous in quality, as well as in magnitude, than the one of them is to the other. Such is the confusion introduced by a blind practice, and, as the consequence of that practice, an inapposite and ill-digested nomenclature.

How punishments so widely different came to be characterized in the first place by the same generic name, and thence by specific names, thus uncouth and inexpressive, shall be explained by and by, after we have analyzed and laid open the contents of the greater felony, of which the other is but an off-set detached from the main root.

History of the Benefit of Clergy.

The Christian religion, ere yet it had gained any settled footing in the state, had given birth to an order of men, who laid claim to a large and indefinite share in the disposal of that remote, but boundless mass of pains and pleasures, which it was one main business of that religion to announce. This claim, in proportion as it was acquiesced in, gave them power: for what is power over men, but the faculty of contributing in some way or other to their happiness or misery? This power, in proportion as they obtained it, it became their endeavour to convert (as it is in the nature of man to endeavour to convert all power) into a means of advancing their own private interest;—first, the interest of their own order, which was a private interest as opposed to the more public one of the community at large; and then of the individuals of that order. In this system of usurpation, a few perhaps had their eyes open; but many more probably acted under the sincere persuasion, that the advancement of their order above that of others, was beneficial to the community at large. This power, in its progress to those ends, would naturally seek the depression, and by degrees the overthrow, of the political power of any other that opposed it. These operations, carried on by an indefinite multitude of persons, but all tending to the same end, wore the appearance of being carried on in concert, as if a formal plan had been proposed and unanimously embraced by the whole clergy, to subdue the whole body of the laity: whereas, in fact, no such plan was ever universally concerted and avowed, as in truth there needed none. The means were obvious—the end was one and the same. There was no fear of clashing: each succeeding operator took up the work where his predecessor had left off, and carried it on just so far as interest prompted and opportunity allowed.

In pursuance of this universal plan, not concerted, but surer than if it had been the result of concert, were those exemptions laid claim to, which, by a long and whimsical concatenation of causes and effects, were the means of breaking down the punishment of felony into the two species of it that now subsist.

The persons of these favoured mortals, honoured as they pretended they were by a more immediate intercourse with the divinity,

and employed as they were incessantly in managing the most important, and indeed only important concerns of mankind, were of course to be accounted *sacred*—a word of loose, and therefore the more convenient, signification, importing, at bottom, nothing more than that the subject to which it was attributed, was or was not to be accounted an object of distant awe and terror. They were therefore not to be judged by profane judgments, sentenced by profane mouths, or touched, in any manner that was unpleasant to them, by profane hands. The places wherein that mysterious intercourse was carried on, imbibed the essence of this mysterious quality. Stones, when put together in a certain form, became sacred too. Earth, within a certain distance round about those stones, became sacred too. Hence the privilege of sanctuary. In short, the whole of the material as well as intellectual globe became divided into sacred and profane; of which, so much as was sacred was either composed of themselves, or become subjected to their power. The rest of it lay destitute of these invaluable privileges, and, as the name imports, tainted with a note of infamy.

I pass rapidly over the progress of their claim of exemption from profane judicature: the reader will find it ably and elegantly delineated in Sir W. Blackstone's Commentaries.

As to the causes, those which come under the denomination of felonies are the only ones with which at present we have to do. Confining our consideration, therefore, to these causes: as to persons, it was first claimed, one may suppose, for those of their own order—by degrees, for as many as they should think fit, for that particular purpose, to recognise as belonging to that order. By degrees, the patience of profane judges was put to such a stretch, that it could hold no longer; and they seem to have been provoked to a general disallowance of those exceptions, which had swelled till they had swallowed up in a manner the whole rule. This sudden and violent reformation, wearing the appearance of an abuse, the clergy had influence enough in the legislature to procure an act* to put a stop to it. By this act it was provided, that all manner of clerks, as well secular as religious, which shall be from henceforth convict before the secular justices, for any treasons or felonies touching other persons than the King himself, or his Royal Majesty, shall from henceforth freely have and enjoy the privilege of Holy Church, and shall be, without any impeachment† or delay, delivered to the Ordinaries‡ demanding them.

This statute, one should have thought, would have been sufficiently explicit, on the one hand, to secure the exemption to all persons in clerical orders; so, on the other hand, to exclude all persons not possessed of that qualification. To prove a person entitled to the exemption, the obvious and only conclusive evidence was the instrument of ordination. But the different ranks of persons who were all comprised under the common name of clerks, and as such partook more or less of the sacred character, were numerous; and some of these seem to have been admitted to their offices without any written instrument of ordination. Whether this omission was continued on purpose to let in a looser method of evidence, or whether it was accidental, so it is that the clergy had the address to get the production of that written evidence dispensed with. In the room of it, they had the address to prevail on the courts to admit of another criterion, which, ridiculous as it may seem at this time of day, was not then altogether so incompetent: "Orders," they said, or might have said, "may be forged, or may be fabricated for the purpose; but as a proof that the man really is of our sacred order, you shall have a proof that can neither be forged nor fabricated; he shall read as we do." The book was probably at first a Latin book—the Bible, or some other book made use of in church service. At that time, few who were not clergymen could read at all, and still fewer could read Latin. And the judges, if they happened to see through the cheat, might in some instances, perhaps, not be sorry to connive at it, in favour of a man possessed of so rare and valuable a qualification. But one book was easily substituted for another: a man might easily be tutored so as to get by rote a small part of a particular book; and as society advanced to maturity, learning became more and more diffused. We need not wonder, therefore, if by the time of Henry VIIth, it was found that as many laymen as divines were admitted to the ecclesiastical privilege—I should suppose a great many more, for there is something in the ecclesiastical function, that in the worst of times will render them less liable than others of the same rank and fortune to fall into open and palpable enormities. A statute,‖ therefore, was made to apply a remedy to this abuse; and what would one imagine was that remedy? To oblige persons, claiming the benefit of clergy, to produce their orders? No; but to provide, that persons claiming it, and not being in orders, should not be allowed it more than once; and that *all* persons who had once been allowed it, should have a mark set upon them, whereby they might be known. Real clergymen—clergy-

* 25 Edw. III. Stat. 3, c. 4.

† It should be *hindrance*: the French original is *empeschement*.

‡ Meaning the Bishop, or other ecclesiastical superior.

‖ 4 Hen. VII. c. 13.

men who had orders to produce, were by an express provision of the statute, entitled to claim it *toties quoties*, as often as they should have need, which privilege they have still.

When a felon was admitted to his clergy, he was not absolutely set free, but delivered to the ordinary. The great point then was, if we may believe lay judges, who, it is to be confessed, are not altogether disinterested witnesses, to prove him innocent; for this tended to discredit the profane tribunal. This business of proving him innocent was called his *purgation*. If this were impracticable, he was put to penance; that is, subjected to such corporal punishment as the ordinary thought proper to inflict upon him, which we may imagine was not very severe. Thus it was that the clergy contrived to bind even the most stubborn spirits under the yoke of their dominion: the honest and credulous by their fears; the profligate, though incredulous, by their hopes.

Circumstances, however, are not wanting, which tend pretty strongly to make it probable, that when once a man got into the hands of the clergy, he almost always stood the purging, and proved innocent; and it is what the lay judges seem to have taken for granted would be the case of course. When, therefore, they made a point of making the offender suffer the train of punishments that stood annexed to acknowledged guilt, (death excepted, which was too much for them to attempt) they knew no other way of compassing it, than by insisting on his not being admitted to make purgation. These punishments, the imprisonment excepted, consisted altogether of forfeitures and civil disabilities; penalties with which the ecclesiastical superior had nothing to do, and which it lay altogether within the province of the temporal judge to enforce. One should have thought, then, it would have been a much less apparent stretch of authority in the latter, to give effect to the proceedings of his own judicature, than to lay a restraint on the ecclesiastical judge in the exercise of what was acknowledged to be his. But it were too much to expect anything like consistency in the proceedings of those rude ages. The whole contest between the temporal judge and the spiritual was an irregular scramble, the result of which was perpetually varying, according to the temper of individuals and the circumstances of the time.

By the time of Queen Elizabeth it came to be generally understood that purgation, which originally meant trial, was synonymous to acquittal.* This is so true, that when by a statute of that reign, purgation came to be abolished,† the legislature, instead of appointing a trial, appointed punishment. Persons claiming the benefit of clergy, instead of being delivered to the ordinary to make purgation, were now, after being burnt in the hand, to be forthwith delivered out of prison, unless the temporal judge should think proper to sentence them to imprisonment, which he was now for the first time empowered to do, for any time not exceeding a year.

It will here be asked, what was done with the pecuniary punishments, the forfeitures, the corruption of blood, and the disabilities? The answer is, nothing at all — they were never thought of. However, by one means or other, there is now an end of them. The legislator neither then nor since has ever opened his mouth upon the subject. But the judge, drawing an argument from that silence, has opened his, and construed them away.

This bold interpretation is a farther proof how entirely the ideas of purgation had become identified with that of acquittal. When a man was admitted to make purgation, he was acquitted: by that means he was discharged from these pecuniary penalties. Now, then, that the legislature has appointed that in the room of going free, the delinquent may now be punished by a slight punishment, and that not of course, but only in case the judges should think fit to order it of their own accord, we cannot, said the judges, suppose that it meant to subject him to a set of punishments so much severer than those it has named. Therefore, as to all but these, coming in place of an acquittal, we must look upon it as a pardon. Having, by this chain of reasoning, got hold of the word pardon, they went on applying it to other purposes in a very absurd manner; but, as we have already had occasion to observe, with a beneficial effect.

One would imagine, that being to suffer

* It is amusing enough to observe the continual struggle between the spiritual and the carnal judge, as described in Staundford, title Clergy. It seems to have been a continual game of leap-frog, in which sometimes spirit, sometimes flesh, was uppermost.[a]

A man, however, was not always so very kindly dealt with: he fared better or worse, according as he happened to be in favour with the church. If they happened not to like him, although he had not been tried when delivered to them, they would not admit him to his purgation, but kept him in hard durance without trial. The temporal courts were then obliged to drive them on to trial.[b] If he was a favourite, although convicted, no guest could be better entertained: they used to cram him at both ends. This a good Archbishop admits, who, being driven by the Parliament to make an ordinance to remedy this mischief, appoints, that in certain cases they shall be dieted in a manner he prescribes: speaking all the while in much worse terms of the lay judges than of the malefactors who met with this reception from their friends.

† 18 Eliz. c. 7.

[a] Tale of a Tub.

[b] Staundford, Clergy, c. 48. Bracton.

nothing, (what has been mentioned only excepted) first, because he was acquitted, next, because he was pardoned, there was an end of all pecuniary penalties, of the one species of forfeiture as well as the other. This, however, neither was nor is the case. A man did then, and does still, continue subject to the forfeiture of his personal estate. The reason of this is of true legal texture, and altogether characteristic of ancient jurisprudence. Forfeiture of real estate is not to take place till after judgment: forfeiture of personal estate, without the least shadow of a reason for the difference, is to take place before judgment; to wit, upon conviction. Now, ever since the days of Henry VI., it has not been the way to admit a man to plead his clergy till *after* conviction. Now, then, if a man comes and pleads his clergy, whatever goods he had, the king has got them. This being the case, having had your clergy, you are innocent, or, what comes to the same thing, you are forgiven. All this is very true; but as to your money, the king, you hear, has got it, and when the king has got hold of a man's money, with title or without title, such is his royal nature, he cannot bear to part with it; for the king can do no man wrong, and the law is the quintessence of reason. To make all this clear, let it be observed there is a kind of electrical virtue in royal fingers, which attracts to it light substances, such as the moveables and reputed moveables of other men; there is, moreover, a certain glutinous or viscous quality, which detains them when they have got there.

Such are the grounds upon which the forfeiture of personal estate, in cases of clergyable felony, still continues to subsist.

This act gave the finishing stroke to the abusive *jurisdiction* of the clergy. The still more abusive exemption remained still, but so changed and depreciated by a lavish participation of it with the laity, that its pristine dignity and value was almost entirely obliterated. By the turn they had given to it, it was originally an instrument of unlimited dominion over others: it was now sunk into a bare protection, and that no longer an exclusive one, for themselves.

At last came the statute of Queen Anne,* which gives the benefit of clergy to *all* men whatsoever, whether they can read, or cannot. This, together with a statute of the preceding reign,† which had already given the same benefit to *all women*, gave quite a new import to the phrase. In words, it confirmed and extended the abusive privilege; in reality, it abolished it. It put the illiterate altogether upon a footing with the literate; providing, at the same time, that in the case of the offences to which it extended, both classes alike should suffer, not the punishment which the unprivileged, but that which the privileged, had been used to suffer before.

Since then, to allow the benefit of clergy to any offence, is to punish all persons who shall have committed that offence, in the same manner as lettered persons were punished before: it is to punish in a certain manner all persons for that offence. To take away this benefit, is to punish in a certain other manner, much more severe, all persons for that offence. The difference between the having it and the taking it away, is now the difference between a greater and a lesser degree of punishment: the difference formerly was the allowing, or not allowing, an oppressive and irrational exemption.

But these entangled and crooked operations have been attended with a variety of mischiefs, which are not by any means cured as yet, and of which scarce anything less than a total revision of the criminal law can work a total cure. Such a veil of darkness, such a cobweb work of sophistry, has been thrown over the face of penal jurisprudence, that its lineaments can scarcely be laid open to public view but with great difficulty, and with perpetual danger of mischief.

Of the mischief and confusion that has thus been produced, I will mention one instance, which will probably be thought enough.

In a statute of Henry VIII,‡ by a strange caprice of the legislature, the benefit of clergy was taken away in the lump from all offences whatever, which should happen to be committed on the high seas. He might as well have said, or in such a county, or by men whose hair should be of such a colour. In point of *expediency*, of a provision like this, one knows not what to make. Considered with reference to other parts of the legal system, it is reasonable, as doing something towards abolishing an unreasonable distinction. Considered in the same point of view, it is unreasonable, as making that abolition no more than a partial one, and grounding it, as far as it went, on a circumstance totally unconnected with the mischievousness of the offence. Considered by itself, it is again unreasonable, as tending to subject to the punishment of death for a great many offences, a great many persons for whom a less punishment might suffice.

In point of fact, however, what the legislature meant by it is clear enough: it meant that all men, without exception, privileged persons as well as others, should suffer death and so forth, who should be guilty of any kind of felonies upon the high seas, instead of their being made, some of them, to suffer death, others a punishment beyond comparison less severe. Would any one imagine what

* 5 Ann. c. 6.
† 3 & 4 W. & M. c. 9.

‡ 28 Hen. VIII. c. 15.

has been the effect of this provision? The effect of it has been, that these privileged persons, instead of suffering death, have suffered no punishment at all: yes, absolutely no punishment — not even that slight degree of punishment to which they before were subject. Now the case is, that at present, if one may be indulged in a solecism established by the legislature, all persons are privileged; so that now, all persons who may think proper to commit clergyable felonies on the high seas are absolutely dispunishable. This situation of things, in itself, is not altogether as it ought to be; but the means whereby it has been brought about are still worse. When a man is indicted of a clergyable offence within that jurisdiction, let his guilt be ever so plainly proved, the *constant course* is, for the judge to direct the jury to acquit him.* The man is proved to be guilty, in such a manner that no one can make a doubt about it. No matter; the judges direct the jury to say upon their oaths that he is not guilty.

In the ecclesiastical tribunal we have above been speaking of, things were so ordered, that, according to the author of the Commentaries, "felonious clerks" were not constantly, but "almost constantly" acquitted. I do beseech the reader to turn to that book, and observe in what energetic terms (partly his own, partly adopting what had been said on the same subject by Judge Hobart) the learned author has chosen to speak of this unjustifiable practice:† — "Vast complication of perjury and subornation of perjury — solemn farce — mock trial — good bishop — scene of wickedness — scandalous prostitution of oaths and forms of justice — vain and impious ceremony — most abandoned perjury." Such are the terms he uses; — to the reader it is left to make an application of them.

Felony without Benefit of Clergy.

As to felony without benefit of clergy, I will, in the first place, state the ingredients of which this mode of punishment is compounded.

Of punishments included under the title of felony without benefit of clergy, we must distinguish, in the first place, such as are made to bear upon the proper object — punishments *in personam propriam;* and in the second place, such as are thrown upon the innocent — punishments *in personam alienam.*

Of punishments *in personam propriam*, it includes the following: —

1. A total forfeiture of goods and chattels, whether in possession or in action at the time of the forfeiture taking place. It is a sweeping punishment of the pecuniary kind. It takes place immediately upon conviction; that is, upon a man's being found guilty — and does not wait for judgment; that is, for sentence being pronounced upon him.

2. Forfeiture of lands and tenements. This also is a sweeping punishment of the pecuniary kind. It does not take place till after judgment. This and the other forfeiture between them include the whole of a man's property, whether in possession or in action at the time of the forfeiture taking place. If he does not lose it by the one, he loses it by the other.

3. The corporal punishment of imprisonment till such time as the conclusive punishment is executed upon him. The length of it depends partly on the judge, partly on the king.

4. The disability to bring any kind of suit. This operates as a punishment in such cases only in which a long interval, as sometimes happens, intervenes between the sentence and the actual infliction of the ultimate punishment.

5. The corporal punishment of death, viz. simple death by hanging. As this punishment in general puts a speedy period to all the rest, the dwelling upon the effect of any other is what may, at first sight, appear useless: but this is not absolutely the case; for the execution of this punishment may, at the pleasure of the king, be suspended for any length of time, and in some instances has actually been suspended for many years. ‡

Thus much for punishment *in propriam personam.* Punishments *in alienam personam* included under it, are the following; some of them are instances of transitive, others of merely random punishment: —

His heirs-general, that is, that person or persons of his kindred who stand next to him, and so to one another in the order of succession to real property unentailed, forfeit all property of that denomination which he had enjoyed, and which, without an express appointment of his to the contrary, they would have been entitled to from him. This results as a consequence of the doctrine of corruption of blood: this is an instant forfeiture: it is a sweeping punishment of the pecuniary kind upon the heir. It may amount to a forfeiture, total or partial, of all the immoveable property the heir would be worth, or to no forfeiture at all. If, previously to the commission of the offence, the offender had settled upon his heir-apparent the whole or any part of what property he had of the kind in question, this the heir will not be deprived of.

* 4 Comm. c. 28, Foster, 288. Moor, 756. † Ib.

‡ Sir Walter Raleigh was kept for many years with the halter about his neck: he had the command given him of an expedition; went to America, where he committed piracies on the Spaniards; came back again; and was hanged at last for the original offence.

2. His heir, as before, forfeits his hope of succession to all such real property as he must make title to through the delinquent, as standing before him in the order of consanguinity to the person last seized. This is a remote contingent forfeiture — another pecuniary punishment of the sweeping kind. In this the uncertainty is still greater than in the former case.

3. Any creditors of his, who have had real security for their debts, forfeit such security, in case of its having been granted to them subsequently to the time of the offence committed. This, where it takes place, is a fixed punishment of the pecuniary kind. It is uncertain as to the person; but if there be a person on whom it falls, it is certain as to the event.

4. Any persons who may have purchased any part of his real property, forfeit such property, in case of this purchase having been made by them subsequently to the time of the offence. This, again, is a fixed punishment of the pecuniary kind. It is uncertain whether it shall fall upon any person, because it is uncertain whether there be a person so circumstanced; but if there be, it is certain as to the event of its falling.

5. Any persons who hold lands or tenements of him under a rent, are obliged to pay over again, to the person on whom the forfeiture devolves, whatever they may have paid to the delinquent subsequently to the time of the offence.

These four last denominations of persons are made to suffer in virtue of the doctrine of *back-relation*. According to legal notions, it is the delinquent that suffers, by the forfeiture being made to relate back to the time of the offence: as if it were a new suffering to a man to be made to have parted with what he had already parted with of his own accord. In plain English, it is the people themselves — the tenants, purchasers, and creditors, that suffer: it is they who forfeit, and not he.

Again, by virtue of the forfeiture of what is called his personal property, the following denominations of persons are made to suffer: —

1. His wife: by being deprived of whatever she would have been entitled to under his will, or under the law of distributions.

2. His children, or others next of kin: by losing what they might, in the same manner, have become entitled to.

3. His creditors: by losing all claim upon his personal estate. By this forfeiture, added to what takes place in the case of real estate, all his creditors whatever are defrauded; such only excepted as may have been fortunate enough to have obtained a real security previous to the commission of the offence.

We now come to *Felony within Clergy*. The mass of punishments included within this title are much less various, as well as less severe.

Of punishments *in propriam personam*, it includes only the first and third of those which are included under the other species of felony.

In the room of the fifth and last punishment, the punishment of death, there is one that takes place, or rather is said to take place, of course: I mean, marking in the hand.* Others there are, which, besides the former, take place optionally, at the discretion of the judge; conjunctively, with respect to the three former — disjunctively, with respect to one another.

This punishment of marking is now become a farce. It is supposed to be inflicted in open court, immediately after the convict, in order to exempt himself from the punishment of the other felony, has been made — if a woman, to plead the statute — if a man, to tell the solemn lie that he is a clerk. The mark to be inflicted is, according to the statute, to be the letter T, unless the offence be murder, in which case it is to be an M; murder, at that time, not as yet having been taken out of the benefit of clergy: as it has, however, since, the mark ought now to be that of a T in all cases. The part to be marked is the brawn of the left thumb; so that if a man happens to have lost his left thumb, he cannot be marked at all; or, if afterwards he chooses to cut it off, he may prevent its answering the purpose it was meant to answer, that of distinguishing him from other men.

The instrument originally employed was a heated iron, with a stamp upon it of the shape of the letter to be marked. To the judges of that time, this was the only expedient that occurred for marking upon the human skin such a mark as should be indelible. At present, the practice is to apply the iron, but it is always cold: this is what is called burning with a cold iron, that is, burning with an iron that does not burn; in consequence, no mark at all is made. The judge presides at this solemn farce: by no one is it complained of; by many it is approved; it is mildness, humanity: it is true that the law is eluded, and turned into ridicule; but the judge spares himself the pain of hearing the cries of a man to whose flesh a red-hot iron is applied. It may be asked, why do not the judges propose that the law should be made conformable to the practice? I cannot tell.

The judge that first disregarded the statute was guilty of the assumption of illegal power: he who should now have the courage to obey it, might now affix the prescribed mark without putting the delinquent to any considerable pain.†

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* 4 Hen. VII. c. 13.

† The statute directs that the convict shall be "marked:" the mode of marking is left altogether to the judge. The author of the Com-

The other punishment, which in all cases of felony within clergy, may, at the discretion of the judge, be superadded or not to those which we have seen, are those of imprisonment and transportation.

For the second offence of a clergyable felony, capital felony is the punishment.*

Clerks in orders are alone exempted:† peers are not: women are expressly subjected to it. It is certainly a distinction highly honourable to the clergy, that they may go on pilfering, while other people are hanged for it.

Why a man, having been punished for one act of delinquency, should be punished more than ordinarily for a second act of the same species of delinquency, or even for any other offence of the same species of delinquency, there is at least an obvious, if not a conclusive reason, But why, when a man has been punished by a certain mode of punishment, and then commits an offence as different as any offence can be from the former, the punishment for this second offence is, because it happens to be the same with that for the first, to be changed into a punishment altogether different, and beyond comparison more penal, is what it will not, I believe, be easy to say. Is it because the first mode of punishment having been tried upon a man, the next above it, in point of severity, is that of capital felony? That is not the case; for præmunire is greatly more penal than clergyable felony. I mention this as being impossible to justify, not as being difficult to account for, since nothing better could consistently be expected from the discernment of those early times.

There is one thing which a clergyable felon does not forfeit, and which every other delinquent would forfeit for the most venial peccadillo, and that is reputation: I mean that special share of negative reputation which consists in a man's not being looked upon as having been guilty of such an offence. This share of reputation the law, in the single instance of clergyable felony, protects a delinquent, in so far forth as it is in the power of law, by brute violence, to counteract the force of the most rational and salutary propensities. If a man has stolen twelve-pence, and been convicted of it, call him a thief and welcome. But if he had stolen but eleven-pence halfpenny, and been convicted of it, and punished as a felon, call him a thief, and the law will punish you. This has been solemnly adjudged.

I say convicted and punished as a felon; for if he has not been convicted of it, in virtue of the general rule in case of verbal defamation, you may call him so if you can prove it; but when the law, by a solemn and exemplary act, has put the matter out of doubt, then you must not mention it. Would any one suspect the reason? It is because the statute which allows the benefit of clergy operates as a pardon. It has the virtue to make that not to have been done which has been done; and it was accordingly observed, that a man could no more call another thief who had been punished for it in this way, (thief say they *in the present time*) than say he *hath* a shameful disease when he had had it, and has been cured of it.‡

It is there also said, with somewhat more colour of reason, though in despite of the last-mentioned rule, "that there is no necessity or *use* of slanderous words to be allowed to ignorants," and that, though the arresting of a pardoned felon, by one who knows not of the pardon, may be justifiable, because this is in "advancement of justice; yet so it is not to call him thief, because that is neither necessary, nor advanceth nor tends to justice." He who said this knew not, or did not choose to know, how mighty is the force, and how salutary the influence, of the *moral* sanction; how much it contributes to support, and in what a number of important instances it serves to controul the caprices, and supply the defects, of the *political*. It was perhaps Sir Edward Coke—a man who, from principle, was a determined enemy, though, from ill humour, upon occasion an inconsistent and unsteady friend to political liberty—who in his favourite case, *de libellis famosis*, has destroyed, as far as was in his power to destroy, the safeguard of all other liberties, that of the press;—proscribing all criticism of public acts; silencing all history; and vying in the extent of his anathemas with the extravagance of the most jealous of the Roman Emperors.

CHAPTER V.

OF PRÆMUNIRE.

THE punishment of Præmunire‖ consists in the being "put out of the King's protection," and "in the forfeiture of lands and tenements, goods and chattels;" but such is the

mentaries (4 Comm. p. 367, ed. 1809) "burnt with a hot iron." It is plain by this that he had never read the statute: for the statute, which is a very short one, says not a syllable about burning, nor about a hot iron.

* 4 Hen. VII. c. 13.

† By 4 Hen. VII. c. 13; repealed in effect, *quoad hoc*, by 28 Hen. VII. c. 1, and 32 Hen. VIII. c. 3; and revived in effect *quoad hoc* by 1 Ed. VI. c. 12. p. 10.

‡ Hobart, 81.

‖ This word, from being the name of nothing at all, first became the name of a writ, then the name of a punishment, and from thence, as was natural, the name of an offence; to wit, of as many offences as were punishable by that punishment.

uncertainty of English law, that some add to the above, imprisonment during the King's pleasure, and others say for life. Sir Edward Coke is for adding loss of credibility: he might as well have added, loss of ears; but I do not find that this conceit has been taken up by anybody else.

The offences to which this punishment has been applied are as heterogenous as any that can be imagined. The offence to which it was first applied was an offence against government; since that, besides a multitude of other offences against government, it has been applied to various offences against the property, against the personal liberty of individuals, and against trade!*

What it is that in such a variety of laws should have tempted the legislature, instead of the known and ordinary names of punishment, to devise a new and unexpressive name, to which no meaning whatever could be annexed, without rummaging over a confused parcel of old French statutes, is not easy to assign. There is nothing gained by it in any way, not in point of brevity; for in one of the statutes in which it is described with the most conciseness, I find more words are taken up by this uncouth description, than would be by the plain one: there is nothing gained by it in point of precision; for the word has no signification whatever, but by reference to the words of the old statute, and consequently cannot be more precise than they are.

The only recommendation I can find for it is, that it is a Latin word; added to the notion, perhaps, that, as being less intelligible than most other names of punishments, it might be more tremendous.

If this has been the design, it has been in some measure answered. Terrible, indeed, is the name of Præmunire; it is become a kind of bugbear, in which shape it has descended even among the lowest mob. It is used as synonymous with a scrape; not that the sort of persons last mentioned have any much clearer idea of the particular sort of scrape, than those have who bring others into it by solemn acts of legislation.

CHAPTER VI.

OUTLAWRY.

THE punishment known in practice by the name of Outlawry, consists of the following ingredients:—

1. Forensic disability, which may be called simple outlawry.
2. Forfeiture of personal estate.
3. Forfeiture of the growing profits of the real estate.
4. Imprisonment, &c.

This is the punishment inflicted for the offence of absconding from justice, in all cases, except where the punishment for the principal offence amounts to felony: in this case, a man against whom a sentence of outlawry is pronounced, is punished as if he had been convicted of the principal offence.

As the offence of absconding is a *chronical* offence, the punishment applied to it should be a *chronical* punishment, such an one as, being made to cease upon the cessation of the offence, may operate only as an instrument of compulsion. All these punishments are capable of being made so: but none are so upon the face of them; none were so originally. They are by this time, however, rendered so in great measure by modern practice, which has corrected the inordinate severity of the original institution.

This punishment applies in most cases, but not in all cases: in all cases where the prosecution for the original offence was in the criminal form; that is, in other words, in all criminal suits: it applies in most, but not in all civil suits. In the same civil suit, it applies or does not apply, according as the suit happens to be commenced before one court or another. In the same suit, and that carried on in the same court, it does or does not apply, according as the suit happens to have been commenced by one kind of jargon or another: all this without the least relation to the merits.

The punishment of forensic disabilities is applied to a multitude of offences; namely, to all those which are punished either by capital felony, or præmunire, or excommunication. In felony, it is useless, because the effect of it is merged in the punishment of death. In præmunire, it is justifiable, in as far as the punishment of total and perpetual impoverishment is an eligible mode of punishment, for of this it makes a necessary part. In excommunication, it is ineligible, on account of its inequality. To make it answer in an equable manner the purpose of impoverishment, is impracticable, for want of the punishment of forfeiture, of which it can come in only as an appendage.

Taking it by itself, and laying aside what is necessary to make it answer the purpose of impoverishment, it is superfluous when added to the punishment of imprisonment.

Whatever may be the offences cognizable in the ecclesiastical court, either corporal punishment is enough for them without pecuniary, or it is not. If it be enough, simple outlawry in addition to it is too much; if not,

* See a list of these offences in Blackstone's Commentaries. So difficult is it for any one to ascertain what the law is upon any subject, that though this punishment was adopted in the Regency, Act 5th Geo. III. c. 27, which was passed many years before the 4th volume of the Commentaries was printed, this act was not enumerated in that list.

it is too little. All this is upon the supposition that the delinquent is forthcoming for the purpose of undergoing imprisonment.

When a man absconds, and has no property in possession, or none that is sufficient to answer the demand upon him, in this case, and in this only, the punishment of simple outlawry is expedient. Why? not because it is eligible in itself, but because it is the only one the case admits of. When a man has no visible property in his own country, and has made his escape into another, generally speaking, his own country has no hold of him. This may happen, suppose in nine instances out of ten; but in the tenth, it may happen that he may have a debt due to him, which he may want the assistance of the laws of his own country to recover. If this debt be more in value to him than what is equivalent to the punishment he would be likely to suffer for the original offence which made him fly, he will return and submit to justice. The punishment of simple outlawry in this case will answer its purpose. It is eligible, therefore, in this case, because it has some chance of compassing its end, and no other punishment has any.*

Advantages and Disadvantages of Forfeiture of Protection.

To this mode of punishment, the objection of inequality applies with peculiar force. The fund out of which a man who has a fund of his own subsists, is either his labour, or his property. If he has property, it consists either in immoveables, or in moveables. If in immoveables, it is either in his own hands, or in those of other persons: if in moveables, it is either in public hands, or in private: if in private, either in his own hands, or in those of other persons.

A man who subsists by his labour, is in general scarcely at all affected by this punishment. He receives his pay, if not before he does his work, at least as soon as a small quantity of it is done.

A man whose fund of subsistence consists in immoveable property, is very little affected by this punishment, if that property is in his own hands. The utmost inconvenience it can subject him to, is the obliging him to deal for ready money. If his property is in the funds, he is not at all affected. There seems no reason to suppose that those who have the management of those funds, would refuse a man his dividend on the ground of any such disability. They would have no interest in such a refusal; and the importance of keeping up public credit would probably be a sufficient motive to keep them in this instance from departing from the general engagement.

If a man's property consists in moveable property which is in his own hands — for instance, stock in trade, it affects him indeed, but not very deeply. The utmost it can do, is to oblige him to deal for ready money; to preclude him from selling upon credit. It does not preclude him from buying upon credit, since, though others are not amenable to him, he is to others.

It is only where a man's property consists in credits — for example, in immoveables in the hands of a tenant, in a sum due for goods sold on credit, or in money out upon security, that it can affect him very deeply. Of such a man it may be the utter ruin.

In this case, whether a man suffer to the extreme amount, or whether he suffer at all, depends upon what? upon the moral honesty of those he happens to have to do with.

There are two circumstances, therefore, on which the quantum of this mode of punishment depends: 1*st*, The nature of the fund from whence he draws his subsistence; 2*d*, The moral honesty of the people he happens to have to do with. But neither of these circumstances is any ways connected with the degree of criminality of any offence for which a man can be thus punished. Of two men, both guilty, and that in the same degree, one may be ruined, the other not all affected. The greater punishment is as likely to fall upon the lesser offender as upon the greater: the lesser upon the greater offender, as upon the lesser.

* An anecdote given us by Selden, in his Table Talk,[a] may serve very well to illustrate the influence this mode of punishment may have over a man who is out of the reach of every other. In the reign of James I. an English merchant had a demand upon the King of Spain, which he could not get the King to satisfy. The merchant had already brought his action, and Selden, who was his counsel, advised him to proceed to outlawry. Writ after writ was sent to the sheriff to take his Majesty, and have his body before the justices at Westminster. His Majesty was not to be found. Great outcry, as is usual, was made after him, upon this, in sundry ale-houses. His Majesty did not happen to be at any of the ale-houses. He was accordingly proclaimed an outlaw; and a wolf's head, in due form of law, was clapt upon his shoulders,[b] so that any body might lay hold of him, and put him into jail, that had a mind for it.[c] The case was, his Majesty happened at that time to have demands upon several merchants in England, for which demands, so long as he continued under judgment of outlawry, he could not have his remedy. Upon this consideration, his ambassador, Gondamar, submitted and paid the money; upon which, the wolf's head was taken off, and the King's head put in its place.

[a] Title *Law*. [b] *Caput Lupinum*. — C. Litt. 128, b. Lamb. Leg. Tax, ch. 128. Fleta. L. 1, c. 27. Bract. L. 5, fol. 421. Britt. fol. 20. Mirror, c. 4, *Defaults Punishable*.

[c] Anciently, when a man had a wolf's head upon his shoulders, he might be killed by anybody. But this was altered in Edw. III.'s time. See C. Litt.

Another objection applies to this mode of punishment, on the score of *immorality*. The punishment being of a pecuniary nature, there is a profit arising out of it, which accordingly is to be disposed of in favour of somebody. And in whose favour is it disposed of? in favour of any one, who, having contracted an engagement with the delinquent, can, for the sake of lucre, be brought to break it.

It may be said, that the engagement being by the supposition rendered void, there is no harm in its being broken. True; it is void, as far as concerns the political sanction, but it is not void by the moral. All that the law does is not to compel him to perform it; but the interests of society require, and, accordingly, so does the moral sanction require, that a man should be ready to perform his engagement, although the law should not compel him. If a man can be brought in this way to break his engagement, it is a sign that the power of money over him is greater than that of the moral sanction. He is therefore what is properly termed an immoral man; and it is the law that either has begotten in him that evil quality, or at least has fostered it.

The dispensations, therefore, of the political sanction, are, in this case, set at variance with those which are, and ought to be, those of the moral sanction. It invites men to pursue a mode of conduct which the moral sanction, in conformity to the dictates of utility, forbids.

CHAPTER VII.

EXCOMMUNICATION.

Various and manifold are the evils which the punishment of excommunication inflicts, or proposes to inflict: various are the sources from whence they flow. It does not confine itself to the political sanction: it calls in, or makes as if it would call in, the two others to its assistance.

Of excommunication, there are two species, or degrees — the greater and the lesser. The greater contains all that the lesser does, and something more. I will first, then, give an account of those that are contained in the lesser, and then take notice of those that are peculiar to the other.

Those contained in the lesser are as follows: —

1. Imprisonment — the time unlimited, depending on the good pleasure of the judge: the severity of it is determined by the circumstance of its being in the common jail.

2. Penance, as a condition to the termination of the other punishment. By penance is meant, a corporal punishment of the ignominious kind. The particular manner of inflicting it shall be considered hereafter.

3. In lieu of the penance, commutation money. The quantum of it is not limited in a direct manner, but is in an indirect manner: it cannot be more than a man chooses to give, in order to avoid the corporal penance.

These two last are accidental ingredients in this complex mass of punishment. Their infliction or omission depends, in some measure, upon the will of the prosecutor. Those which follow, are inseparable.

4. Disability to sue, either in a court of law or equity. This is a punishment of a pecuniary nature, contingent in its nature, and uncertain as to time.

5. Disability of acting as an advocate,* or as an attorney, or procurator, for another: † that is, I suppose, in the ecclesiastical courts, and not in any other. This is a punishment of the class of those that affect a man's condition: in the present instance, it affects a man chiefly on a pecuniary account.

6. Disability of acting as a juryman. ‡

7. Disability of being presented to an ecclesiastical benefice: ‖ of this, the same account may be given as of the last disability but one.

8. Disability of bringing a suit, or action, as an executor. § This is a punishment *in alienam personam*; affecting those who have a beneficial interest under the will.

9. Incapacity of being constituted or continued an administrator; or, at least, danger of being subjected to that disability.

10. Disability of being a witness. This, likewise, is another punishment *in alienam personam*; affecting those persons to whom this evidence, if given, would be beneficial in respect of their lives, fortunes, liberties, and every other possession that is in the protection of the law.

11. The being looked upon as a heathen and a publican. This, I suppose, is meant as a sort of infamy. ¶

12. Exclusion from all churches: this is a species of personal restraint, that involves in it consequences that belong to the religious sanction.

13. Exclusion from the benefit of the burial service. I do not know under what class to rank this punishment: I do not very precisely know what benefit it is to a man, after he is dead, to have the service read over his body: if it be anything, it belongs to the religious sanction.

14. Exclusion from the benefit of the sacraments of baptism and the Lord's Supper: this belongs altogether to the religious sanction.

So much for the lesser excommunication: the greater adds two other circumstances to the catalogue.

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* Gibs. 1050.
† 2 Bacon's Ab. 674.
‡ 3 Blackst. Com. 101.
‖ Gibs. 1050.
§ God. O. L. 37, 8.
¶ Burn, Penance, 6.

1. *Exclusion from the commerce and communion of the faithful.**

2. *Disability of making a Will.*† This is a punishment that affects the power of the party; viz. in the present case, the investitive power performable in a particular manner, with respect to the ownership of such property as he shall die entitled to. In as far as the power of making a will includes that of appointing a guardian to a child, as also that of an executor to manage the property of a person of whom the party in question was executor, it is a punishment *in alienam personam:* the child may suffer for want of a proper guardian; the persons interested in the effects of the first testator may suffer for want of a proper person to manage those effects.

This is the mode, and the only mode of punishment, inflicted by those courts that go by the name of ecclesiastical, or spiritual courts. This they are forced to make serve for all occasions; they have neither less nor greater: it is the only punishment they have. When this punishment is pronounced, they have exhausted their whole penal code. If its brevity be its recommendation, it must be confessed that it has no other. Let us consider a little more particularly the punishments of which it is composed. Of imprisonment, nothing in particular need be said at present.

The punishment of penance demands more attention. It consists in the penitent being exposed, bare-headed and bare-legged, with a white sheet wrapped round the body, either in the parish church, or in the cathedral, or in the public market,‡ there to pronounce a certain form of words containing the confession of his crime. This, as has been already observed, is a corporal punishment of the ignominious kind, and might, if defined with precision, be employed with the same advantage as are other punishments of that description. The time at which it should take place, and the duration of the penance, ought to be determined; but there is nothing fixed with regard to them, so that it may continue for several hours, or only for an instant: it may take place before a crowd of spectators, or in the most absolute solitude. Besides this, there is a vast difference between the parish church of a village, and the cathedral of a great city, or the public market of a district. The larger or smaller concourse of spectators will render the punishment more or less severe.

The penitent ought to pronounce a formula containing an acknowledgment of his crime; a different formula ought therefore to be provided for every crime by law. This formula may be pronounced either distinctly or indistinctly: a man can hardly be expected, willingly, to proclaim his own shame. It would therefore be proper that he should only be required to repeat the words, which should be clearly and distinctly pronounced by an officer of justice, as is practised with respect to the administration of oaths. Certain persons, also, should be nominated to preside over the ceremony, and ascertain that everything is done according to law.

Till these points are regulated, this mode of punishment, though good in itself, will always be subject, as it is at present, to the greatest abuses: it will be executed with inequality, and capriciously, according to the condition of the individuals, rather than according to their crimes, and according as the character of the judge is more or less severe.

Penance is the punishment usually imposed, says Dr. Burn, "in the case of incest or incontinency." These two offences are classed together by the ecclesiastical compiler, and opposed to what he calls smaller offences and scandals. When we consider how far these two first offences are removed from one another, one is astonished to see them classed together, and visited with the same punishment. Far be it from me to treat lightly the exposure of innocence to infamy, the disturbance of domestic felicity, or to degrade the chaste raptures of the marriage bed to a level with the bought smiles of harlots. But there are degrees in guilt, which I see not why it should be meritorious to confound.

It is not often that we hear of this punishment being put in practice: examples of it were more frequent in former times, but now it is most commonly commuted for by the payment of a sum of money.

3. As to the different legal incapacities which form part of this punishment, the objections to which they are liable have been pointed out elsewhere. (See Book IV. *Misplaced Punishments.*)

4. Part of the punishment consists in the delinquent's being looked upon, if men think fit to look upon him in that light, as a heathen and a publican.

To try the effect of generals, the only way is to apply them to particulars. A. is not willing, or not able, to pay his proctor's, or another man's proctor's fees: he is in consequence excommunicated. Amongst his other punishments, he is to be looked upon as a heathen or a publican; that is, as being such a sort of man as Socrates, Cato, Titus, Marcus Antoninus, a collector of taxes, or a Lord of the Treasury. The heaping of hard names upon a man might, at one time, have been deemed a punishment; but such legal trifling now-a-days, serves only to render the laws ridiculous.

5. Exclusion from the churches. In our

* Lenderb. 266.
‡ Swinb. 109. God. O. L. 37.
† Godolph. Appendix, 18. Burn, tit. Penance.

days, an exclusion of this sort shows rather oddly under the guise of punishment. The great difficulty is now not to keep people out of the churches, but to get them in. The punishment, however, was not ill-designed, if it were intended to increase the desire of attending there, by forbidding it—the general effect of every prohibition being to give birth to a desire to infringe it: it affords a presumption, that what is prohibited is in itself desirable, or at least desirable in the opinion of the legislator, or he would not have prohibited it. Such is the natural supposition, when the interdiction relates to an unknown object; but even when it relates to an object which has been tried, and neglected from distaste, the prohibition gives to it another aspect. The attention is directed to the possible advantages of the act: having begun to think of them, the individual fancies he perceives them, and goes on to exaggerate their value: on comparing his situation with that of those who enjoy this liberty, he experiences a feeling of inferiority; and, by degrees, a most intense desire often succeeds to the greatest indifference.

Those who are forward to refer the propensity to transgress a prohibition of any kind to an unaccountable perversity, and unnatural corruption in human nature, as if it were not reconcileable to the known dominion of the ideas of pain and pleasure over the human mind, do an injustice to man's nature, in favour of their own indolence. Man, according to these superficial moralists, is a compound of inconsistencies: everything in him is an object of wonder; everything happens contrary to what they would expect: strangers to the few simple principles which govern human nature, the account they give of everything is, that it is unaccountable.

With respect to those parts of the punishment of excommunication which belong to the religious sanction, such as exclusion from the sacraments, their most striking imperfection is their extreme inequality: their penal effect depends on the belief and sensibility of the individuals. The blow which would produce torments of agony in one person, will only cause the skin of another to tingle. There is no proportion in these punishments, and nothing exemplary: those who suffer, languish in secrecy and silence; those who do not suffer, make a jest and a laughing-stock of the law in public. They are punishments which are thrown at hazard among a crowd of offenders, without care whether they produce any effect or none.

I speak of these punishments with reference only to the present life; for who is there that supposes that a sentence of excommunication can carry with it any penal consequences in a future state? For what man, reasoning without prejudice, can believe that God hath committed so terrible a power to beings so feeble and so imperfect, or that the Divine justice could bind itself to execute the decrees of blind humanity—that it could allow itself to be commanded to punish otherwise than it would have punished of itself. A truth so evident could only have been lost sight of by an abasement, which could only have been prepared by ages of ignorance.*

BOOK VI.

MISCELLANEOUS TOPICS.

CHAPTER I.

CHOICE OF PUNISHMENTS — LATITUDE TO BE ALLOWED TO THE JUDGES.

THE legislator ought, as much as possible, to determine everything relating to punishments, for two reasons: that they may be *certain*, and *impartial*.

1. The more completely the scale of punishments is rendered certain, the more completely all the members of the community are enabled to know what to expect. It is the fear of punishment, in so far as it is known, which prevents the commission of crime. An uncertain punishment will therefore be uncertain in its effects; since, where there is a possibility to escape, escape will be hoped for.

2. The legislator is necessarily unacquainted with the individuals who will undergo the punishment he appoints; he cannot, therefore, be governed by feelings of personal antipathy or regard. He is impartial, or, at least, appears to be so. A judge, on the contrary, only pronouncing upon a particular case, is exposed to favourable or unfavourable prejudices, or at least to the suspicion of such, which almost equally shakes the public confidence.

If an unlimited latitude be allowed to judges in apportioning punishments, their functions will be rendered too arduous: they will always be afraid either of being too indulgent or too severe.

It may also happen, that being able to diminish the punishment at discretion, they may become less exact in requiring proof, than if they had to pronounce a fixed punishment. A slight probability may appear suf-

* These observations might be much more extended, with reference to the details of ecclesiastical judicature, but the subject would not be of general interest. The foregoing observations may therefore suffice with respect to these laws, which are so generally condemned, and may serve to show the necessity for their formal abolition.

ficient to justify a punishment which they may lessen at pleasure.

There may, however, often arise, either with regard to the offences themselves, or the person of the delinquent, unforeseen and particular circumstances, which would be productive of great inconveniences, if the laws were altogether inflexible. It is therefore proper to allow a certain latitude to the judge, not of increasing, but of diminishing a punishment, in those cases in which it may be fairly presumed that one individual is less dangerous, or more responsible than another; since, as has been before observed, the same nominal punishment is not always the same real punishment — some individuals, by reason of their education, family connexions, and condition in the world, presenting, if we may so speak, a greater surface for punishment to act upon.

Other circumstances may render it expedient to change the kind of punishment: that which has been directed by the law may be incapable of application, or it may be less suitable in other respects.

But whenever this discretionary power is exercised by a judge, he ought to declare the reasons which have determined him.

Such are the principles. The details of this subject belong to the penal code, and to the legislative instructions to the tribunals.

CHAPTER II.

OF SUBSIDIARY PUNISHMENTS.

Of all the punishments which can be appointed by the law, there is none but what, from one accident or other, is liable to fail. It is obvious, that against such an event it becomes the law, in every case, to make provision. Such a failure may arise from either of two causes: unwillingness, that is, want of will to bear the punishment; or inability, that is, want of power.

The first cause, if no steps were taken to controul it, would naturally occasion the failure of all punishments, the execution of which is dependent upon the will of the party to be punished. This, among corporal punishments, is the case with all such as are either active or restrictive, one case of restrictive punishment excepted, that, to wit, in which the restraint is produced by physical means.

To give efficacy, therefore, to the mandate, of which any of these punishments is intended as the sanction, it is absolutely necessary that some further punishment should be appointed to back it through the whole of its continuance. In the first instance, this *backing* or *subsidiary* punishment, as it may be called, may be taken from those two classes, as well as from the other; and so through any number of instances, one behind another. A punishment of the active kind, for instance, might be backed by quasi-imprisonment; that, again, by banishment; or any one of those punishments, for a certain term, by the same, or another, (kind of punishment) for a further term. Ultimately, however, every such series must be terminated by some punishment that may be inflicted without the concurrence of the party's will; that is, by some punishment of the passive kind; or if of the restrictive kind, by such restraint as is compassed by physical means.

Even such punishments, to the execution of which (so the party be forthcoming) the concurrence of the party is not essentially necessary, may fail from his *want of power*, or in other words, from his *inability* to sustain them. This is the case with all corporal punishments, not capital, that affect any parts of the body that are not essential to life. It is the case, therefore, with simply afflictive punishments, and with discolourment, disfigurement, disablement, and mutilation, in as far as they affect any of the parts just spoken of. It is also the case with forfeitures of all kinds. The only punishments, therefore, that are sure, and require no others to be subjoined to them, are the above-mentioned corporal punishments, in the cases where the parts they affect are such as are essential to life; imprisonment, and such punishments by which life itself is taken away.

Even these, like any others, may come to fail by the want of will (in the party to sustain them,) to wit, by his not choosing to be forthcoming, which is a cause of failure common to all punishments. But then this cause does not necessarily produce its effect: it does not render the punishment of the man necessarily dependent upon his will, for he may be taken and punished in spite of his wishes and endeavours to prevent it; which, when a man does suffer any of these punishments, especially death, and those other acute and heavy punishments, is generally the case. In this case, the only resource is in forfeitures, upon the contingency of a man's having anything to forfeit, that is, within the reach of justice, or in the punishment of those whose feelings are connected with his own by sympathy, as in punishments *in alienam personam*.

From the differences above remarked, respecting the cause of failure in the punishment *first designed*, results a difference in what ought to be the quantity of the *subsidiary* punishment, concerning which we may lay down the following rules: —

Rule I. *Where inability is manifestly the only cause of failure, the subsidiary punishment should be neither greater nor less than that which was first designed;* for no reason can be given why it should be either less or greater.

Rule II. *Where want of will is manifestly*

the only cause of failure, the subsidiary punishment ought to be greater than that which was first designed; for the punishment first designed is that which by the supposition is thought the best: to determine the delinquent, then, to submit to this, in preference to the other, there is but one way, which is, to make that other punishment the greater.

Rule III. *When the cause of failure may be want of power, or want of will, as it may happen, and it cannot be known which, the subsidiary punishment ought to be greater than the punishment first designed, but not so much greater as in the case last mentioned.* This is apt to be the case with pecuniary forfeitures. If, however, it can be ascertained which of these is the cause, it ought always to be done; otherwise, on the one hand, he who fails from mere inability will be punished more than there is occasion; and he who fails wilfully, not enough.

When a man fails wilfully to submit to the punishment first designed for him, such a failure may be considered in the light of an offence. Viewing it *in* this light, we shall immediately see the propriety of the following rule:—

Rule IV. *The subsidiary punishment ought to be made the greater, the easier it is for the delinquent to avoid the punishment first designed, (without being detected and made amenable.)* For the punishment, to be efficacious, must always be greater than the temptation to the offence; and the temptation to the offence is the greater, the greater is the uncertainty of that punishment which is the motive that weighs against the profit of the offence.

Imprisonment is the most convenient and natural kind of subsidiary punishment, in cases where the offender cannot or will not submit to a pecuniary punishment. A circumstance that renders these two modes of punishment particularly apt for being substituted to each other, is their *divisibility:* they admit of every degree that can be desired.

Simple afflictive punishments, on account of the infamy they involve, cannot in general be eligibly employed as substitutes for pecuniary punishments.

In case of violation of boundaries of local confinement, the most eligible substitute is imprisonment. A single act of transgression may be taken as a sufficient warning that the penal mandate is not meant to be regarded

Laborious punishments require an uninterrupted train of attention, in order to compel the delinquent to submit to them. A constant supply of fresh motives is required: to produce the desired effect, it is necessary, therefore, that these motives should be drawn from a stock of punishment that is susceptible of minute division, and capable of being applied at the moment it is wanted. Thus, whenever an inspector is appointed in a house of correction in which the individuals confined are employed in hard labour, power is tacitly given to him to inflict personal correction. The infamy by which it is accompanied is not an objection; because, by the principal punishment — the penal labour — an equal degree of infamy is produced.

We have already observed, that to pecuniary punishment, in case of inability on the part of the patient, ought to be substituted imprisonment.

But by what standard are we to estimate a sum of money by a sum of imprisonment? for what debt, or part of a debt, is each day's imprisonment to be reckoned as an equivalent?

Let us say that the amount of the debt struck off by each day's imprisonment shall be equal to what each day the patient might have earned, had he remained in a state of liberty. The daily income of a mechanic, sailor, soldier, artist, labourer, servant, may be calculated according to the wages of persons employed in the same profession.

The daily income of a farmer may be estimated according to the 365th part of the rent of his farm. If, besides his farm, he is engaged in any other line of business, the daily benefit arising from that business must be added to the income arising from his farm.

The revenue of a man who is not engaged in any business, or is not a manufacturer, may be calculated as being eight times the rent of his house. If he is a manufacturer, at four times the rent of his house. If he is engaged in trade, at six times that rent.

The revenue of a man that boards and lodges in the house of another may be estimated at double the sum that he so pays. If he lodges only, at four times that sum. If he is supported gratuitously in the house of a relation, as equal to the value of his board and lodging.*

The points that then require to be determined, are the three following:—

1. The income being given, what portion of the debt shall be considered as being abolished by imprisonment of a certain duration?

2. From what period, anterior to the contracting of the debt, ought the value of the income to be estimated?

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* EXAMPLE.

Labourer, 1s. 0d. per day — £15 : 13 : 0 per year —	Debt discharged by seven years' imprisonment,	£109 : 11 : 0	
Ensign, 3s. 8d. ,, — 66 : 18 : 4 ,, —	Debt discharged by a year's imprisonment,	66 : 18 : 4	

3. What proofs ought to be required, by which to fix the amount of the income in question? It would be the interest of the debtor to make it appear as great as possible. During the examination, the creditor ought to be present, and to be at liberty, either by himself or his counsel, to examine the defaulter.

The more exalted a man's rank, the greater in general are his annual outgoings; the greater, consequently, ought to be the debt abolished by a given period of imprisonment.

I confine myself, then, to the laying down the principles upon which the calculation may be made: the details of their application belong more properly to the Penal Code than to a work on punishment.

CHAPTER III.

OF SURETY FOR GOOD CONDUCT.

The obligation of finding sureties for good conduct is an expedient, the utility of which appears more problematical in proportion as it is examined more nearly. A condition which is essential to it is, that there be an ulterior punishment destined to replace this obligation, in case its fulfilment is found impossible. This subsidiary punishment is ordinarily imprisonment: this imprisonment is ordinarily indefinite as to its duration; it may be perpetual, and it is natural that it should be so. Does the accused find himself without friends ready to risk their security upon his good conduct? Imprisonment, and the ignominy that accompanies it, are means little proper for enabling him to find friends so devoted.

Suppose that he finds them: what happens then? To a properly seated punishment, a vicarious punishment is added—a punishment to be borne by the innocent for the guilty. In the nature of things, any punishment might be equally well employed for this purpose. By custom, pecuniary punishment only is employed in the first instance, which, however, changes into imprisonment, in case of insolvability, according to a general rule. It is not, however, natural that a man, especially a man who, by the supposition, has given proofs of misconduct, should find friends who will expose themselves to be punished for actions over which they have no power, unless he have wherewith to indemnify them for bearing this pecuniary punishment. Does he find them in this case? Then this expedient is useless: it would have been quite as well to have fixed the amount upon him directly. In order that this expedient may have an efficacy of its own, it will be necessary to limit its use to the case in which the incapacity of the accused to furnish this indemnity is known. Does he, after this, find any persons sufficiently generous thus to expose themselves for him? It is, without doubt, something gained in point of security; but it is a security very dearly bought. In all other cases, this expedient resolves itself into a question of account.

The support which the law receives from this expedient, springs from two sources. it operates as an additional punishment, whereby the will of the accused is influenced—this punishment consisting in the remorse which a generous mind would feel in seeing friends, who had devoted themselves for him, plunged into misfortune by his ingratitude. It is also an expedient whereby he is attacked upon the side of power: his sureties become guards, whom the danger to which they are exposed induces to watch over his conduct.

But will he, whom the fear of punishment to be inflicted upon himself has been found insufficient to restrain, be restrained by the fear of a less punishment to be inflicted upon another? Those passions which have stifled the voice of prudence, will they obey those of generosity and gratitude? They may obey it; but that they will not obey it is, I think, most natural: but if this is so, it is a very costly expedient. In the majority of cases, instead of ensuring the good of prevention, it will produce the evil of punishment — of punishment borne by the innocent.

Whilst, as to this guard, it is a security much more verbal than real — it would be a very weak security, even if the individuals were his companions, and lived under the same roof with him at all times. But it is not among such as these that sureties are selected: they are, under the English law, required to be householders, having separate establishments. Is it, then, possible, that the passion which, by the supposition, had broken through the united restraints of prudence, gratitude, and honour, should be restrained by so loose a band? Besides this, is it natural that the extremes of confidence and mistrust should be united in the same person?

The bitterness of this punishment, to which the innocent are made to expose themselves, is not taken away by calling the exposure voluntary. This willingness is owing only to the constraint which the consideration of his friend being sent, or about to be sent, to prison for life, brings with it: it is a willingness produced by torture.

In conclusion, suretyship is a resource which ought not to be resorted to without very evident necessity, if it were unattended with any other inconvenience than this, of exposing the virtue of individuals to these combats, which, in a moment of weakness, may give birth to a remorse which shall end only with life.

This expedient is much employed under the English law; but custom has caused it

to exist only in connexion with judicial commination. A certain fine is determined on: the accused is made to say, I consent to the payment of this fine, if I commit a certain offence. One or more sureties are made each to say, I consent, on the same condition, to owe the same, or a part of the same sum. In this manner, as if an inevitable punishment required an extorted consent to its infliction, the accused himself is made to contract an engagement, which, if it is not always ridiculous, it is that it is sometimes unjust. Implying a claim upon his property, it serves to rob his creditors of their just rights to payment of debts contracted between the period of the engagement and the contracting of the debt. .

Of this ill-contrived compound mischief, what are the effects in practice? very commonly, none. This formality is complied with, as so many others are complied with, without thinking of what it means, partly from duty, and partly from habit. Sometimes it may be useful, because it always includes admonition, and sometimes threatening, according to the proportion between the fine threatened, and the punishment which would have had place without it: sometimes, for want of sureties, it may be believed that the accused himself may go to prison: sometimes, after having found them, it may equally be believed that they may incur the fine, and that they pay it, or go to prison, with or without him. Do these misfortunes frequently happen? I know not. How can I know? This is one of those thousand things on which everybody ought to be instructed, and of which no one can find an opportunity of learning the truth.

CHAPTER IV.

DEFEAZANCE OF PUNISHMENT.

§ 1.—*Of Pardon.*

IT is necessary to increase the magnitude of a punishment in proportion as it is wanting in certainty. The less certain your punishments are, the more severe they must be; the more certain your punishments are, the more you may reduce their severity.

What shall we then say of a power expressly established for rendering them uncertain? I mean, the power of pardoning: it has cruelty for its cause; it has cruelty for its effect.

Among nations, as among individuals, the government of the passions precedes that of reason. The object of primitive punishments was to assuage the rage of their authors. Of this there are two proofs: the first is drawn from the multitude of cases in which the most severe punishments have been lavished upon actions which have but a slightly hurtful influence upon the happiness of individuals or society, and with respect to which, such evil influence was not sought to be established till long after these punishments were appointed: of this kind are the punishments directed against heresy. The second is drawn from the praises lavished upon clemency: for whilst the effect of an offence is only to enrage the sovereign, there is merit in his abstaining from punishing it. There is utility in his so doing, for by a privation which is borne by him alone, he spares the infliction of terrible evils upon a multitude of persons. In this consists the difficulty; for it is difficult for a man accustomed to follow the bent of his inclinations, to restrain them. Suppose the effect of a crime is to interrupt his ease, and the effect of the punishment is to repress this crime: to abstain from the application of this punishment is a treason of which the most pardonable sources are feebleness or folly. To praise the clemency of the sovereign upon this supposition, is to praise the surgeon who allows his patient to perish by not cutting off a gangrened finger. Among sovereigns, therefore, without cruelty, the use of unmerited pardons could not take place: the reason is, an enlightened love of the public welfare does not engage him in undoing with one hand what he had done with the other. If the punishments have not had, for the cause of their establishment, cruelty towards individuals, it is cruelty towards the public to render them useless—to violate his promise, the engagement which he has made to the laws to put them in execution.

I speak here of gratuitous pardons, such as all pardons have hitherto been. There are cases in which the power of pardoning is not only useful, but necessary. In all these cases, if the punishment were inflicted, the evil produced would exceed the good, and, in some cases, almost infinitely. If the legislator could have known that certain individual cases would or would not be included in the general case in which he would have wished that the punishment should cease, he would act unwisely were he to rely upon any other person for its cessation. For why should he give to another a power to frustrate his designs? But he does not possess this knowledge, unless, in quality of legislator, he acts also in that of a prophet. It follows, therefore, that he must rely upon some other.

In English law, one method by which the law gives to a party injured, or rather to every prosecutor, a partial power of pardon, consists in giving him the choice of the kind of action which he will commence. On this, or on the difference between the actions, depends a difference between the punishments: so far as the happening of this difference is

concerned, the lot of the offender depends not on the gravity of his offence, but on some other foreign circumstances; such as the degree of the ill-will of the party injured, or other prosecutor, or of the knowledge of his legal advisers. The judge is a puppet in the hands of any prosecutor, which he can cause to move at his pleasure and caprice.

There are many persons, as we have seen, who exercise the power of pardoning: there are many others who possess it, who are not observed.

Among the latter class may be placed those who have the power of placing nullities in the course of procedure. In England, an attorney, or his clerk, any copying clerk at eighteen-pence or two shillings per day, may grant or sell impunity to whomsoever it seems them good.

If the individual injured can directly, or indirectly, put an end to a criminal process, otherwise than by the punishment before the judgment has been pronounced, and, in case of conviction, executed, he enjoys in effect this right of pardoning. The right of remission is, then, one branch of the power of pardoning. When the interest of the public requires that the punishment should take place, the individual injured ought not to enjoy this right: when this interest does not require it, he may enjoy it.

This power may be allowed in all cases, when the offence on which it operates, being founded only in a private quarrel, does not spread any alarm through society, or at least does not spread any alarm which the conduct of the parties does not destroy.

But in the case of corporal injuries, how trifling soever, and especially in the case of injuries accompanied with insult, this remission ought not to be allowed without the knowledge of the judge; otherwise the weakness and good-nature of some minds would serve to draw down upon them vexation from hardened oppressors.

Homicide is a case in which the power of remission ought not to be allowed to any one in particular. It would, in effect, be to grant to him an arbitrary power over the life of those whose death he might thus pardon: he might boldly employ any assassin, by exercising in favour of that assassin his power of pardoning.

If to grant to any one whatsoever, the power of taking away a reward offered by the legislator, would be regarded as an absurdity, to grant the power of taking away a punishment in the opposite case, with the reserve of specific exceptions, would be a more terrible absurdity.

This absurdity is not found in the system of rewards: no person proposes to take away a reward after the legislator has offered it; the nullities, however, allowed in prosecutions, when he has appointed a reward for offenders, operates to this effect in the case of punishment.

The frequency of capital punishment is one of the most probable causes of the popularity of pardons.

In England, it may therefore admit of debate, whether the legislature has done most evil by appointing so many capital punishments, or the sovereign, by exercising his power of remitting them.

The essence of this power is, to act by caprice. The king, as it is falsely said, — the deputy of the king, as it ought to have been said — does not act judicially: he does not act from a knowledge of the matter; he has not the power of doing so; he has not even the power of compelling the attendance of witnesses. Is a lie told before this powerless despot? it is an unpunishable lie.

The power of pardoning is often said to be one of the brightest jewels in the royal crown: it is burdensome as it is bright, not only to those who submit to the crown, but still more so to him also who wears it.

Many cases have occurred in England, in which the counsellors of the crown have, from more or less praiseworthy motives, made use of this lawful despotism of the king, to soften the tyranny of the laws. Never was power so undoubtedly legal, though undue, employed for a mere legitimate purpose: — the result, however, has been, not that the minister has been applauded as he deserved, but that he has become the object of clamour, libels, and threats. The most correct and legitimate exercise of the powers impolitically attached to his character, has only served to draw down upon the king that treatment which a tyrant would have merited.

How much discontent and fear would have been spared, if a right, legally abusive, had given place to an enlightened and well-ordered law!

§ 2. *By Length of Time.*

Ought punishment, in any cases, and in what, to be defeasible by length of time — by the time, I mean, that has elapsed since the commission of the offence?

At first view, the answer seems to be clearly in the negative; for what, it may be said, has the circumstance of the length of time to do with the demand there is for punishment?

Upon a nearer view, however, it will be found, that the utility of prescription in certain cases is maintainable by specious, at least, if not conclusive arguments.

As a foundation for these arguments, it must be admitted, that if in any case the suffering of the delinquent is not necessary for the attainment of the ends of punishment, the punishment ought not to be inflicted.

This being premised, it should seem, that

in a view to one of the ends of punishment, to wit, reformation, the execution of it after a certain length of time is not necessary. A certain number of years, suppose ten, has elapsed since he committed the offence: now then, in all this time, either he has committed similar offences, or he has not. If he has not, he has reformed himself, and the purpose of the law has been answered without punishment: if he has, he has been punished for subsequent offences, and the discipline he stood in need of has been already administered to him, at a time when he stood more in need of it than he can be supposed to stand at present.

Thus stands the argument upon the ground of reformation: but of the facts alleged, one, it must be confessed, is rather problematical. If a man commit an offence, and is forthcoming ten years afterwards, it is by no means clear, from his not having been punished for any similar offences, that he has not committed any. In the same manner that he escaped detection or prosecution for the first, he may have escaped detection or prosecution for any number of other similar offences. The difficulty of detection, the death of witnesses, the subtleties of procedure, are circumstances that afford ample grounds for disputing the force of the inference, from his not having incurred punishment, to his not having deserved it.*

Upon the ground of example, there is still less to be said in favour of prescription. If the prescription is not to take place till at the end of a long period, as ten years (the number above taken for an example), it will not contribute, in any assignable degree, to lessen the apparent value of the punishment. When a man meditates a crime, his great fear is the being detected and apprehended, immediately almost upon the commission of it. The taking away the danger that would await him at the end of ten years, will add very little to his security.†

When a crime has been committed, either the person only who committed it may remain unknown, or the *fact*‡ itself, as well as the *person*. If either be unknown, it is plain no prosecution can have been set on foot: if both be known, then either a prosecution may have been set on foot or not. It is only in case of there being no prosecution, that prescription has ever been allowed. The rule is, that a man shall not be prosecuted after that interval has elapsed — not that, if he has been prosecuted and convicted, he shall not suffer.

The apprehension of danger commences at the time of the discovery. Persons who are about the criminal now understand that they have among them a thief, a robber, or a murderer: this cannot but give them some alarm. If no punishment at all is to be inflicted on him, if he is suffered to go on and live where he did before, how is this alarm to be quieted?

In crimes, the object of which is a pecuniary profit, prescription ought not in any case to operate so as to protect the delinquent in the enjoyment of his ill-gotten acquisition.

Neither ought it to operate in such manner as to leave innocent persons exposed to suffer from their terror or abhorrence of the criminal.

There are also certain crimes, in respect of which prescription ought not to be adopted in any case. Such are three species of homicide: viz. homicide for lucre, through wantonness, or from premeditated resentment; incendiarism; and the offence of sinking a vessel manned, or of laying a country under water. The mischief of crimes of these kinds is so great, that it seems paying too great a regard to the interests of the criminal to adopt a rule that may contribute, though in ever so small a degree, to lessen the apparent certainty of the punishment; and the horror or terror a fact of any of those kinds inspires when discovered, is so great, that that circumstance alone seems enough to overweigh any good that could be gained by it.

What is the good in view in prescription? It is the interest of one single person that is in question — the delinquent; the sparing of that single person from a suffering which it is supposed it may, in the case in which it is proposed the prescription should take place, not be necessary, at least not so necessary as formerly, to the purposes of punishment to inflict. Now, when it is a crime by which men are exposed to suffer in their individual capacities, it can scarcely be detected, but a multitude of persons must begin to suffer; to wit, by the apprehension of his committing other such crimes in future, of which they may chance to be the objects: and this suffering of theirs will continue till he be manifestly disabled to hurt them; the least penal method of doing which, is to send him out of the way.

Upon this slight examination, we perceive that the utility of prescription will vary greatly in respect of different offences. To discuss this topic completely, it would be necessary, therefore, to consider it with a

* Any one who is at all conversant with anecdotes of notorious criminals must have observed, that nothing is more common in this country than for a man to be guilty of twenty, thirty, or forty thefts or robberies, before punishment overtakes him.

† Mr. Bentham does not appear to have carried on his examination of this subject in respect to the other ends of punishment. — ED.

‡ Under the name of the fact, I would here include such and so many circumstances as are necessary to make the act in question come under the denomination of some crime.

view to the several sorts of offences. To do this fully, belongs not to our present subject: all we can do in this place is to offer a few general hints, just to put us in the way, and to serve as a clew to indicate the principal points upon which the inquiry ought to turn.

Whether a given person, detected, after such a length of time, of a crime of the sort in question, is or is not an object of terror to those around him, is a question that can be answered only by a particular inquiry: it is a matter, therefore, that ought rather to be committed to the magistrate who has the power of pardoning, than to be provided for by a general law.

§ 3. *By Death of Parties.*

In pursuit of (the means of making) compensation, the business of punishment is apt to be overlooked. When one man, the party injured, is presented with what another man, the injurer, is made to pay, men are apt to take it for granted, and at first asking would be apt to answer, that there is no punishment in the case. They imagine, but hastily and erroneously, that the only person who has suffered by the offence is that party who is the immediate object of the injury. If, then, that person, by an operation of law, be made to enjoy as much as by the offence he had been made to suffer, they conclude (and justly enough, were the foundation true) that everything is set to rights, and that the law has nothing more to do. The pain which the offender is made to suffer by being made to give up what the party injured is made to enjoy, they do not look upon in the light of punishment. They look upon it as a circumstance resulting, accidentally and unintentionally, out of the operation by which an indemnification is produced to the injured party, so that it would be but so much the better if that pain could be altogether spared; and it is for want of being able to save it, that it is suffered to exist. In short, so entirely is the idea of punishment lost in that of compensation, that a law which appoints the latter, is not understood to appoint the former; is not looked upon as a *penal* law.

Punish, however, it must. A penal law, in one sense of the word, it must be, if it is to have any effect at all in preventing the practice which is productive of the mischief it means to cure; and it is by *punishing* that it does more good than by *indemnifying*. For of the two ends, prevention and compensation, the former, as has been proved, is by much the most important.

This neglect, however, of the principal end of laws made in restraint of private injuries, has not been attended with all the ill consequences that might at first sight be imagined. The indemnification being made to come out of the pocket of the aggressor, has produced the punishment of course. Now, under the laws of most nations, in most instances of acknowledged injuries, indemnification has been exacted, and by that means, in most cases, it has happened that punishment has been applied. Yet not in all; because compensation has been made defeasible by contingencies: I say in most, but it has not in all; for there are two events by which in all these cases indemnification is rendered not necessary in so great a degree as it was before, and, as it may appear upon a superficial glance, not necessary at all. In effect, upon the happening of either of these two events, under most laws, and particularly under our own, the obligation of making compensation has been cancelled. At the same time, compensation being the only object in view, this being taken away, punishment has of course dropped along with it. But in these cases, as I hope soon to make appear, howsoever it may stand with compensation, the demand for punishment has not been lessened by either of the events in question.

These are — 1*st*, The death of the injurer; 2*dly*, The death of the party injured.

1. The death of the injurer has been deemed to take away the occasion for indemnification. The reason that occurs is, that there is nobody to give it. Had he continued alive, he ought to have given it, doubtless; but as he is gone, who ought then? why one person rather than another?

To answer these questions at large, we must make a distinction according to the nature of the offence. The offence is either attended with a *transferable* profit, a fruit transmissible to the representatives of the offender, or not. In the first case, the obligation of making compensation ought clearly to devolve on the representative, on the score of punishment, if on no other. In the latter case, there would still be one use in its being made to devolve on the representative, as far as the possessions he inherits from the party deceased extend, though not so great a use as in the former case.

Where the profit of a transgression is transmissible to a representative, the obligation of restoring the amount of it ought likewise to devolve on him: if not, the punishment would not, in the case in question, be equal to the profit; in fact, there would be no punishment at all, no motive for the party under temptation to abstain from it. It may occur for the first moment (but it will soon appear to be otherwise) that neither will there in contemplation of this case be any temptation; for if the injurer thinks himself about to die, there will be an end of the profit of the injury. But this is not the case: should he be made to lose it ever so soon himself, he may transmit it to those who are dear to him, so that the pleasure of sympathy, grounded

on the contemplation of their enjoyment, is a clear force that acts without controul, and impels him to transgression. Besides this, the delays and uncertainty of justice add still to the force of the temptation. If he can contrive to spin out the suit so long as he lives, the whole business, from beginning to end, is clear gain to him.

2. Even though the profit of a transgression be not of such a nature as to be transmissible to a representative, there seems still to be a reason why the obligation of making amends ought to devolve on the representatives, as far as they have *assets*.* Such an arrangement would be eligible, as well on account of punishment as of compensation:

On account of compensation, for the following reasons: The mischief of the transgression is a burthen that must be borne by somebody: the representative and the party injured are equally innocent in this respect — they stand upon a par; but the representative would suffer less under the same burthen than the party injured, as we shall presently perceive. From the moment when the injury was conceived, the party injured, in virtue of the known disposition of the law in his favour, entertained *expectations* of receiving amends. If these expectations are *disappointed* by a sudden and unforeseen event, like that of the delinquent's death, a shock is felt by the party injured, such as he would feel at the sudden loss of anything of which he was in possession. The eventual representative entertained no such determinate expectations: what expectation he could entertain in the lifetime of his predecessor, respected only the clear surplus of his fortune — what should remain of it after the deduction of all charges that might be brought upon it by his misfortunes, his follies, or his crimes.

On account of punishment, for the following reason: The punishment of the delinquent in his own person is a punishment which fails upon his death: the burthen thrown upon those who are dear to him, extends his punishment, as it were, beyond the grave. Their suffering, it is true, will, for the reasons above given, not be very considerable; but this is what the bulk of mankind are not apt to consider. It will be apt, therefore, in general, to appear to him in the light of punishment, and will contribute to impose a restraint on him in a case in which, otherwise, there would be none. Nor will this advantage, in point of punishment, be charged with that *expense*, which renders punishments *in alienam personam* generally ineligible; for when the burthen is made to rest on the representative who has assets, there is less suffering, as we have shown, upon the whole, than if it were to rest upon any other person.

The law of England on this head is full of absurdity and caprice. The following are the instances in which (the heir is permitted to enrich himself by the wrong-doing of his ancestor) a man is permitted to enrich his heir with the profit of his crimes:† By the wrongful *taking* and withholding of any kind of moveables, while, if it had been by only *withholding* money due, the heir must have refunded; — by the waste committed on immoveables, in which he has only a temporary interest;‡ — by selling to a prisoner for debt his liberty; — by embezzling property entrusted to him by will, though, if he had not broken any such confidence, but had intruded himself into the management of the dead man's property without warrant, the heir must have refunded; — in short, by any kind of injurious proceeding, where the compensation, instead of being left to the discretion of a jury, is thought fit to be increased and liquidated by a positive regulation.

The death of the party injured is another event upon which the obligation of making amends is very commonly made to cease; but with full as little reason, it should seem, as in the former case. The death of the party in question is a contingency which does not at all lessen the demand there is for punishment. For compensation, indeed, the demand is not altogether so strong in this case, as in the former: the person who was the immediate object of the injury, entertained a prospect of reaping, in present, the whole profit of a compensation he expected to be adjudged to him: his representative did not, during the lifetime of the principal, entertain so fixed a prospect; he, however, entertained a full prospect of some compensation to be made to his principal; and he entertained a prospect of a part, at least, of that compensation devolving upon himself, subject to the contingencies to which his general expectations from the principal were exposed. This expectation is more than any one else was in a situation to entertain; so that there is a better reason why he should reap the profit of the punishment, than why any one else should.

The law of England has been more liberal

* Assets: Effects descending to them from the ancestor, and liable to alienation.

† In all these points, I depend upon the authority of Comyns' Digest, I. 262, 263.

‡ A person whom I know, having the immediate reversion of an estate, part in houses, part in land, rented the land of a person who had the life-interest in both. The life-owner letting the houses go to ruin, the reversionary, to indemnify himself, stopt the rent of the land. The life-owner died without repairing the houses, as he was bound: the consequence was, that the reversioner (as he was advised, to his great surprise), though obliged to pay his rent, lost his remedy for the waste.

in the remedies it has given *to* the heir of the party injured, than in those which it has given against the heir of a wrong-doer. It gives it to the heir in all cases, as it should seem, of injuries done to the *property* of the ancestor. It denies it, however, in the case of injuries to the person,* be they ever so atrocious; and, probably, in the case of injuries to the reputation. This omission leaves an open door to the most crying evils. Age and infirmity, which ought, if any difference be made, to receive a more signal protection from the law, than the opposite conditions of life, are exposed more particularly to oppression. The nearer a man is to his grave, the greater is the probability that he may be injured with impunity, since, if the prosecution can be staved off during his life, the remedy is gone.† The remedy, by a criminal prosecution, is but an inadequate *succedaneum*. It extends not to injuries done to the person through negligence, nor to all injuries to the reputation: it is defeasible by the arbitrary pleasure and irresponsible act of a servant of the crown: it operates only in the way of punishment, affording no compensation to the heir.

After so many instances where no satisfaction is exigible from the heir for transgressions by which he profits, no one will wonder to find him standing exempt from that obligation in the case of such injuries as, being inflicted commonly, not from rapacious, but merely vindictive motives, are not commonly attended with any pecuniary profit. Such are those done to the person, or to the reputation, or in the way of mere destruction to the property. So accordingly stands the law;‡ though there are none of them by which the injurer may not, in a multitude of cases, draw indirectly a pecuniary profit: for instance, in the case of a rivalry in manufactures, where one man destroys the manufactory of his more successful rival.

APPENDIX — ON DEATH-PUNISHMENT.‖

JEREMY BENTHAM TO HIS FELLOW-CITIZENS OF FRANCE.

§ I. *Introduction.*

FELLOW-CITIZENS! — Hear me speak a second time!

1. Among the topics of the day § I behold the punishment of death. Shall it be abolished?

2. This question is of the number of those which for threescore years or thereabouts have been familiar to me: for these eight-and-twenty years my thoughts on subjects of this nature have had the honour and good fortune of being viewed among you with eyes not altogether unfavourable: of these thoughts some there are, which, if capable of being of use at any time, present a better chance of being so at the present than at any other; and, moreover, as not being very likely to make their appearance from any other quarter. Put together, these reasons will (I flatter myself) be regarded as affording a tolerably sufficient warrant for this address.¶

3. Now, then, as to this same question. The punishment of death — shall it be abolished? I answer — *Yes*. Shall there be any exception to this rule? I answer, so far as

* 1 Comyns' Dig. 261.

† A man may be kept in gaol, and his fortune ruined by it; and if he die under the imprisonment, his family are without remedy. In some cases, the wrong-doer may not even be punishable by a criminal prosecution; or he may be maltreated in such a manner as to contract a lingering distemper, such as does not follow from the injurious treatment with sufficient speed and certainty to bring it within the crime of murder. If the prosecution can but be staved off till he die, his family are without remedy. Many years ago, a butcher was committed to Newgate, at a time when the gaol distemper was raging in that prison, upon a false and malicious charge of theft. He died there, leaving a large distressed family, who were altogether without remedy for this atrocious injury.

‡ I rest still on the authority of Comyns, except in the case of injuries to reputation, in which I conclude from analogy, Comyns being silent.

‖ In France, while this paper was writing, two mutually connected questions were on the carpet: — the *general* question — shall death punishment, in any, and what cases, be employed? — the *special* question — shall it be employed in the case of the Ex-Ministers? The lot of these men being now disposed of, the matter which applied exclusively to their case has been struck out.

§ [*the day*] — namely, December the 17th, 1830.

¶ Not less than fifty years ago, had already issued from the press a work of mine, in which the properties desirable in a *lot of punishment* are held up to view: — meaning, by *a lot of punishment*, the quantum of it attached to the species of offence in question: and, with the requisite assortment of these properties, *death* punishment is not of itself endowed. But, as no objection to the use of this *one* instrument in particular is constituted by a deficiency which is capable of being filled up by the addition of *others*, the demand for the consideration of this mode of punishment, on this present occasion, has not been found superseded by anything that is contained in that former work, — or in any by which it has been succeeded, *in that same or any other language*.

regards *subsequential* offences, *No:* meaning, by *subsequential*, an offence committed on any day subsequent to that which stands appointed by the law, as that after which no such act of punishment shall be performed.

4. Meantime, on the part of rulers, general custom — general at least, not to say universal — delivers its testimony in favour of this punishment. This considered, a consequence is — that to justify the abolition of it, determinate reasons are requisite: this I cannot but acknowledge.

5. Well, then, various features of inaptitude — features peculiar to itself — features such as, when taken together, will be seen to be absolutely conclusive—I have to charge it with. *Inaptitude* is a term of reference:— subject-matter of reference, the *end in view*. *End in view*, on the present occasion, prevention of the like acts of maleficence in future. This is, at any rate, the *main* end: any *others*, of which mention may come to be made, will be seen to be of no other than *subordinate* importance.

6. Features of inaptitude, or say, in other words, *bad properties*. Here they follow:—

I. Bad property the first — *Inefficiency:* — comparative inefficiency—inefficiency, in comparison with other modes of punishment.

II. Bad property the second — *Irremissibility:* — incapacity of being remitted as to the remainder, after a part has been undergone.

III. Bad property the third — *Positive maleficence:* — *tendency to produce crimes.*

IV. Bad property the fourth — *Enhancing the evils produced by ill-applied pardon.* — Under these several heads, explanations will follow.

7. In favour of this punishment — in support of it against the argument afforded by the proof of all these its bad properties — the only argument adducible will be found to be — that presumption of its aptitude which is afforded by the extensiveness, as above, of the acceptance given to it. This presumption will be seen repelled, by indication made of the *sources* of the attachment to it thus manifested by rulers — sources, among which will not be found any experience of its comparative conduciveness to the only proper ends to which it is or can be directed.

8. To the proof of the bad properties thus charged upon it, you will see added the proof afforded of its *needlessness:* afforded—by experiments actually made, and the experience thereby obtained.

Should all these truths be rendered manifest and incontestable, can any further reason or argument in support of the proposed abolition of it be desired?

9. But, in and for the cases in which, at present, application is made of it, a *succedaneum* to it will be necessary. A succedaneum preferable to it in every imaginable particular will accordingly be indicated, and proposed for your consideration.

§ II.—1. *Bad property the first—Inefficiency.*

I.—1. Now, then, for bad property the first —*Inefficiency:* that is to say, with reference to that same *end in view*, namely, prevention of acts similar to that in consideration of which application is made of it: I mean, acts on the part of individuals, other than the one to whom, on the individual occasion in question, it is applied; for, as to that one, the efficiency of it in this respect cannot (it must be confessed) be disputed.

2. Causes of this inefficiency, these —

1. *Cause the first.* On the part of the several descriptions of persons whose co-operation is necessary to the conviction of the criminal, reluctance as to the performance of their respective parts in the melancholy drama. These persons are —

i. The Informer or Informers.
ii. Prosecutor or Prosecutors.
iii. Witnesses.
iv. Judges.
v. Where Jury-trial is in use, Jurymen.

In any one of these several situations, let but the necessary service be withheld, the denunciation made of this punishment fails of being productive of the preventive effect looked for and endeavoured to be produced.

3. II. *Cause the second.* On the part of the delinquent himself — that is to say, on the part of persons at large, considered as standing exposed to the temptation of becoming delinquents in this shape — comparative *insensibility* to the danger of punishment in this shape: — as to this matter, presently

4. Look first at cause the first. Prodigious is the counteracting force with which you will see this same reluctance tending to destroy the efficiency of *this* mode of punishment: — prodigious, in comparison of that with which it acts in relation to any *other* mode.

5. And, as the dissocial affections decrease in strength, and the social increase — in a word, as civilization advances — the reluctance to contribute to the infliction of this punishment will increase: so, therefore, in the eyes of the individual in question, the apparent improbability of its infliction, and thence in his instance the probability of its being without effect.

6. Now for a measure of the degree of this same reluctance. Would you have an instructive one? Take, for the subject-matter of observation, a place, in which sympathy, for sufferings ordained by law, may be stated as being at its minimum — the heart of an English judge.

7. Case, prosecution for theft. Subject-matter, nine and thirty pieces of gold; value, nine and thirty *pounds* sterling: Judge's charge, — Gentlemen of the Jury, find the

value nine and thirty *shillings*. Note, that, in England — the verdicts of jurymen are given on their *oaths;* and that the breach of an oath is termed *perjury;* and to induce a man to commit perjury, is termed *subornation of perjury*.

8. For what purpose, then, this subornation? For the purpose of preventing the execution of the law: — that law which *he* too is *sworn* to execute. Why thus seek to prevent the execution of the law? Because, by the law in question, where the value of the subject-matter of a theft was as high as forty shillings, no less punishment was allowed to be inflicted than a sort of *olla podrida*, called *felony*, of the ingredients of which death was one: and at the expense of this compound of perjury and subornation of perjury, and not otherwise, the substitution of a different punishment to death-punishment, on these terms, and no others, was effectible. Recommendation, given to a jury — to this effect, and with this effect — has long been a common practice.

9. When such is the reluctance, in a heart of such hardness as that of an English judge, steeled against all generous affections by sinister interest with the accompanying prejudices, think what it must be in a heart of average consistence, in the several other situations above mentioned.

10. Fellow-Citizens! who can now doubt but that, of the reluctance thus produced, impunity in vast abundance must have been the effect? And of the impunity, increase in the multitude of the several crimes: effect *actually* produced, the reverse of the effect *intended*, and supposed to be produced?

11. Is there any other punishment, in regard to which any such reluctance can be seen to have place? No, not one.

12. Think of the multitudes of men, of so many different classes, whose breasts one inclination or other employs itself in hardening against impressions from the fear of sufferance in this shape.

I. Military men, against death by warfare.

II. Men of education, against death by duelling. In this case, the fact of the insensibility is out of dispute: its propriety is a consideration that belongs not to the present purpose.

III. Seafaring men, of the non-military, as well as the military class.

IV. Men engaged for subsistence, in various occupations, in greater or less degree *unhealthy*.

But — why all this rambling? this resort to other countries? The question is a local one. Insensibility — to what? to the fear of death. In what place? In the hearts of Frenchmen. Wanted, for the occasion, a measure for the force of this quality. Fellow-Citizens! would you have a correct one? Look at home: Look at the work of the *Three Days!*

§ III. — II. *Bad Property the second — Irremissibility.*

1. For this purpose, punishments may be distinguished into *continuous* and *instantaneous:* continuous, those which, being in their nature capable of continuing to be inflicted and suffered, for and during a length of time more or less considerable, may, after having been suffered for and during a part of that same time, be made to cease as to what remains of them: instantaneous, such of which, if any part is suffered, so is every other part. Of the instantaneous, and in this sense, of the irremissible sort, is (as every one sees) death punishment.

2. By *remission*, understand — not prevention of the *whole*, but, after a part has been already undergone, prevention of the remainder.

3. Whatsoever, on the occasion in question, may be the demand for the *remission* of the punishment — death-punishment being thus instantaneous, is not capable of being remitted; consequently, in every case in which justice requires such remission, it is productive of injustice.

4. Of occasions, on which it may be manifestly desirable, that the punishment which a man has been sentenced to suffer should thus be remitted, — examples (you will see) are these: —

I. Discovery of the innocence of the supposed criminal.

II. Special service, in some determinate shape, capable of being rendered — by the criminal in question, and not by any other person.

III. Indication, for example, of evidence probative of *delinquency*, in any shape, on the part of some other person.

IV. Or, of *innocence* on the part of some other person, who otherwise would have been convicted of delinquency, no matter in what shape.

V. Special service, in any other shape whatsoever, in which service can be rendered to mankind.

5. Death-punishment is thus rendered unapt — in comparison, not only of all *continuous*, but of other *instantaneous* punishments; for, in the case of every such punishment — mulct, pillory, whipping, for example — after the punishment has been undergone, there the man is, in a capacity of receiving satisfaction, in the shape of compensation, and whatever other shapes may be indicated — by the nature of the supposed offence committed, the punishment undergone, and the circumstances of the individual sufferer; in such sort that, suffering and satisfaction taken together, he may be — not a sufferer, but rather a gainer, upon the balance of the account.

6. And note — that, at the charge of some fund or other, *satisfaction* in the *pecuniary* shape, say in one word *compensation*, the

man should be made to receive, in every case; that is to say, at the charge of individual witnesses and prosecutors, one or both, wherever the falsehood, by which the conviction was produced, had *evil consciousness* or *temerity* for its accompaniment on their part: failing that *private* fund — then at the charge of the public fund.

7. And thus it is — that, not only is death-punishment a punishment, of the infliction of which irreparable wrong may be the consequence; but it is the *only* mode of punishment of which so deplorable a result is a necessary consequence.

8. The comparative inefficiency of this punishment, in consequence of men's reluctance to contribute to the infliction of it, has just been brought to view. To that same inefficiency, this same irremissibility cannot but be, in a greater or less degree, contributory. By the thought — that, should the suffering which his testimony, if given, will be productive of, turn out to be wrongful, the wrong will be irreparable, — can it be, but that a man will be restrained from delivering such testimony, on many an occasion on which he would have delivered it, had the punishment been of no other sort than one, of which, if eventually found undue, the remainder might be remitted, — and, for the part already undergone, reparation made? Reader! whoever you are, put this question to yourself, and make answer to it.

§ IV. — III. *Bad property the third — Tendency to produce Crimes.*

1. Now comes bad property the third — *Tendency of this punishment to produce crime.* Paradoxical as it may seem, — the proposition by which this property is attributed to this same punishment, is not the less true. For this so extraordinary a property, it is indebted to its capacity of being applied to the *extinction of evidence.* For, you will see immediately, whatsoever evil is producible by *false* evidence, that same evil is producible by extinction of *true* evidence.

2. By false evidence, a man may be invested with a right that does *not* belong to him; he may be divested of a right that *does* belong to him: so, therefore, may he by extinction of true evidence.

3. By false evidence, a guiltless man may be made to suffer punishment, whether in the shape of death-punishment, or any other; a guilty man may by acquittal be exempted from all punishment — and, unreclaimed, let loose upon society, to add to the number of his crimes. So likewise may evil in these shapes be produced, by extinction of true evidence.

4. But, if any sort of crime there be, to which death-punishment is attached, — then so it is — that, by prosecution, as for a crime of that sort, with false evidence for the support of it, and conviction thereupon pronounced, may a man be put out of the way, — and the evidence, which he would have delivered on the occasion of such other suit, extinguished.

5. In this case, here is a man, who has been seduced and converted into a murderer. Seduced? and by whom? Even by the law herself, who has thus put arms into his hands, having prepared the judge and his subordinates to serve him in the character of instruments and accomplices. And thus it is — that, by means of death-punishment, may be produced — wrongs and crimes to any amount, which would not otherwise have had place.

6. In a word, death-punishment puts it in the power of any ill-disposed person, by extinction put upon true evidence, to produce any evil, producible by him by means of false evidence. By no other mode of punishment can evil, in this shape, be produced.

§ V. — IV. *Bad property the fourth — Enhancing the evil effects of undue Pardon.*

1. Throughout the civilized world, pardon is as yet upon an unapt footing: and of this inaptitude, death-punishment is the main cause. Fellow-Citizens! you look for explanation: here it follows.

2. Punishment is everywhere an evil; but everywhere a necessary one: punishment, that is to say, suffering applied purposely by public functionaries. No punishment, no government; no government, no political society.

3. Punishment is everywhere necessary: the application of it is everywhere a necessary part of judicial procedure. But of that same procedure, power of pardon is moreover a *requisite* part; power of pardon, that is to say, as above, power of arresting the hands of the judge, and preventing him from applying punishment, notwithstanding that demand for it, which the conviction of the accused has proved to have place. *Requisite*, I say — not *necessary:* for, without the existence of any such power, government might be anywhere carried on. But in this case, evils of no small magnitude would unavoidably have place — evils which, by apt application of *pardon-power*, may be excluded; and, by such application as is actually made of them, — are, in a degree more or less considerable, everywhere excluded.

4. On the other hand, — evils there are, which are liable to be produced by *pardon-power* where unaptly applied; and, unaptly applied it is, — when applied otherwise than under certain *restrictions*, of which presently. Not inconsiderable will these same evils be seen to be: and, in death-punishment you will see a main cause of them.

5. In what way? you ask. I answer — in this way. Whenever monarchy has place, — a public functionary there is, in whose hands pardon-power has place; and the monarch is that functionary. How the case stands in

this respect under a pure aristocracy, as in Switzerland, — how, in a representative democracy, as in the Anglo-American United States, — I stay not to inquire: to the present purpose any such inquiry would be irrelevant: only that you may see they are not overlooked, is this brief mention made of those cases.

6. You — so long as you have a king — you will have a functionary, in whose hands this same pardon-power will remain lodged. But, having in hand this power, he will have in hand an instrument, with which, if death has place in the list of punishments, it depends upon him, (unless restrained by conditions which will presently be brought to view) — yes, upon him it *does* depend, for the gratification of whatever may at any time be his desires, to produce evil without stint. Take for example murder: applying to *murder* this same power, — it depends upon him — to murder any man, — and as many men, as, at any time or times, it pleases him so to deal with; to apply to that purpose — not his own hands only, but any hand or hands, which, by remuneration, he can engage to lend themselves to this service. In a word, in this same power he possesses an instrument, which (always supposing death to have place on the list of punishments,) is, in the very nature of it, a perennial source of delusion corruption, and misrule, in every imaginable shape.

7. How so? you ask. I answer, thus: Wherever, with a title such as that of *king*, a monarch has place, — so it is that, under the influence of fear and hope, imagination has exalted him into a being of a superior order — a sort of god. In this god upon earth, the people behold the god of their idolatry: — image, deputy, and representative, of the God which is in heaven. As such they worship him, they bow down to him, they kneel to him, they pray to him. Whatsoever it is that he bids them do, that of course they feel disposed to do, repelling as undutiful the consideration of what may be the consequences. To this maleficent exaltation, death-punishment is in a prodigious degree contributory. In the hands of the God of heaven, is the power of life and death: so accordingly is it in the hands of this god upon earth; in *his* hands and no others. The God which is in heaven has his *attributes:* some of them belong to him in severalty; others he holds in joint-tenancy, having for partner this his likeness — the god upon earth. In the import of the word *mercy* is included, the supposition of the existence of a power of producing pain and pleasure — of producing it in cases, in which the production of it is not required by justice; or, on any other score, by the *greatest-happiness* principle. Mercy is of the number of the attributes of the God of heaven: it is of the number of those, in which, by law, he has for partner, this his deputy — the god upon earth.

8. Thus mischievous is this same word *mercy*. In a Penal Code, having for its first principle the greatest-happiness principle, — no such word would have place.

9. Power on the one part is created by obedience on the other part: correspondent, with perfect exactness, is this same power with this same obedience: correspondent and proportionate; neither greater nor less. By whatever hand political power in any shape is holden, a perpetual operation of it is — the pushing the power onwards, in every direction in which the man finds obedience yielding to it, and in every such hand, the abuse of this same power, except in so far as kept down by appropriate checks, — rises in proportion to the quantity of it.

10. Fellow-Citizens! certain restrictions (I have said) there are, without which, by this same power, evils cannot fail to be produced. The restrictions I had thus in view, are these which follow: —

11. i. Restriction the first. — No *pardon* granted, but on condition — that, to the fact of its being granted, and the grounds on which it is grounded, the same *publicity* be given as to the fact, and ground of the *conviction*.

12. Proper grounds for pardon, these: —

I. Multitude of the delinquents. This applies, of course, not to any one separately considered, but to a part of the number: — a part, greater or less, according to the circumstances of the individual case.

II. Since the conviction, discovery made of the convict's *non-guiltiness*.

III. On condition of receipt of the pardon, and not otherwise, *special service* in any shape rendered, or on adequate grounds expected to be rendered, by the convict; such service not being otherwise obtainable on such good terms.

IV. Special service, in the *particular* shape of indication made, — of not less maleficent delinquency on the same occasion, or on any other occasion, on the part of some other individual; or needful evidence afforded, such as is not extractible from the delinquent himself.

V. In case of infliction, apprehension of displeasure at the hands of the *people*.

VI. In case of infliction, apprehension of displeasure at the hands of this or that *foreign power*.

13. What! says somebody, — if the remission has for its ground — apprehension of displeasure at the hands of the people, or at the hand of a foreign power, would any such allegation be compatible with the dignity of the government? would it not be a confession of weakness? I answer — Against this evil, such as it is, the door might be shut without difficulty. Whether it has place or no, depends on the

complexion given to the discourse, which on this occasion is employed: in the case where the people were in question, a tone of sympathy, or say of paternal condescension, would be the tone proper to be assumed: in the case where a foreign power was in question, a tone of civility and general desire of amity.

14. As to the *time* of the *publicity*, both that, and the time of the *pardon*, might and should be left to be appointed by the *power-holder* in question, and left to be determined by circumstances. In many, if not in most, cases of *special service*, what might happen is, that by the publicity the service expected would be prevented from being received.

15. ii. Restriction the second. — As to the relative *time* of the grant of the pardon on the ground of special service — the grant should not be made, unless and until the service had been performed: in other words, it should be made *conditional;* and the condition should be — actual receipt of the expected service: or at any rate, performance of so much as depended upon the individual in question towards the receipt of it. Reason — But for this condition, the ground in question might, where it had no existence, (no such service being so much as expected) be successfully employed as a pretence for pardon, in cases in which pardon was unmeet.

16. iii. Restriction the third. — In the mean time, instead of definitive, the remission might be temporary, or say — in the word commonly employed — a *respite*.

17. iv. Restriction the fourth. — Where, to the *particular ground* of the pardon — namely, the particular service thus performed — publicity is not given at the time of the publicity given to the pardon *itself*, — still, to the *general* ground — *special service expected*, the publicity might be given, and, on the same occasion, an engagement entered into — to give publicity to the *particulars* of the service, so soon as *that* could be done without detriment to the public interest.

18. v. Restriction the fifth. — Lest this engagement should be a pretence, — a list should be kept of all these cases of *publicity delayed:* and, at the recurrence of some certain period — twelve months, for example — publicity should be given to a list of those several engagements: the notice, requisite for explanations and justification, being, in the instance of each delinquent, inserted under appropriate heads.

19. From pardon-power unrestricted, comes impunity to delinquency in all shapes: from impunity to delinquency in all shapes, impunity to maleficence in all shapes: from impunity to maleficence in all shapes, dissolution of government: from dissolution of government, dissolution of political society.

20. All this while, no such sweeping results have place. Whence happens this? Only from the influence of two causes: — 1. One is — on the part of those on whose hands the power of pardon is lodged, non-existence of sinister interest adequate to the production of such result: on the contrary, existence of an interest adequate to the prevention of it. 2. The other is—the preventive tutelary power of public opinion.

21. Still, only in part is it — that, by their united power, these two causes have the effect of warding off this calamitous state of things. As to the *first*, — to no inconsiderable degree, as you will see, the functionaries in whose hands the power of pardoning is lodged, *have* an interest, and that an adequate, and but too effective interest, in the production of the evils in question: as to the *second* — namely, public opinion, — you will see it is itself influenced and determined, by those same men, who are thus under the dominion of that same sinister interest; and that to such a degree, that they are, actually and purposely, instrumental in giving birth to these same evils.

22. Then as to death. That being the case, you will see how it is—that, in the place which death has in the list of punishments, originates so large a portion of that same sinister interest, and at the same time of the power of giving effect to it. This is what you will see immediately, when the cause of the attachment of rulers in general to this mode of punishment, comes to be brought to view: from all which you will see — how important it is that those same *restrictive applications* should accordingly be made.

§ VI. *Causes of the general approval of it.*

1. But (says somebody)—the application so universally made of it — is not this a strong presumptive proof of the need there is of it? Is it not everywhere in use? in use under every form of government? What is more — is it not generally, is it not almost universally, approved? by some a more, by others a less extended application of it? by almost everybody, to some cases, approved, or at any rate to one case — the case of murder — the application of it? Here, then, is not public opinion thus decidedly, and to this degree, in favour of it? Exists there, then, in the whole business of government, a practice, in favour of which a more strongly presumptive proof has place, than that which is seen to plead in favour of *this?* Of the application made of it in practice, the cause (*you* say) may be seen in the interest of *kings* — that sinister interest which you have been holding up to view:—but—public opinion—does not public opinion likewise thus declare in favour of it? and, in the maintenance of this or any other practice in use, on the part of kings or any other rulers, can public opinion have any such, or any other, sinister interest?

I answer — the case is — that, in regard to this practice, public opinion *has* a sinister interest. Public opinion is—in every country,

where civilization and aristocracy have place —the child and disciple of aristocracy; and, in the sinister interest, by which monarchy is wedded to this practice, aristocracy has no small share.

2. Moreover, not only, in one shape, is sinister interest created as above by *power:* but, in another shape also, it is created by *pride;* and, in this case too, aristocracy has its full share. Look now if this be not the case. Whatsoever presents itself as constituting the distinction between the higher and lower orders, the higher orders take a pleasure in the possession of: death-punishment presents itself to them as contributing to this distinction: for, wherever death has place, the lower are sure to stand more exposed to it than the higher orders.

3. Take for instance, *depredation.* In some cases, death-punishment has commonly been applied to this maleficent practice. What are those cases? Those in which it is more particularly the practice of the lower orders: for instance, highway robbery, house robbery, and pocket-picking, in the literal sense of the word: they having in *indigence* an excitement which does not so strongly apply to the higher orders.

4. In other cases, instead of death-punishment, the punishment applied to it is one, which, susceptible as it is of variation upon a scale of indefinite length — such as pecuniary punishments and imprisonment — may be at pleasure reduced to next to nothing. What are these cases? They are those, in which the maleficent forbidden practice is more particularly the practice of the higher orders: for instance, *extortion,* in which case it may be styled the *crime of office* — official situations being those by which are afforded the means necessary to the commission of it.

5. In other cases, again — instead of being punished, it is licensed and established by law. What are these cases? They are those, in which the maleficent practice is exclusively the practice of the higher orders: for instance, where *sinecurism,* pay of useless or needless offices, or overpay of useful and needful offices, is the shape in which it veils itself: *sinecurism* — a mode of obtaining money on false pretences.

6. So much for sinister interest. But, in support of death-punishment, acts, moreover, the never-failing offspring and accompaniment of sinister interest, *interest-begotten prejudice.*

7. Again—those who believe in the Christian religion, believe also in the Jewish religion; and under the Jewish religion, abundant was the application made of death-punishment; and thus may be seen *authority-begotten prejudice* operating in support of it.

8. Lastly, under all governments, from and ever since the earliest times, death-punishment has been in *customary* use: and thus may be seen *primæval prejudice,* and *custom-begotten prejudice,* testifying in favour of it, and operating in support of it. Several causes concurred in bringing it into, and have concurred in keeping it in, use:—1. The strength of the antipathy excited by the acts to which it was applied: 2. The influence which groundless antipathy had in the choice made of punishments in those rude ages, on which the light of the *greatest-happiness principle* had not yet dawned: 3. Personal interest, and aptitude for the purpose of vengeance, in the breasts of rulers: 4. The non-existence as yet of its present succedaneum—prison discipline: 5. The deficiency of prison-room, for want of the quantity of *capital* necessary to the establishment of it. Without need of recurring to its supposed efficiency, sufficient, surely, to account for the universality of death-punishment, is the *sum* of all these causes.

§ VII. *Its Inefficiency and Needlessness proved by experience.*

1. Closed, on this subject, you have been seeing the eyes of rulers, and by what causes, against *reason:* — closed, behold them now, against *experience.*

2. On this subject, the following is the information, for which I find the question indebted, to our fellow-citizen —*M. Lucas:* — In *Tuscany,* in the whole interval between the abolition of death-punishment, in that Grand Duchy, by the Emperor Leopold, while Grand Duke — and the re-establishment of it — the average number of crimes was considerably less than those after that same re-establishment: length of the interval many years: and, in that same interval, *assassinations* no more than *six:* while, in the Roman States, not much larger than Tuscany, the number, in a quarter of a year, was no less than *sixty.*

3. For the first of these so highly instructive and interesting articles of information, we were already indebted to my friend — the illustrious *Howard,* familiarly known by the name of *Prison Howard:* for the other, I know not that we are indebted to anybody but *M. Lucas.*

4. That, by all this put together, the *ruling few* should, in many places, be engaged to abstain willingly from thus dealing with the *subject many,* is little to be hoped for: but, that the *subject many,* although the *ruling few* are not tired of thus dealing with them, — should, sooner or later, be tired of being thus dealt with, — and *that,* to such a degree as to do what depends upon them towards engaging the *ruling few* to cease thus dealing with them, seems not too much to hope for. If so, who can refuse to say — the sooner the oppressed bestir themselves, and the more they bestir themselves, the better?

Whatever may have been the case *antecedently* to this experience — subsequently to the demonstration thus afforded of the needlessness and uselessness of this so highly objectionable mode of punishment, the leaving it unabolished, was everywhere without excuse. Nor could the practice have anywhere remained unabolished, but for the original influence of the above-mentioned causes of error, and in particular, sinister interest, the progenitor of all the others. And therefore it is — that, to account for men's thus shutting their eyes against the light, — the force, by which they appear to have been closed, has thus been presented to your view.

*** While these pages are under revision, comes in the London newspaper, the Spectator. A masterly article, on this subject, presenting itself as operating powerfully in support of the policy here recommended, — it is here subjoined. The No. is 182, for the week ending Saturday, May 28, 1831.

CAPITAL PUNISHMENTS.

Two men were hanged on Wednesday; one for sheep-stealing, the other for stealing in a dwelling-house. It was alleged, in aggravation of the crime of the former, that his character was bad, — he was what the French call a *mauvais sujet;* it does not appear that he had ever been tried before: the thefts of the latter had been numerous and extensive. The execution of these men for crimes unaccompanied by the slightest violence, has very naturally attracted the notice of a large and respectable class of the community, to whom the sanguinary character of our code has long been a subject of regret. It indeed appears singular, on a first view of the subject, that in free England, as it is usually called, the number of crimes punishable with death should be greater than in any other European state — that we who boast so highly of our civilization should display in our practice greater barbarism than the least enlightened of our neighbours. On a closer inspection of the case, however, the wonder will vanish. Our race of real freedom is only beginning; hitherto there has been freedom for a party — licence for a faction, but the great mass of the people have been in bondage. In purely despotic countries, the king can afford to be just. Joseph the Second abolished the punishment of death throughout his dominions. Even now it is inflicted there only for murder and treason. The emperor has his Lichtensteins and his Esterhazys, as we have our Northumberlands and our Newcastles; but Austria has no Sarums nor Gattons — the curse of the rotten boroughs has not visited her. In states, again, where freedom is a living substance as well as a form, the government can show mercy. America has almost no capital punishments: America has neither boroughs nor boroughmongers. In England, "law grinds the poor." And why? The remainder of the line supplies the ready answer — "rich men make the law!" Here is the secret of our bloody code — of the perverse ingenuity by which its abominations have so long been defended — of the dogged obstinacy with which all attempts to wash them away has been withstood. "Whoso stealeth a sheep, let him die the death," says the statute: could so monstrous a law have been enacted, had our legislators been chosen by the people of England? But our lawmakers hitherto have been our landlords. By the sale of his sheep, the farmer pays his rent; by the rent of the farmer, the luxury of the Member is upheld; touch one link, touch all. The price of blood, some six hundred years ago, was equal to forty pounds of our degenerate coin. In process of time, silver fell in the market, and with it the life of an Englishman, twenty-fold. Sir Robert Peel, moderate in all things, raised the sum from £2 to £5. Why not to £500 — why not to £5000? In point of moral guilt, is not he who filches a shilling as criminal as he that filches a million? If we hang for *example*, the lesser crime is of necessity the more frequent, and most calls for repression. Besides, it is the poor — they who most require protective laws, that are the sufferers by petty plunder. There's the rub. "Rich men make the law." Rich men alone suffer by the abstraction of large sums — hence the bloody penalty. But the remedy is nigh at hand — it is even now come. The bill, which gives us good legislators, insures for us good laws. Men impartially chosen will judge impartially. We shall no more have one rule for the rich and another for the poor; nor shall we any longer have the pain of listening to the defence, in the high Court of Parliament, of absurdities which have long been condemned by sensible men in every other place in the empire. Reform will satisfy the yearnings of humanity as amply as the hopes of patriotism.

PART III.

OF INDIRECT MEANS OF PREVENTING CRIMES.

INTRODUCTION.

In all sciences, there are some branches which have been cultivated more slowly than others, because they have required a longer train of observations, and more profound reflection. Thus, in mathematics, one part is called transcendental, or sublime, because, so to speak, it is a new science, beyond the ordinary science.

The same distinction might, at a certain point, be applied to legislation. Some actions are hurtful: what ought to be done to prevent them? The first reply which presents itself to all the world is — *Prohibit such actions; punish them.* This method of combating offences is the most simple, and the first adopted; and every other method of attaining the same end is a refinement in art, and, so to speak, its transcendental part.

This part consists in providing a train of legislative proceedings for the prevention of offences, by acting principally upon the inclinations of individuals, for the purpose of diverting them from evil, and impressing on them the direction most useful to themselves and others.

The first method of combating offences, by *punishments*, constitutes *direct* legislation.

The second method of combating them, *by means which prevent them*, constitutes what may be called the *indirect* branch of legislation.

Thus the sovereign acts *directly* against offences, when he prohibits each one separately, under pain of special punishment: he acts indirectly, when he takes precautions to prevent them.

In direct legislation, the evil is attacked in front: in indirect legislation, it is attacked by oblique methods. In the first case, the legislator declares open war with the enemy: he hoists his signals, he pursues, he fights hand to hand with him, and mounts his batteries in his presence, in open day. In the second case, he does not announce his designs: he opens his mines, he consults his spies; he seeks to prevent hostile designs, and to keep in alliance with himself those who might have secret intentions hostile to him.

Political speculators have perceived all this; but in speaking of this second branch of legislation, they have not clearly expressed their ideas: the former has long since been reduced to system; the second has never been analyzed: no one has thought of treating it methodically, of classifying it, — in a word, of considering it as a whole. It is still a new subject.

Writers who have formed political romances tolerate direct legislation: it is the last resource to which they apply, and of which they never speak with a very lively interest. On the contrary, when they speak of the means of preventing offences — of rendering men better — of improving their manners — their imagination kindles, their hopes brighten, they believe that they are about to effect a great work, and that the condition of the human race is about to receive a new form. This arises from the habit of thinking every thing magnificent in proportion as it is unknown, and because upon such vague subjects the imagination has greater scope than upon those which have long been submitted to the yoke of analysis. *Major e longinquo reverentiâ.* This saying is equally applicable to thoughts and persons. A detailed examination will reduce all these undefined hopes to their just dimensions of what is possible; but if we lose some fictitious treasures, we shall be well indemnified by ascertaining the real extent of our resources.

In order clearly to ascertain what belongs to these two branches, it is necessary to begin by forming a just idea of direct legislation.

We should proceed in the following manner: —

1. To determine what acts ought to be considered as crimes.

2. To describe each crime: as murder, theft, peculation, &c.

3. To exhibit the reasons for attributing to these acts the quality of crimes — reasons which ought to be deduced from a single principle, and consequently which should agree among themselves.

4. To set apart a sufficient punishment for each crime.

5. To exhibit the reasons which serve to justify this punishment.

This penal system, if it were the best possible, would be defective in many respects:

1. It would require that the evil had existed, before the remedy could be applied. The remedy consists in the application of punishment; and punishment can only be inflicted after the crime is committed. Each fresh instance of the infliction of punishment is another proof of its inefficiency, and allows a certain degree of danger and alarm to subsist.

2. The punishment itself is an evil, al-

though necessary for the prevention of a greater evil. Penal justice, throughout the whole course of its operation, can only be a train of evils — evils in the threats and constraint of the law — evils in the pursuit of the accused, before the innocent can be distinguished from the guilty — evils in the infliction of judicial sentences — evils in the inevitable consequences which reverberate upon the innocent.

3. In short, the penal system has not sufficient hold upon many mischievous acts which escape from justice — sometimes from their frequency, sometimes from the facility with which they are concealed — sometimes from the difficulty of defining them — sometimes from a wrong direction in public opinion, which screens them. Penal law can only act within certain limits, and its power only extends to palpable acts, susceptible of manifest proofs.

This imperfection of the penal system has induced a search after new expedients for supplying what is wanting. These expedients have for their object the prevention of crimes, — sometimes by taking away even the *knowledge* of evil — sometimes by taking away the *power* or the *will* to do evil.

The most numerous class of these means is connected with the art of directing the inclinations, by weakening the seductive motives which excite to evil, and by fortifying the tutelary motives which excite to good.

Indirect methods, then, are those which, without having the characters of punishment, act either physically or morally upon the man, in order to dispose him to obey the laws — to remove from him temptations to crimes, and govern him by his inclinations and his knowledge.

These indirect methods have not only great advantage in point of gentleness; they also often succeed when direct methods fail. All modern historians have remarked how much the abuses of the Roman Catholic Church have been diminished since the establishment of Protestantism. What popes and councils could not effect by their decrees, a happy rivalry has effected without trouble: they have feared to give occasion of scandal, which should become a subject for triumph to their enemies. Hence, this indirect method, the free competition of religions, has had greater force in restraining and reforming them, than all their positive laws.

We may take another example from political economy. It has been considered desirable that the prices of merchandise, and especially that the interest of money, should be low. High prices, it is true, are only an evil, by comparison with the good of which they hinder the enjoyment; but such as it is, there has been a reason for seeking to diminish them. In what manner has it been attempted? a multitude of regulations have been established — a fixed rate — a legal interest; and what has happened? The regulations have been eluded — punishments have been increased — and the evil, instead of being diminished, has increased also. There is no efficacy but in an *indirect* method, of which few governments have had the wisdom to make use. To leave a free course for the competition of all merchants, of all capitalists — to trust, instead of making war upon them — to allow them to supplant each other — to invite the buyers to themselves by the most advantageous offers: — such is the method. Free competition is equivalent to a reward granted to those who furnish the best goods at the lowest price. It offers an immediate and natural reward, which a crowd of rivals flatter themselves that they shall obtain, and acts with greater efficacy than a distant punishment, from which each one may hope to escape.

Before entering upon an exhibition of these indirect methods, I ought to acknowledge that the manner of their classification is a little arbitrary, so that several might be ranged under different heads. In order invariably to distinguish them from each other, an exceedingly subtle and fatiguing metaphysical analysis would be required. It is sufficient for the object in view, if all the indirect methods may be placed under one or other of these heads, and if the attention of the legislator be awakened to the principal sources from which they may be drawn.

I only add one preliminary remark, but it is an essential one. In the variety of measures about to be exhibited, there is not one that can be recommended as suitable to each government in particular, and still less to all in general. The special advantage of each measure, considered by itself, will be indicated under its title, but each may have relative inconveniences, which it is impossible to determine, without a knowledge of particular circumstances. It ought, therefore, to be well understood, that the object in view is, not to propose the adoption of any given measure, but solely to exhibit it to the view, and recommend it to the attention, of those who may be able to judge of its fitness.

CHAPTER I.

METHODS OF TAKING AWAY THE PHYSICAL POWER OF INJURING.

WHEN the will, the knowledge, and the power, necessary for an act concur, this act is necessarily produced. *Inclination, knowledge, power;* these, then, are the three points to which the influence of the laws may be applied, in order to determine the conduct of individuals. These three words contain in abstract the sum and the substance of every

thing which can be done by direct or indirect legislation.

I begin with power, because the means of influence in this respect are more limited and more simple, and because, in those cases in which the power to injure is taken away, every thing is done — success is secure.

Power may be distinguished into two kinds: 1. *Internal* power, which depends upon the intrinsic faculties of the individual: 2. *External* power, which depends upon the persons and things which are without him, and without which he cannot act.*

As to *internal* power, which depends upon the faculties of the individual, it is scarcely possible to deprive a man of this advantage: the power of doing evil is inseparable from the power of doing good. When the hands are cut off, a man can hardly steal; but also he can hardly work.

Besides, these privative means are so severe, that they can only be employed with regard to criminals already convicted. Imprisonment is the only one which can be justified in certain cases, in order to prevent an apprehended offence.†

There are some cases in which the power of injuring may be taken away, by excluding what Tacitus calls *irritamenta malorum* — the subjects, the instruments of the offence. Here the policy of the legislator may be compared to that of a governess: the bars of iron for the windows, the guards around the fire, care in removing all sharp and dangerous instruments out of the reach of the children, are steps of the same kind; with the prohibition of the sale and fabrication of dies for coining, of poisonous drugs, of concealed arms, of dice, and other instruments of prohibited games; the prohibition of making and having snares or other means of catching game.

Mahomet, not trusting to reason, has sought to put it out of the power of men to misuse strong liquors. If we regard the climate of hot countries, in which wine produces fury rather than stupidity, it will perhaps be found that its total prohibition is more gentle than its permitted use, which would have produced numerous offences, and consequently numerous punishments.

Taxes upon spirituous liquors, in part, accomplish the same end. In proportion as the price is raised above the reach of the most numerous class, the means of yielding to intemperance are taken from them.

Sumptuary laws, so far as they prohibit the introduction of certain articles which are the objects of the legislator's jealousy, may be referred to this head. It is this which has rendered the legislation of Sparta so famous: the precious metals were banished; strangers were excluded; voyages were not permitted.

At Geneva, the wearing of diamonds was prohibited, and the number of horses was limited.‡

Under this head may be mentioned many English statutes relative to the sale of spirituous liquors: their open exposure to sale is prohibited; it is necessary to obtain a licence which costs much, &c. The prohibition to open certain places of amusement on the Sunday belongs to this head.

To the same head must be referred measures for the destruction of libels, seditious writings, and obscene figures exhibited in the streets, and for preventing their printing and publication.

The old police of Paris prohibited servants from carrying not only swords, but also canes and sticks. This might have been a simple distinction of rank — it might have been as a means of security.

When one class of the people is oppressed by the sovereign, prudence would direct that they should be forbidden to bear arms. The greater injury becomes a justifying reason for the commission of the lesser.

The Philistines obliged the Jews to resort to them, whenever they wanted to sharpen their hatchets and saws. In China, the manufacture and sale of arms is confined to the Chinese Tartars.

By a statute of George the Third, any individual is forbidden to have more than fifty pounds weight of gunpowder in his house; and the dealers in gunpowder are forbidden to have more than two hundred pounds weight at one time. The reason assigned is the danger of explosions.

In the statutes relating to the public roads and turnpikes, the number of horses to be used in a carriage is limited to eight; except in case of the removal of certain articles, and in what relates to the public service connected with the artillery and ammunition.

* 1. Power *ab intra*. 2. Power *ab extra*.

† Muto linguam. De virginibus puerisque, sed non virginibus puerisve sermo est: et præterea alienus sermo non erubescit. Dixi adversus potestatem peccandi, quam *ab intra* nominavi, nullum dari remedium. En vero exceptionem *circumcisio*. Dicitur non apud Judæos solos fuisse in usu. Quænam igitur instituti ratio? Anne adversus venerem solitariam? Ita visum est, nescio cui: credo equidem Voltario. Ingeniosum sane fuisset excogitamentum: siquidem hoc modo, ut videtur, proclivitas saltem minuitur si non facultas tollitur. Adversus debilitatem remedium, sterilesque nuptias. Vitium magis perniciosum quam quæ multò sunt odiosiora: siquidem magis debilitat, et homo sibi semper præsens. Quidni huc pertineat Judeæ gentis spectata fæcunditas! sed nec vitium videtur nec remedium rude ævum sapere: faciliusque crediderim hodiernos attribuisse quam antiquos invenisse.

‡ These customs are not cited as models, but only to show under what class of laws they should be ranged.

The reason assigned is the preservation of the roads.

If these measures, and others like them, have, besides, a political object, it is what I do not pretend to say; but it is certain, that such expedients may be employed for taking away the means of revolt, or diminishing the facilities for smuggling.

Among the expedients which may be derived from this source, I know of none more happy nor more simple than that which is employed in England for rendering the stealing of bank-notes difficult, when it is intended to send them by the post: they may be cut into two parts, and each part sent separately. The stealing of one half of the note would be useless, and the difficulty of stealing both parts, the one after the other, is so great, that the offence is almost impossible.

For the exercise of some professions, proofs of capacity are required. There are others which the laws render incompatible with each other. In England, many offices of justice are incompatible with the condition of an attorney: it is feared lest the right hand should secretly work for the benefit of the left.*

Contractors for the supply of provisions, &c. for the navy, are not allowed to sit in Parliament. The contractors may become delinquents, and subject to the judgment of the Parliament: it would not be proper that they should be members of it. But there are stronger reasons for this exclusion, to be drawn from the danger of increasing ministerial influence.

CHAPTER II.

ANOTHER INDIRECT METHOD — HINDER THE ACQUISITION OF KNOWLEDGE WHICH MAY BE RENDERED INJURIOUS.†

I ONLY mention this policy to proscribe it: it has produced the censorship of books; it has produced the inquisition; it would produce the eternal degradation of the human race.

I intend to show—1*st*, That the diffusion of knowledge is not hurtful upon the whole; crimes of refinement being less hurtful than those of ignorance: 2*d*, That the most advantageous method of combating the evil which may result from a certain degree of knowledge, is to increase its quantity.

I say at once, that the diffusion of knowledge is not hurtful upon the whole. Some writers have thought, or appeared to think, that the less men knew, the better they would be; that the less they knew, the fewer objects would they be acquainted with, as motives to, or instruments for doing evil. That fanatics have held this opinion, would not be surprising, seeing there is a natural and constant rivalry between the knowledge of useful and intelligible things, and the knowledge of things imaginary, useless, and unintelligible. But this style of thinking, with respect to the danger of knowledge, is sufficiently common among the mass of mankind. They speak with regret of the golden age — of the age when nothing was known. In order to exhibit the mistake upon which this manner of thinking is founded, a more precise method of estimating the evil of an offence, than has hitherto been employed, is required.

That the crimes of refinement have been considered more hateful than the crimes of ignorance, is not surprising. In judging of the grandeur of offences, the principle of antipathy has been more followed than the principle of utility: antipathy looks more at the apparent degradation of character indicated by the offence, than at any other circumstance. This, in the eyes of passion, is the *salient point* in every action; in comparison with which, the strict examination required by the principle of utility will always appear cold. Now, the greater the knowledge and refinement indicated by a crime, the greater the reflection exhibited on the part of its author, the greater the depravation of moral dispositions indicated also: but the evil of a crime, the only object, according to the principle of utility, is not solely determined by the depravity of character exhibited — it depends immediately upon the sufferings of the persons who are affected by the crime, and the alarm which results from it to society in general; and into this sum of evil, the depravity which the criminal has manifested, enters as an aggravation, but not as an essential circumstance.

The greatest crimes are those for which the slightest degree of knowledge is sufficient; the most ignorant individual always knows how to commit them.

Inundation is a greater crime than incendiarism, incendiarism greater than murder, murder than robbery, robbery than cheating. This might be demonstrated by an arithmetical process, by an inventory of the items of evil on both sides, by a comparison of the extent of evil done to each person injured, and by the number of persons who would be

* In Austria, a flayer is not allowed to sell meat, it being presumed that if the animal had been wholesome, it would not have come to his hands. *Sonenfel's* Police of Vienna, 1777. A great number of police regulations may be referred to this head.

† Knowledge, though commonly considered as distinct from power, is really a branch of it. It is a branch of power, whose seat is in the mind. Before a man can perform any act, he must know two things: the motives for doing it, and the means of doing it. These two kinds of knowledge may be distinguished into that of motives, and that of means: the first constitutes inclination, the second constitutes a part of power.

enveloped in such evil. But how much knowledge must be possessed, that an individual may be qualified to commit such acts? The most atrocious of all only requires a degree of information which is found among the most barbarous and savage of men.

Rape is worse than seduction or adultery; but rape is more frequent in times of ignorance; seduction and adultery in times of civilization.

The dissemination of knowledge has not augmented the number of crimes, nor even the facility of committing them: it has only diversified the means of their accomplishment. And how has it diversified them? by gradually substituting those which are less hurtful.

Is a new method of cheating invented? the inventor profits for a time by his discovery; but soon his secret is discovered, and we are upon our guard. He must then have recourse to a new method, which, like the first, will last only for a time, and pass away. All this time it is only cheating, which is less mischievous than theft, which itself is a less evil than highway robbery.* For what reason? The confidence of every one in his own prudence, in his own sagacity, hinders him from being alarmed so much by a case of cheating as by a robbery.

Let us, however, acknowledge that the wicked abuse every thing, — that the more they know, the greater will be their means of doing evil: what follows?

If the good and the wicked compose two distinct races, as those of the blacks and the whites, the one might be enlightened whilst the other was held in ignorance. But since it is impossible to distinguish them, and since good and evil are so frequently mingled in the same individuals, one law must be established for all: general illumination or general blindness; there is no medium.

The remedy springs out of the evil itself. Knowledge confers no advantage upon the wicked, except they exclusively possess it: a snare, when recognised, is no longer a snare. The most ignorant nations have known how to poison the points of their arrows; but it is only those nations which are far advanced in civilization, which are acquainted with all poisons, and can oppose antidotes to each.

All men are qualified to commit crimes: it is only the enlightened who are qualified to frame laws for their prevention. The less instructed a man is, the more is he led to separate his interests from those of his fellows. The more enlightened he is, the more distinctly will he perceive the union of his personal with the general interest.

Examine the history of past times: the most barbarous ages will present an assemblage of all crimes, and even crimes of cheating, as well as those of violence. The grossness given to some vices does not exclude a single one. At what period were false titles and false dotations most multiplied? When the clergy alone knew how to read—when, from the superiority of their knowledge, they regarded other men nearly as we regard horses, which we could no longer render submissive to the bit and the bridle, if their intellectual faculties were augmented. Why, at the same time, had they recourse to judicial duels, to proofs by fire and water, to all those species of trials which they called *judgments of God?* It was because, in the infancy of reason, they had no principles upon which to discern between true and false testimony.

Compare the effects produced under those governments which have restrained the publication of thought, and those which have allowed it a free course. You have, on the one side, Spain, Portugal, Italy; you have, on the other side, England, Holland, and Northern America. Where are the most civilized manners and the greatest happiness? where are the most crimes committed? where is society most gentle and most secure?

Those institutions have been too much celebrated, in which their heads have monopolized all knowledge. Of this kind was the priesthood of ancient Egypt, the caste of the Bramins in Indostan, the societies of the Jesuits in Paraguay. Upon these institutions it is proper to make two observations: the first, that if their conduct have merited eulogium, it is with respect to the interest of those who have invented these forms of government, not with respect to the interest of those who have been subject to them. It may be admitted that the people have been tranquil and docile under these theocracies: have they been happy? This cannot be believed, if it be admitted that abject servitude, vain terrors, useless obligations and mortifications, painful privations and gloomy opinions, are obstacles to happiness.

The second observation is, that they have less completely obtained their design in maintaining natural ignorance than in spreading prejudices and propagating errors. The chiefs themselves have always finished by becoming the victims of this narrow and pusillanimous policy. Nations which have been retained in a state of constant inferiority by institutions

* I always suppose that the damage of the crime is the same: for, in one point of view, cheating may prove worse; since a greater sum may be obtained by fraud than by highway robbery. For proof of the superiority of modern manners over those of ancient times, reference may be made to Hunter's Essay on Population: for proof of their superiority over the Gothic ages, to Voltaire's General History, Robertson's Introduction to Charles V., Barrington's Observations on the English Statutes, and the Treatise of Le Chevalier de Chastelleux on Public Happiness—a work well designed, but indifferently executed.

which were opposed to all kinds of progress, have at length become the prey of other nations, who have obtained a comparative superiority. These nations, become old in their infancy, under tutors who prolonged their imbecility in order more easily to govern them, have always offered an easy conquest, and, once subjugated, have known no change but in the colour of their chains.

But it may be said, there is no question among us of leading men back to ignorance: all governments feel the necessity of illumination. What excites their fears, is the liberty of the press. They are not opposed to the publication of books of science; but have they not reason to oppose the publication of immoral and seditious writings, with regard to which there is no longer any opportunity of preventing their mischief, when once they are issued? To punish a guilty author may *perhaps* prevent the guilt of those who may be tempted to imitate him; but to prevent, by the institution of a censorship, the publication of evil books, is to stop the poison at its source.

The liberty of the press has its inconveniences, but the evil which may result from it is not to be compared with the evil of the censorship.

Where shall that rare genius, that superior intelligence, that mortal accessible to all truth and inaccessible to all passions, be found, to whom to confide this right of supreme dictation over all the productions of the human mind? Would a Locke, or a Leibnitz, or a Newton, have had the presumption to undertake it? And what is this power that you are obliged to confide to ordinary men? It is a power which, by a singular necessity, collects together in its exercise all the causes of prevarication, and all the characters of iniquity. Who is the censor? He is an interested judge — a sole, an arbitrary judge, who carries on a clandestine process, condemns without hearing, and decides without appeal. Secresy, the greatest of all its abuses, is essential to a censorship: publicly to plead the cause of any book would be to publish it, in order to determine whether it were fit for publication.

Whilst as to the evil which may result from it, it is impossible to estimate it, since it is impossible to say what it arrests. It is nothing less than the danger of arresting the progress of the human mind in every career. Every interesting and new truth must have many enemies, because it is interesting and new. Is it to be presumed that the censor will belong to that infinitely small number who rise above established prejudices? were he to possess this elevation of mind, would he possess boldness sufficient to compromise himself by discoveries of which he would not possess the glory? There is only one course of safety for him: it is to proscribe all but ordinary ideas — to pass his blasting scythe over every thing which rises above the ordinary level. He risks nothing by prohibition; he risks every thing by permission: by doubt he does not suffer; it is truth which is stifled.

If it had depended upon men invested with authority to regulate the progress of the human mind, where should we now have been? Religion, legislation, natural philosophy, morals, would still be all in darkness.

The proof of these well-known facts need not here be repeated.

The true censorship is that of an enlightened public, which will brand dangerous and false opinions, and will encourage useful discoveries. The boldness of a libel in a free country will not save it from general contempt; but, by a contradiction easily to be explained, the indulgence of the public in this respect is proportioned always to the rigour of the government.

CHAPTER III.

OF INDIRECT MEANS OF PREVENTING THE WILL TO COMMIT OFFENCES.

WE have seen that legislation can only operate by influencing the power, the knowledge, the will: we have spoken of the indirect means of taking away the power of injury: we have seen that the policy which would prevent men from acquiring information would be more hurtful than advantageous. All other indirect means which can be employed must therefore have reference to the direction of their inclinations; to the putting in practice the rules of a logic too little understood at present — *the logic of the will* — a logic which often appears in opposition to the logic of *understanding*, as it has been well expressed by the poet —

"Video meliora,
Proboque, et deteriora sequor."

The methods we are about to present are of a nature to make this internal discord in many cases to cease; to diminish this contrariety among motives, which often exists only from the unskilfulness of the legislator — from an opposition which he has himself created between the natural and political sanctions — between the moral and religious sanctions. If he could make all these powers concur towards the same end, all the faculties of the man would be in harmony, and the inclination to injure would no longer exist. In those cases in which this object cannot be attained, it is proper that the power of the tutelary motives should be made to exceed that of the seductive motives.

I shall propose the indirect methods by which the will may be influenced in the form

of political or moral problems, and I shall show their solution by different examples:—

Problem 1*st*, To divert the course of dangerous desires, and direct the inclination towards those amusements which are most conformed to the public interest.

2*d*, To make such arrangements, that a given desire may be satisfied without prejudice, or with the least possible prejudice.

3*d*, To avoid furnishing encouragements to crimes.

4*th*, To augment the responsibility of individuals, in proportion as they are more exposed to temptation.

5*th*, To diminish their sensibility with regard to temptation.

6*th*, To strengthen the impression of punishments upon the imagination.

7*th*, To facilitate the knowledge of the commission of crimes.

8*th*, To prevent crimes, by giving to many persons an immediate interest in preventing them.

9*th*, To facilitate the means of recognising and finding individuals.

10*th*, To increase the difficulty of escape to delinquents.

11*th*, To diminish the uncertainty of procedure and punishments.

12*th*, To prohibit accessory offences, in order to prevent their principals.

After these means, whose object is special, we shall point out others of a more general nature, such as the cultivation of benevolence and honour, the employment of the motive of religion, and the use which may be made of the power of instruction and education.

CHAPTER IV.

PROBLEM I.

To divert the course of Dangerous Desires, and direct the inclination towards those amusements which are most conformed to the public interest.

THE object of direct legislation is to combat pernicious desires, by prohibitions and punishments directed against the hurtful acts to which those desires may give birth. The object of indirect legislation is to countermine their influence, by augmenting the force of the less dangerous desires which may enter into competition with them.

There are two objects to be considered:—What are the desires which it would be desirable to weaken? By what means may we attain this end?

Pernicious desires may arise from three sources:—1*st*, The malevolent passions; 2*d*, The fondness for inebriating liquors; 3*d*, The love of idleness.

The methods of diminishing them may be reduced to three heads:—1. The encouraging kindly feelings; 2. The favouring the consumption of non-inebriating liquors, in preference to those which intoxicate; 3. The avoidance of forcing men into a state of idleness.

Some persons may be astonished that the catalogue of the sources of vicious inclinations is so limited; but they must be made to observe, that in the human heart there is no passion absolutely bad: there is no one which does not need direction — there is no one which ought to be destroyed. It is said, that when the angel Gabriel prepared the prophet Mahomet for his mission, he took out of his heart a black spot which contained the seed of evil. Unhappily this operation is not practicable in the hearts of ordinary men. The seeds of good and evil are inseparately mixed: inclinations are governed by motives. But motives are constituted by pains and pleasures; by all pains to be avoided, by all pleasures to be pursued. Hence all these motives may produce all sorts of effects, from the best to the worst.

They are trees, which bear excellent fruits, or poisons, according to the aspect in which they are found, according to the culture of the gardener, and even according to the wind which prevails, and the temperature of the day. The most pure benevolence, too confined in its object, or mistaking its means, will be productive of crimes: selfish affections, though they may occasionally become hurtful, are constantly most necessary; and notwithstanding their deformity, the malevolent passions are always at least useful — as means of defence, as securities against the invasions of personal interest. No one affection of the human heart ought therefore to be eradicated, since there is not one which does not act its part in the system of utility. All that is required, is to work upon these inclinations according to the direction which they take, and the effects which can be foreseen. It may be possible also to establish a useful balance among them, by fortifying those which are usually weak, and weakening those which are too strong. It is thus that a farmer directs the course of the waters, that he may not impoverish his meadows, and prevents their inundation by dykes. The art of constructing dykes consists in not directly opposing the violence of the current, which would carry away every obstacle placed directly in its front.

The desire for intoxicating liquors is, properly speaking, the only one which can be extirpated without producing any evil, since the irascible passions, as I have said, are a necessary stimulant in the cases in which individuals have to protect themselves from injuries, and to repel the attacks of their enemies. The love of repose is not hurtful in itself; indolence is, however, an evil, inasmuch as it

favours the ascendancy of evil passions. At all times, these three desires may be considered as requiring to be equally resisted. It need scarcely be dreaded, lest we should be too successful in overcoming the inclination to idleness, or that it will be possible to reduce the vindictive passions below the point of their utility.

The first expedient, I have said, consists *in encouraging innocent amusements.* This is one branch of the very complicated but undefined science which consists in advancing civilization. The state of barbarism differs from that of civilization by two characteristics: — 1. By the force of the *irascible* appetites; 2. By the small number of objects of enjoyment which offer themselves to the *concupiscible* appetites.*

The occupations of a savage, when he has procured the necessaries for his physical wants — the only wants he knows — are soon described: the pursuit of vengeance — the pleasures of intoxication, if he possess the means — sleep, or the most complete indolence: these are all his resources. Each of his inclinations is favourable to the developement and action of every other: resentment finds easy access to an empty mind; idleness is the door of drunkenness, and drunkenness produces quarrels which nourish and multiply quarrels. The pleasures of love not being complicated by the sentimental refinements which embellish and strengthen them, do not occupy a conspicuous part in the life of the savage, and do not go far in filling up the intervals of his labours.

Under a regular government, the necessity of revenge is suppressed by legal protection, and the pleasure of giving way to it is repressed by fear of punishment. The power of indolence is weakened, but the love of intoxicating liquors is not diminished. A nation of savages, and a nation of hunters, are convertible terms. The life of a hunter offers long intervals of leisure, as well as that of a fisherman, provided they understand the means of preserving the species of food which they obtain. But in a civilized state, the mass of the community is composed of labourers and artisans, who have no more leisure than is required for relaxation and sleep. The misfortune is, that the passion for strong drinks may be gratified in the midst of a life of labour, and they may be taken during the hours set apart for repose. Poverty restrains it among the inferior classes; but artisans, whose labour is better paid for, may make great sacrifices to this fatal desire; and the richer classes may devote to it all their time. Hence we see that, in the rude ages, the superior classes have divided their life between war — the chase, which is the image of war — the animal functions, and long repasts, of which drunkenness was the chief attraction. The detail of such scenes formed the whole history of a great proprietor, of a grand feudal Baron, in the Gothic ages. The privilege of this noble warrior, of this noble hunter, seems to have been to prolong, in a more civilized society, the occupations and the character of the savage.

This being the case, every innocent amusement that the human heart can invent is useful under a double point of view: — 1*st*, For the pleasure itself, which results from it; 2*d*, From its tendency to weaken the dangerous inclinations which man derives from his nature. And when I speak of innocent amusements, I mean all those which cannot be shown to be hurtful. Their introduction being favourable to the happiness of society, it is the duty of the legislator to encourage them, or, at least, not to oppose any obstacle to them. I shall mention the sources of some, commencing with those which are regarded as most gross, and proceeding to those which are considered as more refined: —

1. The introduction of a variety of aliments, and the improvement of horticulture applied to the production of nutritive vegetables.

2. The introduction of non-intoxicating liquors, of which coffee and tea are the principal. These two articles, which some superficial minds would be surprised to find occupying a place in a catalogue of moral objects, are so much the more useful, since they come in direct competition with intoxicating liquors.†

3. The improvement of every thing which constitutes elegance, whether of dress or furniture, the embellishment of gardens, &c.

4. The invention of games for passing the time, whether athletic or sedentary, among which the game of chess holds a distinguished rank: I exclude only games of chance. These tranquil games have brought the sexes more nearly upon an equality, and have diminished ennui, the peculiar malady of the human race, and especially of the opulent and the aged.

5. The cultivation of music.

6. Theatres, assemblies, and public amusements.‡

* This distinction of the schoolmen is sufficiently complete: to the first class belong the pleasures of malevolence; to the second, all other pleasures.

† The celebrated Hogarth painted two pictures, called Beer Street and Gin Street. In the first, every thing breathes an air of gaiety and health; in the second, of misery and disease. This admirable artist wished to instruct by his pencil, and had reflected more upon morals than many who give themselves out as professors of this science.

‡ "I have heard M. d'Argenson say, that when he was lieutenant of police, there were more irregularities and debaucheries committed in Paris during the Easter fortnight, when the theatres were shut, than during the four months

7. The cultivation of the arts, sciences, and literature.

When we consider these different sources of enjoyment, as opposed to the necessary means of providing subsistence, they are called objects of luxury: if their tendency be such as has been suggested, how singular soever it may appear, luxury is rather a source of virtue than of vice.

This branch of policy has not been entirely neglected, but it has been cultivated in a political, rather than in a moral view. The object has rather been, to render the people tranquil and submissive to government, than to render the citizens more united among themselves, more happy, more industrious, more honest.

The games of the circus were one of the principal objects of attention among the Romans. It was not merely a method of conciliating the affections of the people, but also of diverting their attention from public affairs. The saying of Pylades to Augustus is well known.

Cromwell, whose ascetic principles did not allow him to use this resource, had no other means of occupying the minds of his countrymen, than engaging the nation in foreign wars.

At Venice, a government jealous to excess of its authority, showed the greatest indulgence to pleasures.

The processions and other religious festivals of Catholic countries partly accomplished the same object as the games of the circus.

All these institutions have been considered by political writers as so many means of softening the yoke of power — of turning the minds of men towards agreeable objects, and preventing them from occupying themselves with the affairs of government. This effect, without having been the object of their establishment, has caused them to obtain more favour when they have been established.

Peter I. had recourse to a greater and more generous policy.

The manners of the Russians, with the exception of sobriety, were more Asiatic than European. Peter I., desirous of moderating their grossness, and softening the ferocity of their manners, employed some expedients which were perhaps a little too direct. He employed every possible encouragement, and went so far as to use violence, in order to introduce the European dress, the amusements, the assemblies, the arts, of Europeans. To lead his subjects to the imitation of the other nations of Europe, was, in other terms, to civilize them. But he found the greatest resistance to all these innovations. Envy, jealousy, contempt, and a multitude of anti-social passions, rendered them disinclined to an assimilation to these rival strangers. These passions no longer recognised their object when the visible marks of distinction were effaced. By taking away that exterior which distinguished them, he took away from them, so to speak, the pretext and aliment of these hateful rivalries. He associated them with the great republic of Europe, and he gained every thing for them by this association.

The rigid compulsory observance of the Sabbath, as in Scotland, in some parts of Germany, and in England, is a violation of this policy, which has no foundation in the Gospels, and is even contrary to many texts and positive examples.

Happy the people who, rising above brutal and gross vices, study elegance of manners, the pleasures of society, the embellishments of their places of resort, the fine arts, the sciences, public amusements, and exercises of mind. The religions which inspire sadness— the governments which render men mistrustful, and separate them one from another, contain the germs of the greatest vices and of the most hurtful passions.

CHAPTER V.

PROBLEM II.

To make such arrangements, that a given Desire may be satisfied without prejudice, or with the least possible prejudice.

THE desires of which we are about to speak, as well as others which we have not mentioned, may be satisfied in different manners, and on different conditions, through all the degrees of the scale of morality, from innocence to the highest crime. That these desires may be satisfied without prejudice— such is the first object to be accomplished; but if they cannot be regulated to this point, that their satisfaction may not produce so great an injury to the community as that which results from a violated law — such is the second object. If even this cannot be attained, to arrange every thing in such manner, that the individual, placed by his desires between two offences, may be led to choose the least hurtful — such is the third object. This last object appears humble enough; it is a species of composition with vice: a bargain is made with it, so to speak, and it is sought that the individual may be satisfied at the least possible expense.

Let us examine how it is possible to deal upon all these points with three classes of imperious desires—1. Revenge; 2. Poverty; 3. Love.

SECTION I. For the satisfaction of vindictive desires without prejudice, there are two means — 1. To provide a legal redress for every species of injury; 2. To provide a com-

of the season during which they were open."— *Memoirs de Pollnitz*, tom. iii.

petent redress for all injuries which affect honour; 3. For the satisfaction of these vindictive desires *with the least possible* prejudice, there is only one expedient: it is that of showing indulgence to duelling. Let us recapitulate these different heads.

1. *To provide a Legal Redress for every species of injury.*

The vices and the virtues of the human race depend much upon the circumstances of society. Hospitality, as has been observed, is most practised where it is most necessary. It is the same with revenge. In the state of nature, the fear of private vengeance is the only restraint of brute force — the only security against the violence of the passions: it corresponds to the fear of punishment in a state of political society. Each step in the administration of justice tends to diminish the force of the vindictive appetites, and to prevent acts of private animosity.

The interest principally in view, in legal redress, is that of the party injured. But the offender himself finds his profit in this arrangement. Leave a man to avenge himself, and his vengeance knows no limits. Grant to him what you, in cool blood, consider as a sufficient satisfaction, and prohibit his seeking for more: he will choose rather to accept what you give him, without running any hazard, than expose himself to the judgment of the law, by endeavouring to take a greater satisfaction by himself. Here, then, is an accessory benefit resulting from care to provide judicial redress. Reprisals are prevented: covered by the buckler of justice, the transgressor, after his offence, finds himself in a state of comparative security under the protection of the law.

It is sufficiently evident, that the more completely legal redress is provided, the more the motive will be diminished which might excite the party injured to procure it for himself. When every pain which a man is liable to suffer from the conduct of another, shall be followed immediately by what shall, in his eyes, be an equivalent pleasure, the irascible appetite will no longer exist. The supposition is evidently an exaggerated one; but, exaggerated as it is, it includes enough of truth to show, that each amelioration which is made in this branch of justice, tends to diminish the force of the vindictive passions.

Hume has observed, in speaking of the barbarous times of English history, that the great difficulty was to engage the injured party to receive satisfaction; and that the laws which related to satisfaction were as much intended to limit his resentment as to procure for him an enjoyment.

In addition to this, institute a legal punishment for an injury: you provide a place for generosity — you create a virtue. To pardon an injury, when the law offers a satisfaction, is to exercise a species of superiority over an adversary, by the obligation which results from it. No one can attribute the pardon to weakness: the motive is above suspicion.

2. *To provide a competent Redress for injuries which attack the Point of Honour in particular.*

This class of injuries demands so much the more particular attention, in as much as they have a more marked tendency to excite the vindictive passions. Enough has been already said upon this subject in Part I. Ch. xiv. to render a return to it unnecessary.

In this respect, the French jurisprudence has long been superior to all others.

English jurisprudence is eminently defective upon this point. It knows nothing of honour — it has no means of estimating a corporal insult but by the size of the wound. It does not suppose that there can be any other evil in the loss of reputation, than the loss of the money which may be the consequence of it. It considers money as a remedy for all evils — a palliation for all affronts. He who does not possess it, possesses nothing: he who possesses it, can want for nothing. It knows only pecuniary reparation. But the present generation ought not to be reproached with the rudeness of the ages of barbarism. These laws were established when sentiments of honour had not been developed. Questions of honour are now decided by the tribunal of public opinion, and its decrees are pronounced with a power altogether peculiar.

However, it cannot be doubted but that the silence of the law has had a bad effect. An Englishman cannot enter France without observing how much more the feeling of honour, and the contempt of money, descends, so to speak, among the inferior classes in France, than in England. This difference is especially remarkable in the army. The sentiment of glory — the pride of disinterestedness — are everywhere discovered among the common soldiers; and they would consider a noble action as tarnished by estimating its value in money: an honorary sword is the first of recompenses.

3. *To show indulgence to Duelling*

If the individual offended will not be contented with the satisfaction offered by the laws, it is proper to be indulgent to duelling. Poisoning and assassination are hardly heard of, where duelling is established. The light evil which results from it, is like a premium of assurance, whereby a nation guarantees itself against the greater evil of other offences. Duelling is a preservative of politeness and peace: the fear of being obliged to give or receive a challenge, destroys quarrels in their

germ. The Greeks and Romans, it will be said, were acquainted with glory, and knew nothing of duelling. So much the worse for them: their sentiment of glory was not opposed either to poisoning or assassination. Among the political dissensions of the Athenians, one half of the citizens plotted the destruction of the other. Compare what passes in England and Ireland with the dissensions of Greece and Rome. Clodius and Milo, according to our customs, would have fought a duel: according to Roman customs, they reciprocally sought to assassinate each other, and he who killed his adversary only forestalled him.

In the island of Malta, duelling had become a species of madness, and, so to speak, of civil war. One of the Grand Masters made such severe laws against it, and executed them so rigorously, that duelling ceased: but it was to give place to a crime which unites cowardice with cruelty. Assassination, before unknown among the knights, became so common, that they soon regretted the loss of duelling, and at last expressly tolerated it, in a certain place, and at certain hours. The result was such as had been expected. So soon as a course of honourable revenge was opened, the clandestine methods were rendered infamous.

Duels are less common in Italy than in France and England: poisoning and assassinations are much more so.

In France, the laws against duelling were severe; but methods were found for eluding them. Upon an agreement to fight, a pretended quarrel was got up as a kind of prelude.

In England, the law confounds duelling and murder: but the juries do not confound them; they pardon it, or, what amounts to the same thing, find it manslaughter (involuntary homicide.) The people are better guided by their good sense, than the jurists have been by their science. Would it not be better to place the remedy among the laws, rather than in their subversion?

Section II. Let us turn to indigence: we have here to consider the interests of the poor themselves and those of the community.

A man deprived of the means of subsistence, is urged, by the most irresistible motives, to commit every crime by which he may provide for his wants. Where this stimulus exists, it is useless to combat it by the fear of punishment, because there is scarcely one punishment which can be greater, and no one, which, by reason of its uncertainty and its distance, can appear so great, as the dying of hunger. The effects of indigence can therefore only be guarded against, by providing necessaries for those who have them not.

The indigent may be distinguished in this respect, into four classes: 1. The industrious poor; those who are willing to work that they may live. 2. Idle mendicants; those who prefer rather to depend upon the precarious charity of passengers for subsistence, than to labour for their subsistence. 3. Suspected persons; those who, having been arrested on account of a crime, and set at liberty because of the insufficiency of proof, have remained with a stain upon their reputation, which hinders their obtaining employment. 4. Criminals who have been confined for a time in prison, and have been set at liberty. These different classes ought not to be treated in the same manner, and in establishments for the poor, particular care ought to be taken to separate the suspected from the innocent classes. "One scabby sheep," says the proverb, "infects the flock."

Every thing which the poor can be made to earn by their labour, is not only a profit for the community, but also for themselves. Their time ought to be occupied as their lives ought to be sustained. It is humanity which prescribes the finding occupations for the deaf, the blind, the dumb, the lame, the impotent. The wages of idleness are never so sweet as the reward of toil.

If a man have been apprehended and accused of a crime of indigence, even when he is acquitted, he ought to be required to render an account of his means of subsistence at least for the last six months. If he be honest, this inquiry can do him no harm; if he be not, it is proper to act accordingly.

Females, especially those a little above ordinary labour, have a peculiar disadvantage in finding occupation. Men having more activity, more liberty, and perhaps more dexterity, even take possession of those labours which belong more properly to the other sex, and which are almost indecent in the hands of men. Men are found selling toys for children, keeping shops for fashions, &c.; making shoes, stays, and dresses for women. Men are found filling the function of midwives. I have often doubted whether the injustice of the custom might not be redressed by the law, and whether women ought not to be put in possession of these means of subsistence, to the exclusion of men. It would be an indirect method of obviating prostitution, by providing females with suitable employments.

The practice of employing men as midwives, which has excited such lively reclamations, is not yet* generally adopted, except among the higher classes, where anxiety is greatest, and in those cases when the danger appears extreme. It would therefore be dangerous to establish a legal exclusion of men, at least until female pupils had been educated, capable of replacing them.

* Written in 1782.

With respect to the treatment of the poor, no universal measure can be proposed: it must be determined by local and national circumstances. In Scotland, with the exception of some great towns, the government does not interfere with the care of the poor. In England, the tax raised for their support in 1831, exceeded £8,000,000. Their condition is, however, better in Scotland than in England: the object is better accomplished by the manners of the people, than by the laws. Notwithstanding the inconveniences of the English system, it cannot be given up all at once, otherwise the one half of the poor would perish, before the necessary habits of benevolence and frugality have taken root. In Scotland, the influence of the clergy is highly salutary: having only a moderate salary and no tithes, the clergymen are known and respected by their parishioners. In England, the clergy being rich and having tithes, the clergyman is often quarrelling with his flock, and knows little of them.

In Scotland, in Ireland, in France, the poor are moderate in their wants. At Naples, the climate saves the expense of fuel, of lodging, and almost of clothing. In the East Indies, clothing is hardly necessary, except for decency. In Scotland, domestic economy is good in all respects, except neatness. In Holland, it is also as good as it can be in every respect. In England, on the one hand, wants are greater than anywhere else, and economy is perhaps upon a worse footing than in any country in the world.

The most certain method of providing for the poor is, not to wait for indigence, but to prevent it. The greatest service which can be rendered to the working classes, is the institution of savings banks, in which, by the attractions of security and profit, the poor may be disposed to place their little savings.

SECTION III. We come now to that class of desires for which no neutral name is found, —no name which does not present some accessory idea of praise or of blame, but especially of blame; the reason of which is easily discovered. Asceticism has sought to brand and criminalize the desires to which nature has confided the perpetuity of the species. Poetry has protested against these usurpations, and has embellished the images of voluptousness and love. Its object is praiseworthy, when good manners and decency are respected. We may observe, however, that these inclinations have sufficient natural strength, and do not require the excitements of exaggerated and seductive representations.

Since this desire is satisfied in marriage, not only without prejudice to society, but in an advantageous manner, the first object of the legislator, in this respect, should be to facilitate marriage; that is to say, to place no obstacle which is not absolutely necessary in its way.

With the same view, he ought to authorize divorces under suitable restrictions. In place of a marriage broken in point of fact, and subsisting only in appearance, divorce naturally leads to a real marriage. *Separations* permitted in a country where marriages are indissoluble, have the inconvenience either of condemning the individuals to the privation of celibacy, or leading them to form illicit connexions.

But if we would speak upon this delicate subject honestly, and with a freedom more honest than an hypocritical reserve, we shall acknowledge at once, that there is an age at which man attains the developement of his powers, before his mind is ripe for the conduct of business and the government of a family. This is especially true with regard to the superior classes of society. Among the poor, necessary labour diverts the desires from love, and retards their developement. A frugal nourishment and simple kind of life maintains for a longer period a calm among the feelings and the imagination. Besides, the poor are unable to purchase the favours of the other sex, except by the sacrifice of liberty.

Independently of the youth who are not yet marriageable in a moral respect, how many men are there who are unable to undertake the charge of a wife and family! on the one hand, domestic servants, soldiers, sailors, living in a state of dependence, and often having no fixed residence; on the other hand, men of a more elevated rank, who expect a fortune or an establishment. Here is a very numerous class deprived of marriage, and reduced to a forced celibacy.

The first method which presents itself for mitigating this evil, would be the rendering legitimate contracts for a limited time. This method has great inconveniences; still concubinage really exists in all societies in which there is considerable disproportion in fortunes. In prohibiting these arrangements, they are not prevented; they are only rendered criminal and degraded. Those who dare to acknowledge them, proclaim their contempt for manners and laws; those who conceal them are exposed to suffer from the moral sanction, in proportion to their sensibility.

In the ordinary course of thinking, the idea of virtue is associated with this contract when its duration is indefinite, and the idea of vice when it is limited for a time. Legislators have followed this opinion: prohibition against making the contract for a year — permission to make it for life; — the same action, criminal in the first place, will be innocent in the other. What can be said for this difference? The duration of the engagement? — can it change black into white?

But if marriage for a limited time is inno-

cent in itself, it does not follow that it is so honourable for the woman who contracts it: she can never obtain the same respect as a wife for life. The first idea which presents itself with respect to her is, "If this woman were of equal value with others, she would have obtained the same condition as others: this precarious arrangement is a sign of inferiority, either in her condition or in her merit."

What, then, would be the advantage resulting from this kind of contract? The law which now forbids it would not be continually broken and despised. It would also protect the female, who lends herself to this arrangement, from a humiliation which, after having degraded her in her own eyes, almost always leads her to the lowest degree of debauchery. It would, in fine, prove the birth of the children, and secure to them paternal care. In Germany, marriages known under the name of *left-handed marriages*, were generally established. The object was to conciliate domestic happiness with family pride. The woman thus acquired some of the privileges of a wife, but neither she nor her children took the name nor the rank of her husband. In the code of Frederick they were prohibited; the king still reserving to himself the right to grant particular dispensations.

Whilst an idea so contrary to received opinions is proposed, it may be observed that it is not proposed as a good, but as an amelioration of an evil which exists. Where manners are sufficiently simple, where fortunes are sufficiently equal not to require this expedient, it would be absurd to introduce it. It is not proposed as a rule, but as a remedy.

Under a similar apology, a more weighty disorder may be spoken of. It is an evil which particularly exists in great towns, which also arises from the inequality of fortunes, and the concurrence of all the causes which increase celibacy. This evil is prostitution.

There are some countries where the laws tolerate it; there are others, as in England, where it is strictly forbidden: but though forbidden, it is as commonly and as publicly carried on as can be imagined, because the government dares not to punish it, and the public would not approve of this employment of authority. Prostitution, prohibited as it is, is not less extended than if there were no law; but it is much more mischievous.

The infamy of prostitution is not solely the work of the laws. There is always a degree of shame attached to this condition, even when the political sanction remains neuter. The condition of courtezans is a condition of dependence and servitude: their resources are always precarious; they are always on the borders of indigence and hunger. Their name connects them with those evils which afflict the imagination. They are justly considered as the causes of those disorders of which they are, at the same time, the victims. There is no need to mention the sentiments with which they are regarded by *modest* females: the most virtuous pity them; all agree in despising them. No one seeks to defend or to uphold them. It is therefore natural that they should be crushed by the weight of opinion. They have themselves never been able to form a society which could counterbalance this public contempt: when they shall wish to form it, they will be unable. If the interest of a common defence should unite them, rivalry and want would separate them. The person, as well as the name, of a prostitute, is an object of hatred and disdain to all her fellows. It is, perhaps, the only condition openly despised by the persons who publicly profess it. Self-love, by the most striking inconsistency, seeks to blind itself to its own misfortune: it appears to forget what is is, or to make an exception for itself, by severely treating its companions.

Kept mistresses very nearly partake the same infamy with open prostitutes. The reason for it is simple: they are not yet in that class, but they seem always ready to fall into it. However, the longer the same person has lived with the same man, the more she is removed from the degraded condition—the more she approaches to the condition of a modest woman. The greater the duration of the connexion, the more difficult it appears to be broken; the greater the hope it presents of perpetuity.

What is the result of these observations? It is, that the remedy, so far as a remedy can exist, is in the evil itself. The more this condition is naturally the object of contempt, the less necessary is it to add any legal disgrace. It carries with it its natural punishment—punishment which is already too heavy, when every thing which should lead to commiseration in favour of this unfortunate class has been considered — the victims of social inequality, and always so near to despair. How few of these females have embraced this condition, from choice, and knowing the consequences! How few would continue in it, if they could quit it — if they could leave this circle of ignominy and misfortune — if they were not repulsed from every career which they may try to open for themselves! How many have fallen into it from the error of a moment — from the inexperience of youth — from the corruption of their parents — by the crime of the seducer — from inexorable severity — directed against a first fault — almost all from neglect and misery. If opinion be unjust and tyrannical, ought the legislator to exasperate this injustice? ought he to employ this instrument of tyranny?

Besides, what is the effect of these laws?

It is to increase the corruption of which these unhappy women are accused;—it is to precipitate them into intemperance and excess in the use of intoxicating liquors, that they may find in them a momentary oblivion of their misery;—it is to render them insensible to the restraint of shame, by directing against their misfortune that opprobrium which ought to be reserved for real crimes;—it is, in fine, to prevent the precautions which might soften the inconveniences of this disorder, if it were tolerated. All these evils, which the laws lavish without care, are a foolish price which the laws pay for an imaginary good, which is not, and can never be obtained.

The Empress-queen of Hungary undertook to extirpate this evil, and laboured with a perseverance praiseworthy in its principles, and deserving of a better cause. What followed? Corruption extended itself in public and private life: the conjugal bed was violated; the seat of justice was corrupted; adultery gained all that was lost by prostitution: the magistrates made a trade of their connivance; fraud, prevarication, oppression, extortion, spread themselves in the country, and the evil which it was sought to destroy, being obliged to hide itself, only became more dangerous.

Among the Greeks, this profession was tolerated, sometimes even encouraged; but it was not allowed to parents to traffic in the honour of their daughters. Among the Romans, in what are called the best times of their republic, the laws were silent upon the subject. The saying of Cato, to the young man whom he met on leaving a place of ill name is a proof of it: Cato was not a man to encourage the violation of the laws.

In the metropolis of the christian world, this vocation is openly exercised.* This was without doubt one of the reasons for the excessive rigour of the protestants.

At Venice, the profession of a courtezan was publicly authorized under the republic.

In the capital of Holland, houses of this nature receive a licence from the magistrate.

Retif de la Bretonne published an ingenious work, entitled *Pornographe*, in which he proposed to government to found an institution, subject to regulations, for the reception and government of prostitutes.

The toleration of this evil is useful in some respects in great towns: its prohibition is useless; it has even particular inconveniences.

The hospitals established in London for repentant girls are good institutions: but those who regard prostitution with absolute rigour are not consistent with themselves, when they approve of these charitable foundations. If they reform some, they encourage others. The hospital at Chelsea, is it not an encouragement for soldiers? and that at Greenwich, for sailors?

It would be desirable to institute annuities, commencing at a certain age: these annuities should be adapted to this sad condition, in which the period of harvest is necessarily short, but in which there are sometimes considerable profits.

The spirit of economy springs up with little encouragement, and always goes on increasing a sum too small to offer any resource, as actual capital may yield a considerable annuity at a distant period.

Upon points of morality, where there are contested questions, it is well to consult the laws of different nations. This is to the mind a species of travelling. In the course of this exercise, whilst the usages of other nations pass in review before us, we become disengaged from local and national prejudices.

CHAPTER VI.

PROBLEM III.

To avoid furnishing Encouragement to Crimes.

To say that government ought not to reward crimes—that it ought not to weaken the moral sanction, or the religious sanction, in those cases in which they are useful, is a maxim which appears too simple to require proof. It is, however, often forgotten: striking examples of this forgetfulness will be given; but the more striking they are, the less will it be necessary to develope them: it will be more desirable to dwell upon those cases in which this maxim is violated in a less evident manner.

1. *Unjust Detention of Property, &c.*

If the law suffer a man who unjustly detains the property of another to make a profit by delaying the payment, it becomes an accomplice in the wrong. The cases in which the English law is defective in this respect are innumerable. In many cases, a debtor has only to refuse payment till he die, in order to free himself from the principal of his debt: in many others, he may by his delays free himself from the interest: in all, he may retain the capital, and obtain, so to speak, a forced loan at the ordinary rate of interest.

To put a stop to this source of iniquity, it would be sufficient to establish—1*st*, That in matters of civil responsibility with regard to lands, the death of one or other of the parties should make no alteration; 2*d*, That interest should be payable from the commencement of the obligation; 3*d*, That the obligation should commence, not at the ascertaining the amount of the damage, but at the time of the damage itself; 4*th*, That the interest arising

* Written 1782. This is not true at this time, 1820. It remains to be seen if this severity be beneficial to good manners.—*Dumont.*

from this obligation exceed the ordinary rate. These methods are extremely simple: how does it happen that they remain yet to be proposed? Those who thus inquire, know little of the effect of custom, indolence, indifference to the public welfare, and the bigotry of the law, without reckoning on the effect of personal interest and party spirit.

2. *Unlawful Destruction.*

When a man insures his goods against any calamity, if the value for which he insure exceed the value of the effects insured, he has in a certain sense an interest in producing the event insured against — to set fire to his house, if he be insured against fire — to sink his vessel, if he be insured against sea risks. The law which authorizes these contracts may therefore be considered as furnishing a motive to the commission of these crimes. Does it follow that it ought to refuse them its sanction? By no means; but only that it ought to direct and suggest to the assurers the precautions most likely to prevent these abuses, without being so restrictive as to hinder their operations. The taking preliminary informations — requiring certificates of the real value of the goods insured — requiring, in cases of accident, the testimony of certain respectable persons, as to the character and probity of the party who has been insured — submitting the effects insured to examination, in every state of the cause, when the assurer has any doubts, &c. Such are a part of the measures to be taken.

3. *Treason.*

If it be permitted to insure the vessels of enemies, a state may be exposed to two dangers: — 1*st*, The commerce of an inimical nation, which is one of the sources of its power, is facilitated. 2*d*, The assurer, in order to guarantee himself against a loss, may give secret intelligence to the enemy as to the departure of the armaments and cruisers of his own nation. With respect to the first inconvenience, it is only an evil in case the enemy could not insure his vessels elsewhere, or that he could not employ his capital with the same profit in any other branch of trade. With respect to the second inconvenience, it is absolutely nothing, unless the assurer be able to give to the enemy information that he could not obtain in any other manner for money, and that the facility of giving this information was so great as to lead him to disregard the infamy and the risk of treason. Such is the state of things as to its inconveniences.

On the other hand, its advantages for the nation assuring is certain. In this species of traffic, it has been found that the balance of profit in a given time is on the side of the assurers; that is to say, in taking all the losses and gains together, he receives more in premiums than he pays in reimbursements. It is then a lucrative branch of commerce, and may be considered as a tax levied upon the enemy.

4. *Peculation.*

In making a bargain with architects and superintendents, it is common to give them a per-centage upon the amount of the expense. This mode of payment, which appears sufficiently natural, opens a door for peculation — for peculation of the most destructive kind, in which, in order that the peculator may make a small profit, it is necessary that his employer should suffer a large loss.

This danger is at its highest degree in public works, in which no individual has a particular interest in preventing profusion, and each may find his interest in conniving at it.

One of the means of remedying it is to fix a sum in accordance with an estimate made, and to say to the superintendent — Thus far you shall have so much per cent.; above this you shall have nothing. If you reduce the expense below the estimate, you shall have your profit as upon the whole sum.

5. *Abuse of the Confidence of the Sovereign.*

If a statesman who has the power of contributing to war or to peace, possess an employment of which the emoluments are larger in time of war than in time of peace, an interest is given to him to make use of his power in order to prolong or create a state of war. If his emoluments increase in proportion to the expense, an interest is given him to conduct such war with the greatest possible prodigality. The inverse reason would be much better.

6. *Offences of every kind.*

When a man lays a wager upon the affirmative side regarding a future event, he has an interest proportioned to the value of the wager in the happening of the event. If the event be among the number of those prohibited by the laws, he has an interest in committing an offence. He is even stimulated by a double force, one part of which possesses the nature of reward, the other possesses the nature of punishment: the reward, what he will receive if the event happen; the punishment, what he will have to pay in the contrary case. It is as if he were suborned by the promise of a sum of money on the one hand, and that he had made an engagement under an explicit punishment on the other.*

If, then, all wagers, without distinction,

* In the Adventures of a Guinea, a wager is made between the wife of a clergyman, and the wife of a minister of state, that the clergyman would not be made a bishop. It may be guessed which of the two wins the bet.

were recognised as valid without restriction, venality of every kind would receive the sanction of the laws, and liberty would be given to all the world to enrol accomplices for every kind of crime. On the other hand, if all wagers without restriction were annulled, the insurances so advantageous to commerce, so helpful against a multitude of calamities, would have no place; for these insurances are only a species of wager.

The desirable medium seems to be this: — In all cases when the wager may become the instrument of mischief without answering any useful object, prohibit it absolutely: in those cases in which, as an insurance, it may become a means of help, admit it; but leave a discretion to the judge to make the necessary exceptions, when he finds that it has been made a cloak for subornation.

7. *Reflective Offences, or Offences against One's self.*

When a lucrative place has been conferred upon a man, the possession of which depends upon his submission to certain rules of conduct, if these rules are such as to be hurtful to himself, without producing any benefit to any other person, the creation of such an office has the effect of a law diametrically opposed to the principle of utility — of a law which tends to augment the sum of pains, and to diminish that of pleasures.

Such institutions are monasteries in catholic countries; such also are the remains of the monastic spirit in the English universities.

But it may be said, since no one engages in such a condition without his own consent, the evil is only imaginary. This answer would be good, if the obligation ceased so soon as the consent ceased: the misfortune is, that the consent is the work of a moment, and the obligation is perpetual. There is another case, indeed, in which a transitory consent is admitted, as the ground of durable condition: it is that of military enlistment. But the utility of the rule, or, to speak more correctly, its necessity, is its justification. The state could not exist without its army; and the army could not exist, if all who compose it were at liberty to leave it whenever they pleased.

CHAPTER VII.

PROBLEM IV.

To augment the Responsibility of Individuals, in proportion as they are more exposed to temptation to do wrong.

THIS rule principally regards the public servants. The more they have to lose in respect of fortune or honours, the more may be taken from them. Their salaries are a source of responsibility. In case of malversation, the loss of this salary is a punishment from which they cannot escape, even when they can escape from all others. This method is especially suitable in those employments which give the management of the public property. If you cannot otherwise secure the probity of a cashier, make the amount of his appointments a little exceed the interest of the greatest sum which is entrusted to him. This excess of salary may be considered as a premium paid for an insurance against his dishonesty: he has more to lose by becoming a rogue than by remaining an honest man.

Birth, honours, family connexions, religion, may also become so many sources of responsibility — so many pledges for the good conduct of individuals. There have been cases in which legislators would not trust bachelors: they have regarded a wife and children as hostages given by the citizen to his country.

CHAPTER VIII.

PROBLEM V.

To diminish Sensibility with regard to Temptation.

THE preceding chapter referred to precautions against the improbity of an individual: the present chapter treats of the means of preserving the probity of the honest man, by not exposing him to the overpowering influence of seductive motives.

We shall first speak of salaries. Money, according to the manner in which it is employed, may serve either as a poison or an antidote.

Without regard to the happiness of individuals, the interest of the public service requires that public officers should be raised above want, in all employments which present the means of acquiring money in a prejudicial manner. In Russia, the greatest abuses, in all the departments of government, have been found to arise from the insufficiency of salaries. When men, oppressed by want, become avaricious extortioners and thieves, the blame ought to be divided between them and the government which has spread the snare for their probity. Placed between the necessity of living, and the impossibility of living honestly, they are led to consider extortion as a lawful supplement, tacitly authorized by those who employ them.

Will the supply of what is physically necessary suffice to place them above want? No: if there be not a certain proportion between the dignity with which a man is invested and his means of sustaining it, he is in a state of suffering and privation, because he cannot comply with what is expected of him; and he is compelled to remain upon the verge of the class with whom he is called to

associate. In a word, wants increase with honours, and relative necessity changes with condition. Place a man in an elevated rank, without giving him the means of maintaining it, what will be the result? His dignity will furnish a motive for evil-doing, and his power will furnish him with the means of evil-doing.

Charles II., when restricted by the economy of his parliament, sold himself to Louis XIV., who offered to supply his profusion. The hope of relieving the embarrassments in which he was plunged, led him, like an individual overwhelmed with debts, to the employment of criminal resources. This miserable economy cost the English two wars, and a more disastrous peace. It is true, that it is difficult to discover what sum would have operated as an antiseptic with a prince thus corrupted; but this example is sufficient to show, that the civil list of the kings of England, which appears exorbitant in the eyes of common calculators, is in the eyes of a statesman a measure of general security. Besides, from the intimate connexion which exists between wealth and power, every thing which increases the splendour of dignity increases its power; and royal pomp may, in this respect, be compared to those ornaments of architecture, which serve, at the same time, to support and bind the building together.

This great rule of diminishing, as much as possible, sensibility to temptation, has been singularly violated in the Catholic Church. Imposing celibacy upon the priests, and confiding to them the most delicate functions — the examination of consciences, and the direction of families — was placing them in a trying situation, between the unhappiness of observing a useless law, and the opprobrium of its violation.

When Gregory VII. directed, in a council at Rome, that the married clergy, or those who had concubines, should not say mass, he excited their cries of indignation: they accused him of heresy, saying, according to the historian of the times, "If he persist, we would rather renounce the priesthood than our wives: he must seek for angels to govern the churches."—*(Histoire de France par l'Abbe Millot*, tom i. *Regne de Henri I.)*

In our days it has been proposed to allow the French priests to marry; but there were no men found among them, they were all angels.

CHAPTER IX.

PROBLEM VI.

To strengthen the Impression of Punishments upon the Imagination.

It is the real punishment which produces all the evil: it is the apparent punishment which produces all the good. It is proper to diminish the first, and to augment the second, as much as possible. Humanity consists in the appearance of cruelty.

Speak to the eyes, if you would move the heart. This precept is as old as the age of Horace, and the experience which dictated it, as old as the first man: — every one has felt its force and endeavoured to profit by it; the actor, the rogue, the orator, the priest, all know its prevailing power. Render, therefore, your punishments exemplary; give to the ceremonies which accompany them a mournful pomp; call to your assistance all the imitative arts; and let the representation of these important operations be among the first objects which strike the eyes of childhood.

A scaffold painted black, the livery of grief—the officers of justice dressed in crape— the executioner covered with a mask, which would serve at once to augment the terror of his appearance, and to shield him from ill-founded indignation — emblems of his crime placed above the head of the criminal, to the end that the witnesses of his sufferings may know for what crimes he undergoes them: these might form a part of the principal decorations of these legal tragedies; whilst all the actors in this terrible drama might move in solemn procession — serious and religious music preparing the hearts of the spectators for the important lesson they were about to receive. The judges need not consider it beneath their dignity to preside over this public scene, and its sombre dignity should be consecrated by the presence of the ministers of religion.

Instruction should not be rejected when it is offered, even by the most cruel enemy. The Vehemic Council, the Inquisition, the Star-Chamber, may all be consulted, all their methods examined and compared. A diamond is worth preserving, though covered with mud. If assassins employ pistols for the commission of murder, is this a reason why I should not use them in self-defence?

The emblematic dresses of the inquisition might be usefully employed in criminal justice: an incendiary under his cloak, painted with flames, would present to all eyes the image of his crime, and the indignation of the spectator would be fixed upon the idea of his crime.

A system of punishments, accompanied with emblems appropriated as much as possible to each crime, would possess an additional advantage: it would furnish allusions for poetry,* for eloquence, for dramatic authors, for ordinary conversation. The ideas derived from them would, so to speak, be reverbe-

* See in Juvenal, his allusion to the punishment of parricides: —

Cujus supplicio non debuit una parari
Simia non serpens unus, &c.

rated by a thousand objects, and disseminated on all sides.

The Catholic priests have known how to derive from this source the greatest assistance for augmenting the efficacy of their religious opinions. I recollect having seen, at Gravelines, a striking exhibition: a priest showed to the people a picture, in which was represented a miserable multitude in the midst of flames, and one of them was making a sign that he wanted a drop of water, by showing his burning tongue. It was a day appointed for public prayers, for drawing souls out of purgatory. It is evident, that such an exhibition would tend less to inspire a horror for crimes, than a horror of the poverty which did not allow him to be redeemed. The necessary consequence is, that money for the purchase of masses must be obtained at any rate; for where every thing is to be expiated by money, misery alone is the greatest of all crimes, the only one which has no resource.*

The ancients have not been more happy than the moderns in the choice of punishments: no design, no intention, no natural connexion between punishments and crimes, can be discovered; every thing is the work of caprice.

I shall not dwell upon a point which has for a long time been familiar to all who are capable of reflection. The modes of punishment in England form a perfect contrast with every thing which inspires respect: A capital execution has no solemnity. The pillory is sometimes a scene of buffoonery; sometimes a scene of popular cruelty—a game of chance, in which the sufferer is exposed to the caprices of the multitude and the accidents of the day. The severity of a whipping depends upon the money given to the executioner. Burning in the hand, according as the criminal and the executioner can agree, is performed either with a cold or a red-hot iron; and if it be with a hot iron, it is only a slice of ham which is burnt: to complete the farce, the criminal screams, whilst it is only the fat which smokes and burns, and the knowing spectators only laugh at this parody of justice.

But it may be said, that every question has two sides — that these real representations, these terrible scenes of penal justice, will spread dismay among the people, and make dangerous impressions. I do not believe it. If they present to dishonest persons the idea of danger, they offer only an idea of security to those who are honest. The threat of terrible and eternal punishment for undefined and indefinite crimes, working upon an active imagination, may have sometimes produced madness. But here no undefined threatenings are supposed: on the contrary, here is a manifest crime proved — a crime which no one need commit; and consequently the dread of punishment can never rise to a dangerous height. It would, however, always be desirable to guard against producing false and hateful ideas.

In the first edition of the Code Theresa, the portrait of the empress was surrounded with medallions, representing gibbets, racks, fetters, and other instruments of punishment. What a blunder, to present the image of the sovereign surrounded by these hideous emblems! This scandalous frontispiece was suppressed; but the print, representing all the instruments of torture, was allowed to remain. A sad picture, which could not be considered without each one saying to himself, Such are the evils to which I am exposed, although innocent! But if an abridgment of the penal code were accompanied with prints representing the characteristic punishments set apart for each crime, it would form an imposing commentary — a sensible and speaking image of the law. Each one might say, That is what I shall suffer, if I become guilty. It is thus that, in matters of legislation, a slight difference sometimes separates what is good from what is bad.

CHAPTER X.

PROBLEM VII.

To facilitate the Discovery of Offences committed.

IN penal matters, the judge must be acquainted with two things before he can exercise his office: the fact of the offence, and

* At the commencement of the reigns of the kings of Poland, there existed a very singular custom:—

"A bishop of Cracow, murdered by his king in the eleventh century, cited to his tribunal, that is, to the chapel where his blood was shed, the new king, as if he had been guilty of the misdeed. John repaired thither on foot, and replied, as his predecessors had done, that the crime was atrocious, that he was innocent of it, that he detested it, and in asking pardon for it, implored the protection of the holy martyr upon himself and his kingdom. It is to be wished, that in all states they had thus preserved the monuments of the crimes of kings: flattery has discovered in them only virtues."—*History of John Sobiesky, by l'Abbe Coyer*, vol. ii. p. 104.

This is a singular fact, and proves the great skill of the clergy in seizing upon the imagination, and making an impression upon the minds of men. How well every thing was calculated in this ceremony, to render the person of a bishop holy and sacred in the eyes of the king and of the nation! This crime, which no time could efface—this blood, which always cried out—this new king, who seemed to inherit the malediction of the misdeed, until he had disavowed it—this first act of his reign, a kind of honourable fine, for violence committed ages before,—here is a solemnity well directed to its end; whilst, as to the wish of the Abbe Coyer, it is without doubt good, but he ought to have taught us the means of accomplishing it.

the person of the offender. These two things being known, his knowledge is complete. According to the difference of cases, obscurity spreads itself over these two points in different proportions. Sometimes it is greatest upon the first, sometimes upon the second. We shall treat, in the following articles, of what relates to the fact of the offence, and of the means by which its discovery may be facilitated.

Art. I. — *Require written Title-Deeds.*

It is only by writing, that evidence can be rendered permanent and authentic. Verbal transactions, at least when not of the simplest kind, are subject to interminable disputes. *Litera scripta manet.* Mahomet himself has recommended his followers to observe this precaution. It is almost the only passage of the Koran which has a grain of common sense. *(Chapter of the Cow.)*

Art. II.—*Cause the Names of the Witnesses to be attested upon the head of Title-Deeds.*

It is one thing to require that there should be witnesses to the execution of a deed: it is another point to require that their presence be notified, attested, enregistered at the head of the deed. A third circumstance is, to add to it those circumstances by which the witnesses, if necessary, may be easily found.

In the attestation of deeds, it would be useful to observe the following precautions: —

1. Prefer a great number of witnesses to a small number. This diminishes the danger of prevarication, and increases the chance of finding them, if necessary. 2. Prefer married to single persons; heads of families to servants; persons of public character to individuals less distinguished; young men in the flower of their age to old and infirm persons; persons who are known, to those who are unknown. 3. When a deed is composed of many sheets or pieces, each piece ought to be signed by the witnesses. If there be corrections or erasures, a list of these should be made and attested; the lines ought to be counted, and the number in each page indicated. 4. Each witness should add to his Christian and surname, if it be required, his quality, his residence, his age, his condition, whether single or married. 5. The time and place of the execution of the deed should be minutely specified; the time not only by the day, the month, the year, but also by the hour; the place by the district, the parish, even by the house, and by the name of him who occupies it at the time. This circumstance is an excellent preservative against forgery. A man will fear to embark in such an enterprise, when it is necessary to be acquainted with so many details before he affixes a supposititious date to a deed; and if he do attempt it, it will be more easily discovered. 6. Numbers ought to be written in words at length, especially dates and sums; except in matters of account, in which case it is sufficient to state the total in words at length; except also when the same date or the same sum frequently recurs in the same deed. The reason of this precaution is, that figures, if they are not very carefully written, are liable to be taken the one for the other; and besides that, they are easily altered, and the slightest alteration may have considerable effects: 100 is easily converted into 1000. 7. The forms to be observed in the execution of a deed ought to be printed upon the margin of the sheets of paper or parchment on which it is written.

Ought these forms to be left to the discretion of individuals as a means of security required by prudence, or ought they to be rendered obligatory? Some ought to be made obligatory; others ought not. As to those which ought to be made obligatory, it will be proper to allow the judges latitude, that they may distinguish the cases in which it was not possible to attend to them. It may be that a deed has been executed in a place where the prescribed paper could not be obtained; where a sufficient number of witnesses could not be found, &c. The deed might be provisionally declared valid, until it had been possible to attend to the forms required.

Greater latitude ought to be allowed in wills, than in deeds between living parties. Death waits neither for lawyers nor witnesses, and men are accustomed to defer making them to a time when they have neither leisure nor time to correct and review. On the other hand, these sorts of deeds are those which require the most precaution, because they are most subject to imposture. In the case of a deed between living parties, the party to whom it may be wished to attribute an engagement may chance to be living to contradict it. In the case of a will, this chance no longer exists.

It would require many details to point out the points to be established and the exceptions to be made. I only observe, that great latitude must be left; that no formality can be found so simple, that its omission ought to render a deed absolutely invalid.

When such instructions as these shall have been published by government, even without being rendered necessary, every body will seek to observe them, because each one will seek, in a deed honestly executed, to obtain for himself all possible security. The omission of these forms, therefore, would form a strong ground of suspicion of fraud, unless such omission could clearly be attributed to the ignorance of the parties, or to circumstances which rendered such omission unavoidable.

ART. III. — *Institute Registers for the Preservation of Titles.*

Why ought deeds to be registered? What deeds ought to be registered? Ought the registers to be secret or public? Ought registration to be optional, or ought its omission to be liable to punishment?

Registers would be useful as guards — 1*st*, against the fabrication of forged deeds; 2*d*, against forgery by falsification; 3*d*, against accidents — the loss or destruction of the original; 4*th*, against double alienation of the same property to different persons.

For the first and last of these objects, a simple memorial would be sufficient; for the second, an exact copy would be required; for the third, an extract would be sufficient, but a copy would be better.

Against forgery by fabrication, registration would only be useful if it were obligatory; nullity in cases of omission, with latitude for accidental cases. The advantage which would result is, that after the period for registration was expired, the fabrication of a deed which, according to its apparent date, ought to be registered, would fail of itself. The period in which a fraud of this kind could be committed with probability of success would be limited to a short space, and that so near a time to that of the supposed deed, that the proofs of fraud could scarcely be wanting.

It would also be necessary that registration should be obligatory under pain of nullity, if it be designed to prevent double alienations, such as mortgages or marriage contracts. Without this obligatory clause, registration would scarcely take place, because neither party would have any interest in it. He who alienates, has even a contrary interest: an honest man may dislike to have it known that he has sold or mortgaged his property; a rogue would desire the power of receiving its value twice over.

Wills are the kind of deeds most liable to be fabricated. The most certain protection against a fraud of this nature is to require their registration, under pain of nullity, during the life of the testator. It may be objected, that this would make him dependent on the mercy of those who surround him in his last moments, since he would no longer be able to reward or punish them; but this inconvenience might be obviated by allowing a testator to dispose of a tenth of his property by a codicil.

What deeds ought to be registered? All those in which a third person is interested, and whose importance is sufficiently great to justify this precaution.

Of what deeds ought the registration to be secret? and of what public?

Deeds between living persons, in which third persons are interested—mortgages, marriage-contracts, ought to be public. Wills, during the life of the testator, ought to be inviolably secret. Promissory deeds, apprentice indentures, marriage-contracts which do not bind landed property, might be kept secret, reserving the right of communicating them to persons who could present a special title to examine them.

The office ought then to be divided into secret and public departments, free or obligatory. Free registrations would be frequent, if the charge were moderate. Prudence directs the preservation of copies against accidents; but where could copies be better preserved than in a depot of this kind?

The necessity of registering deeds by which territorial property is charged, by way of mortgage, would be a species of restraint upon prodigality. A man could hardly, without some degree of shame, borrow upon his possessions to spend in pleasure. This consideration, which ought to operate in favour of this measure, has been urged as an objection against it, and has prevented its establishment.

The jurisprudence of many countries has adopted more or less of this mode of registration. That of France appears to have hit the happy medium.

In England, the law varies. In Middlesex and the county of York, register-offices were established in the reign of Queen Anne, whose principal object has been to prevent double alienations; and the good effects have been such, that the value of land is higher in these two counties than elsewhere.

Ireland enjoys this benefit, but registration is left to the free choice of individuals. It has been established in Scotland: wills ought there to be registered before the death. In the county of Middlesex, registration is only obligatory after the death of the testator.

ART. IV. — *Method of preventing Forged Deeds.*

There is one expedient which might have place as a species of registration. A particular kind of paper or parchment should be required for the deed in question: those who sold it by retail should be prohibited from selling it without indorsing the day and year of the sale, and the names of the seller and buyer. The distribution of this kind of paper might be limited to a certain number of persons, of whom a list should be kept. Their books being required to be correct registers, should, after their death, be deposited in an office. This precaution would hinder the fabrication of all kinds of deeds pretending to a distant date.

It would be a further restraint if the paper ought to be of the same date with the deed itself. The date of the paper might be marked

in the paper itself, in the same manner as the maker's name. In this case, no forged deed could be made without the concurrence of a paper-maker.

Art. V. — *Institute Registers for Events which serve to establish Titles.*

Much need not be said upon the evident necessity of proving births and burials. Prohibition to inter the dead, without the previous inspection of some officer of police, is a general precaution against assassination. It is singular, that, in England, marriages, instead of being by writing, were for a long time left to the simple notoriety of a transitory ceremony. The only reason which can be given for it, is the simplicity of this contract, which is the same for all, except in particular arrangements relative to fortunes.

Happily, under the reign of William III., these events, which serve as the foundation of so many titles, presented themselves as suitable objects for taxation; they were required to be registered. The tax has been suppressed, but the advantage remains.

Even at the present time, the security given to the rights which depend upon these events is neither so certain nor so universal as it ought to be. There exists only one copy: the register of each parish ought to be transcribed in a more general office. In the marriage-act under George II., the advantage of this regulation is refused to Quakers and Jews, either from intolerance or inadvertency.

Art. VI. — *Put the People on their guard against different Offences.*

1. *Against Poisoning.*

Give instructions with regard to the different poisonous substances, the methods of detecting them, and their antidotes. If such instructions were indiscriminately spread among the multitude, they might do more hurt than good. This is one of those cases in which knowledge is more dangerous than useful. The methods of employing poison are more certain than the means of cure. The suitable medium lies in limiting the circulation of these instructions to the class of persons who can make a good use of them, whilst their situation, their character, and their education, would be guarantees against their abuse. Such are the parochial clergy, and medical practitioners: with this view, the instructions might be in Latin, which these parties are reputed to understand.

But as to the knowledge of those poisons which present themselves without being sought, and which ignorance may innocently administer, this ought to be rendered as familiar as possible. There must be a strange deprivation in the character of a nation, if hemlock, which is so easily confounded with parsley, and verdigris, which so speedily collects in copper vessels when the tinning is worn off, were not more often administered by mistake than by design. In this case, there is more to be hoped for than feared from the communication of knowledge, how dangerous soever it may be.

2. *Against False Weights and Measures.*

Give instructions as to false weights, false measures, false standards of quality, and the methods of deception which may be used when just weights and measures are employed. To this head would be referred scales with unequal arms, measures with double bottoms, &c. Knowledge on these subjects cannot be too widely extended. Every shop should have such instructions openly exhibited, as a proof that there is no wish to deceive.

3. *Against Frauds with respect to Money.*

Give instructions showing how good may be distinguished from bad money. If a particular kind of false coin appear, government ought to give notice of this circumstance in a particular manner. At Vienna, the mint does not fail to notify the kinds of counterfeits it discovers; but the coinage is upon so good a footing, that attempts of this kind are rare.

4. *Against Cheating at Play.*

Give instructions with regard to false dice, as to methods of cheating in dealing cards, by making signs to associates, by having accomplices among the spectators, &c. These instructions might be suspended in all places of public resort, and presented in such a manner as to put youth upon its guard, and to exhibit vice as both ridiculous and hateful. It would be proper also to offer a reward to those who detect the artifices of sharpers, in proportion as they invent new schemes.

5. *Against the Impostures of Beggars.*

Some, though in perfect health, counterfeit sickness; others cause a slight wound to assume the most disgusting appearances; others relate false histories of shipwrecks and fires; others borrow or steal children, that they may employ them as instruments of their trade. It would be proper to accompany the instructions respecting these artifices with an advertisement, for fear that the knowledge of so many impostures should harden the heart, and render it indifferent to real misery. In a country under a well regulated police, an individual who presents himself under so unfortunate an aspect ought neither to be neglected nor left to himself: the duty of the first person who meets him should be to consign him to the hands of public charity. Instructions of this kind would form homilies

for the people, more amusing than controversial discourses.

6. *Against Theft, Cheating, and other means of obtaining Money under false pretences.*

Give instructions which should develope all the methods employed by thieves and cheats. There are many books upon this subject, of which the materials have been furnished by penitent malefactors, in the hopes of deserving pardon. These compilations are generally very bad, but useful extracts might be taken from them. One of the best is, *The Discoveries and Revelations of Poulter, otherwise Baxter*, which passed through sixteen editions in the space of twenty-six years. This shows how wide a circulation an authentic book of this kind, published and recommended by government, would have. The tone which might be given to these works would make them excellent lessons in morality, as well as books of amusement.*

7. *Against Religious Impostures.*

Give instructions with regard to crimes committed by means of superstitions, relating to the malice of spiritual agents. These crimes are too numerous; but they are a light matter, in comparison with the legal persecutions which have taken their rise in the same errors. There is scarcely a Christian nation which has not to reproach itself with bloody tragedies occasioned by a belief in sorcery.

The histories of the first class would furnish an instructive subject for homilies, which might be read in the churches; but there is no need to give a sad publicity to the second. The suffrages of so many respectable and upright judges, who have been the miserable dupes of this superstition, would rather serve to confirm the populace in their error, than to cure them.

The English statutes were the first which had the honour of expressly rejecting from the penal code the pretended crime of sorcery. In the Code Theresa, though compiled in 1773, it occupies a considerable space.

ART. VII.—*Publish the price of Merchandise, in opposition to Mercantile Extortion.*

If the exaction of an exorbitant price cannot properly be treated as an offence, and subjected to punishment, it may at least be looked upon as an evil, which it would be advantageous to suppress, if it could be done without causing greater evils.

Direct punishments being inadmissible, indirect methods must be employed. Happily, this is a species of offence of which the evil is diminished, rather than increased, by the number of offenders. What should the law do? increase their number as much as possible. Is an article sold too dear? is the profit gained by it exorbitant? spread this information: the dealers in it will assemble from all quarters, and by the effect of their competition alone, will lower the price.

Usury may be ranked under the head of mercantile extortion. To lend money, is to sell present money for future money: the time of payment may be either determinate or indeterminate; dependent, or not, upon certain events; the amount returnable all at once, or by instalments, &c. Prohibit usury: by rendering the transaction secret, you increase the price.

ART. VIII.—*Publish an Account of Official Rights.*

Almost everywhere, certain rights are annexed to the services of government offices: these rights form part of the pay of the persons employed. As an artisan sells his manufacture, a public officer sells his labour as dear as possible. Competition, the facility of going to another market, retains this disposition within due bounds as respects ordinary labour; but by the establishment of an office, all competition is taken away; the right to sell this particular kind of service becomes a monopoly in the hands of the person employed.

Leave the price to the discretion of the seller, and there will be no other limits than those prescribed by the wants of the buyer. The rights of officers ought therefore to be exactly determined by law, otherwise the extortion which may take place, ought to be imputed to the negligence of the legislator, rather than the rapacity of the person employed.

ART. IX.—*Publish all Accounts in which the Nation is interested.*

When accounts are rendered in a limited time, before a limited number of auditors, and these auditors, perhaps chosen or influenced by the accountant himself, and no one is afterwards called upon to controul them, the greatest errors may be passed without being perceived, or without being noticed; but when accounts are published, there can be no want of witnesses, nor commentators, nor judges.

Each item is examined. Was this article necessary? did it arise from want, or was it suggested for the purpose of creating expense? Is not the public more dearly served than individuals? has not a preference been given to a contractor at the public expense?

* The most ancient work which I know upon this subject, is entitled *Clavell's* Recantation. The second edition is dated 1628. It is in verse. Clavell was a man of family, who became a highwayman: he obtained a pardon. It is said in the title-page, that the book was published at the express order of the king (Charles I.) One of the more modern is entitled, *A View of Society and Manners in High and Low Life, by Parker.*

Has not a secret advantage been given to a favourite? has nothing been granted to him upon false pretences? Have no manœuvres been practised to prevent competition? Is there nothing concealed in the accounts? There are a hundred questions of the same kind, upon which it is impossible to secure complete explanations, if accounts are not rendered public. In a particular committee, some may want integrity, others knowledge; a mind slow in its operations will pass over what it does not understand, for fear of discovering its inaptitude; a lively spirit will not trouble itself with details; each will leave to others the fatigue of examination. But every thing which is wanting in a small body, will be found in the assembled public: in this heterogeneous and discordant mass, the worst principles will lead to the desired end, as well as the best; envy, hatred, malice, will assume the mask of public spirit; and these passions, because they are more active and persevering, will scrutinize all the parties better, and make even a more scrupulous examination. Hence those who have no other restraint than the desire of human applause, will be retained in the discharge of their duty by the pride of integrity and the fear of shame.

In seeking for exceptions, I have only found two: the first regards the expenses of this publication; the other regards the nature of those services which ought to remain secret. It might be useless to publish the accounts of a small parish, because the books are accessible to all who are interested in their examination; and the publication of the sums destined to secret service, could only be thought of, under the pain of losing all the information you might otherwise obtain respecting the designs of your enemies.

Art. X. — *Establish Standards of Quantity, Weights, and Measures.*

Weights indicate the quantity of matter; measures, the quantity of space. Their utility consists — first, in satisfying each individual as to the quantity of any thing which he wants; secondly, in terminating disputes; thirdly, in preventing frauds.

To establish uniformity in the same state has been the object of many sovereigns. To find a common and universal measure for all people, has been the object of research with many philosophers, and latterly of the French Government — a service truly honourable, since there is hardly any thing more rare and noble, than to see a government labouring upon one of the essential bases of union among mankind.

Uniformity of weights and measures, under the same government, and among a people who, in other respects, have the same language, is a point upon which it would seem that there is no need of much reasoning to show its utility. A measure of which an individual does not know the contents, is useless. If the measures of two towns are not the same, either in name or quantity, the trade between the individuals cannot but be exposed to great mistakes or great difficulties. These two places, in this respect, are strangers one to another. If the nominal price of the goods measured be the same, and the measures are different, the real price is different: continual attention is requisite, and distrust mingles with the course of affairs; errors glide into honest transactions, and fraud hides itself under deceptive denominations.

For the introduction of uniformity, there are two methods: — The first, to make standards, which should have public authority; to send them into every district, and to forbid the use of every other: the second, to make standards, and leave to general convenience the case of their adoption. The first method has been employed in England; the second was practised with success by the Archduke Leopold, in Tuscany.

When a public standard has been provided, a punishment may be imposed upon those who make weights and measures not in conformity to the standards; and then all bargains, which have not been made according to these standards, might be declared null and void. But this last measure would hardly be necessary; the two former would be sufficient.

In different nations, the want of uniformity in this respect cannot produce so many mistakes — the difference of language alone, putting every one upon their guard. Much embarrassment, however, results from it to commerce; and fraud, favoured by mystery, may often avail itself of the ignorance of purchasers.

An inconvenience of less extent, but which is not less important, is felt in medicine. If the weights are not exactly the same, especially with regard to substances of which small quantities are important, the pharmacopœia of one country can with difficulty be employed in another, and may lead to fatal errors. It is also a considerable obstacle to the free communication of the sciences; and the same inconvenience is found in relation to those arts, in which success depends upon the most delicate proportions.

Art. XI. — *Establish Standards of Quality.*

It would require many details to state all that government would have to do, in order to establish the most suitable criteria of the quality and value of a multitude of objects which are susceptible of different proofs. The touchstone is an imperfect proof of the quality and value of metallic compositions mingled with gold and silver: the hydrometer is an unfailing proof, in so far as identity of qua-

lity results from the identity of specific gravity.

The adulterations most important to be known, are those which are hurtful to health; such as the mixture of chalk and burnt bones with flour, in the making of bread; the use of lead in taking off the acidity of wine, or of arsenic in refining it. Chemistry presents the means of discovering all these adulterations; but knowledge is required for their application.

The intervention of government in this regard, may be limited to three points:— 1*st*, The encouragement of the discovery of the means of proof, in those cases in which they are still wanting; 2*d*, The dissemination of this knowledge among the people; 3*d*, The prescription of their use by officers appointed for the purpose.

ART. XII. — *Institute Stamps or Marks, to attest the Quantity or Quality of Articles which ought to be made according to a certain Standard.*

Such marks are declarations or certificates in an abridged form. There are five points to be considered in these documents: 1*st*, Their end; 2*d*, The person whose attestation they bear; 3*d*, The extent and the details of the information they contain; 4*th*, The visibility, the intelligibility of the mark; 5*th*, Its permanence, its indestructibility.

The utility of authentic attestations is not doubtful. They are successfully employed for the following objects:—

1. To secure the rights of property. It may be left to the prudence of individuals to use this precaution in what concerns them; but with respect to public property, and objects in deposit, the employment of such marks ought to be regulated by law. It is thus that, in England, stores for the use of the royal navy bear a particular mark, which it is unlawful to employ in the merchant service. In the royal arsenals, an arrow is marked upon the timber used in building; a white thread runs through the cordage, which private persons are forbidden to use.

2. To secure the quality or quantity of commercial articles for the benefit of purchasers. Thus, by statute law in England, marks are placed upon many articles; upon blocks of wood exposed to sale, upon leather, bread, pewter, plate, money, woollen goods, stockings, &c.

3. To secure the payment of taxes. If the article liable to the tax has not the mark in question, it is a proof that the tax has not been paid. The examples are numberless.*

4. To secure obedience to the laws which prohibit importation.

* Chocolate, tea, hops, letters, newspapers, cards, almanacks, hackney-coaches, &c.

CHAPTER XI.

PROBLEM VIII.

To prevent Offences, by giving to many persons an interest in preventing them.

I AM about to cite an example, which might have been referred to the preceding head as well as to this, for it has prevented the offence — it may be, by increasing the difficulty of hiding it — it may be, by giving to more persons an immediate interest in preventing it.

The carriage of post letters in England had always wanted diligence and exactness: the couriers would stop for their pleasure, or their profit: the innkeepers would not urge them forward. All these circumstances were so many little offences or violations of the established rules. What ought the legislature to do to remedy them? Superintendence was fatiguing; punishment was gradually relaxed; informations, always regarded as odious or embarrassing, became rare, and the abuse, suspended for a moment, soon returned to its ordinary course.

A very simple mode was hit upon, which required neither law, nor punishment, nor information, but which was better than all.

This mode consisted in combining two establishments, which had till that time been distinct: the carriage of letters and the conveyance of passengers. The success was complete: the celerity of the post has been doubled, and travellers have been better served. This deserves the trouble of an analysis.

The travellers who accompany the post-office servants, become so many inspectors of their conduct; they cannot escape from their observation. At the same time that they are excited by their praises, and by the reward which they expect from them, they cannot be ignorant that if they lose their time, these travellers have a natural interest in complaining, and that they may become informers, without being paid for the service, or fearing the odium attached to the character. Such are the advantages of this little combination. Evidence secured respecting the slightest faults — the motive of reward substituted for that of punishment — informations and examinations spared — occasions for punishment rendered extremely rare, and the two services rendered by their union more commodious, more prompt, and more economical.

This happy idea of Mr. Palmer is a study in legislation. It is well to reflect on what he has successfully done in this respect, that we may learn to overcome other difficulties. In seeking to develope the cause of this success, we shall rise from particulars to general principles.

CHAPTER XII.

PROBLEM IX.

To facilitate the Recognition and the finding of Individuals.

The greater number of offences would not be committed, if the delinquents did not hope to remain unknown. Every thing which increases the facility of recognising and finding individuals, adds to the general security.

This is one reason why less is to be feared from those who have a fixed habitation, property, or a family. The danger arises from those who, from their indigence or their independence of all ties, can easily conceal their movements from the eye of justice.

Tables of population, in which are inscribed the dwelling-place, the age, the sex, the profession, the marriage or celibacy of individuals, are the first materials of a good police.

It is proper that the magistrate should be able to demand an account from every suspected person as to his means of living, and consign those to a place of security who have neither an independent revenue, nor other means of support.

There are two things to be observed with regard to this object: That the police ought not to be so minute or vexatious as to expose the subjects to find themselves in fault, or vexed by numerous and difficult regulations. Precautions, which are necessary at certain periods of danger and trouble, ought not to be continued in a period of quietness; as the regimen suited to disease ought not to be followed in a state of health. The second observation is, that care should be taken not to shock the national spirit. One nation would not bear what is borne by another. In the capital of Japan, every one is obliged to have his name upon his dress. This measure might appear useful, indifferent, or tyrannical, according to the current of public prejudices.

Characteristic dresses have a relation to this end. Those which distinguish the different sexes are a means of police as gentle as salutary. Those which serve to distinguish the army, the navy, the clergy, have more than one object; but the principal one is subordination. In the English universities, the pupils wear a particular dress, which restrains them only when they wish to go beyond the prescribed bounds. In charity schools, the scholars wear not only a uniform dress, but even a numbered plate.

It is to be regretted that the proper names of individuals are upon so irregular a footing. Those distinctions, invented in the infancy of society, to provide for the wants of a hamlet, only imperfectly accomplish their object in a great nation. There are many inconveniences attached to this nominal confusion. The greatest of all is, that the indication arising from a name is vague; suspicion is divided among a multitude of persons; and the danger to which innocence is exposed, becomes the security of crime.

In providing a new nomenclature, it ought to be so arranged, that, in a whole nation, every individual should have a proper name, which should belong to him alone. At the present time, the embarrassment which would be produced by the change would perhaps surpass its advantages; but it might be useful to prevent this disorder in a new state.*

There is a common custom among English sailors, of printing their family and christian names upon their wrists, in well-formed and indelible characters; they do it that their bodies may be known in case of shipwreck.

If it were possible that this practice should become universal, it would be a new spring for morality, a new source of power for the laws, an almost infallible precaution against a multitude of offences, especially against every kind of fraud in which confidence is requisite for success. Who are you, with whom I have to deal? The answer to this important question would no longer be liable to evasion.

This means, by its own energy, would become favourable to personal liberty, by permitting relaxations in the rigour of proceedings. Imprisonment, having for its only object the detention of individuals, might become rare, when they were held as it were by an invisible chain.

There are, however, plausible objections to such a practice. In the course of the French revolution, many persons owed their safety to a disguise, which such a mark would have rendered unavailing. Public opinion, in its present state, opposes an insurmountable obstacle to such an institution; but opinion might be changed, by patiently guiding it with skill, and by beginning with great examples. If it were the custom to imprint the titles of the nobility upon their foreheads, these marks would become associated with the ideas of honour and power. In the islands of the South Sea, the women submit to a painful operation, in tracing upon their skin certain figures, to which they annex the idea of beauty. The impression is made by puncturing the skin, and rubbing in coloured powders.

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* The following is a sketch of the general plan. The whole name might contain the following parts:—1. The family name, essential for the identification of the races; 2. A single baptismal name or pre-nomen; 3. The place and the date of birth. This compound denomination should be repeated in all legal affairs. The method of abbreviating it for ordinary use, would depend upon the genius of the language.

CHAPTER XIII.

PROBLEM X.

To increase the Difficulty of Escape for Delinquents.

These means depend much upon geographical dispositions — upon natural and artificial barriers. In Russia, the thinness of the population, the asperity of the climate, the difficulty of the communications, give to justice a force which could hardly have been believed to exist in so vast a country.

At Petersburgh and at Riga, a passport cannot be obtained till the intention to depart has been several times announced in the Gazette. This precaution, taken against fraudulent debtors, has greatly increased commercial confidence.

Every thing which increases the communication of intelligence with rapidity, may be referred to this head.

Descriptions are very imperfect and doubtful instruments of recognition; profiles, which may be so easily multiplied at a low price, would be much better: they might be employed either for prisoners whose escape is feared, or for soldiers whose desertion is apprehended, or for any suspected person who may have been denounced to the magistrate, and whom it is desirable to secure, without carrying restraint so far with regard to him as imprisonment.

CHAPTER XIV.

PROBLEM XI.

To diminish Uncertainty with regard to Procedure and Punishment.

It is not my intention here to enter upon the vast subject of procedure: this will be the object not of a chapter, but of a separate work. The present chapter will be confined to two or three general observations.

Has a crime been committed? it is the interest of society that the magistrate charged with its punishment should be informed of it, and informed in such manner as to authorize the infliction of the punishment incurred. Is it alleged that a crime has been committed? it is the interest of society that the truth or falsehood of this allegation should be made evident. Hence, the rules of evidence, and the forms of procedure, ought to be such as, on one side, to admit all true information, and, on the other, to exclude all false information; that is to say, all that offers more chances of deceiving than enlightening.

Nature has placed before our eyes a model of procedure. When we regard what passes in the domestic tribunal — when we examine the conduct of the father of a family among his children and servants, of whom he is the head — we there discover the original features of justice, which we can hardly recognise after they have been disfigured by men incapable of discerning, or interested in disguising the truth. A good judge is only the father of a family acting upon a larger scale. The methods which are good for the father of a family in his search after truth, are equally good for the judge. This is the first model of procedure; it has been departed from, but it ought never to have been discarded.

It is true, that a confidence may be accorded to the father of a family, which cannot be accorded to a judge, because the last has not the same motives of affection to guide him, and may perhaps be led astray by a personal interest. But this only proves that it is necessary to guard against the partiality or corruption of the judge, by precautions which are not requisite in the domestic tribunal. This does not prove that the forms of procedure, and rules of evidence, ought to be different.

English jurisprudence admits the following maxims: —

1. That no one shall be witness in his own cause.
2. That no one shall accuse himself.
3. That the testimony of a person interested in the cause is not admissible.
4. That hearsay evidence is not admissible.
5. That no one shall be tried twice for the same offence.

It is not my intention here to discuss these rules of evidence. In treating of procedure in general, it will be proper to examine if English jurisprudence, superior in so many respects to that of all other nations, owes that superiority to these maxims, or whether they are not the principal cause of that weakness in the powers of justice, from which arises the feebleness of the police in England, and the frequency of crimes.

I shall only observe, that all precautions which are not absolutely necessary for the protection of innocence, offer a dangerous protection to crime. I know no maxim in procedure more dangerous than that which places justice in opposition to itself — which establishes a kind of incompatibility among its duties. When it is said, for example, that it is better to allow one hundred guilty persons to escape, than to condemn one that is innocent, — this supposes a dilemma which does not exist. The security of the innocent may be complete, without favouring the impunity of crime: it can only be complete upon that condition; for every offender who escapes, menaces the public safety; and to allow of this escape is not to protect innocence, but to expose it to be the victim of a new crime. To absolve a criminal, is to commit by his hands the crimes of which he becomes the author.

The difficulty of prosecuting crimes is one cause of their impunity, and of weakness on the part of justice. When the law is clear — when the judge is appealed to immediately after the commission of the supposed crime, the function of accuser is almost confounded with that of witness. When the offence is committed under the eyes of the judge, only two persons are necessary, so to speak, in the drama — the judge and the offender. It is distance which detaches the function of witness from that of judge. But it may happen, that all the witnesses to a fact cannot be collected together; or that the discovery of the offence may not be made till long after its commission; or that the accused has to allege in his defence, facts which can only be verified in the place where they are said to have happened. All this may require delay. This delay may give rise to new incidents, which may require further delay. The procedure of justice becomes complicated; and in order to follow all this chain of operations, without confusion and without neglect, it becomes requisite to place over these judicial proceedings a person who shall have to conduct them. Hence arises another function, that of accuser. The accuser may be either one of the witnesses, or a person interested in the affair, or an officer expressly appointed for this object.

Judicial functions have often been so divided, that the judge who receives the evidence whilst it is recent, has no right to decide upon it, but must send the affair to another judge, who will only have leisure to attend to it when the proofs are half effaced. There are beforehand established, in most states, many useless formalities, and it has been necessary to create officers to follow up these formalities. The system of procedure is thus rendered so complicated, that it becomes an abstruse science: he who would prosecute an offence is obliged to put it into the hands of an attorney, and the attorney himself cannot proceed without having another man of law, of a superior class, to direct him by his counsels, and to speak for him.

To these disadvantages may be added two others: —

1. Legislators, without thinking that they have placed themselves in opposition to themselves, have often closed the approaches of the tribunals to those who have most need of them, by subjecting procedure to the most objectionable taxes.

2. There is a public dislike attached to all those who employ themselves as public accusers in the execution of the laws. This prejudice is foolish and pernicious, yet legislators have often had the weakness to encourage it, without having made the slightest effort to overcome it.

What is the effect of all this accumulation of delay and discouragement? it is, that the laws are not executed. When a man can at once address the judge, and tell him what he has seen, the expense of this proceeding is a trifle. In proportion as he is obliged to pass by a great number of intermediates, his expenses increase; when to this is added the loss of time, the disgust, the uncertainty of success, one is surprised that men are still found sufficiently resolute to engage in such a pursuit. There are but few, and there would be still fewer, if those who adventure in this lottery knew as well as the lawyers what it would cost, and the number of adverse chances.

These difficulties would vanish on the simple institution of a public accuser, clothed with the character of a magistrate, having the conduct of the prosecution, and chargeable with the expenses. The informers who would require to be paid, need have only a small salary; and a hundred gratuitous informers would present themselves, for one who required to be paid.* Each law put into execution would exhibit its good or bad effects: the good grain would be preserved, and the chaff thrown into the fire. Informers, animated by public spirit, rejecting all pecuniary recompense, would be listened to with the respect and confidence which is their due. Delinquents would no longer be able to withdraw themselves from the punishment they had incurred, by treating with those who have undertaken the prosecution, either by engaging them to desist, or by turning them to their own favour.

It is true, that in England, in every important case, the prosecutor is forbidden to make a compromise with the accused without the permission of the judge; but if this prohibition were universal, what effect would it have in those cases in which it is the interest of both parties to evade it?

CHAPTER XV.

PROBLEM XII.

To prohibit Accessory Offences, in order to prevent their Principals.

Those acts which have a connexion with a pernicious event as its cause, may be consi-

* I know by experience, says Sir John Fielding, that for one information brought before me from the desire of reward, I have received ten which had no other motive than the public good. P. 412.

The smallest expense of a prosecution in an ordinary court of justice, is £28 sterling, a sum nearly equal to the subsistence of a common family for a year. How can it be expected that a man, from public spirit, should expose himself to so considerable a sacrifice? independently of the embarrassment of all kinds connected with it. With such a system of procedure, it would be a miracle if the laws had the efficacy of which they are susceptible, if these obstacles were removed,

dered as *accessory* offences in relation to the *principal* offence.

The principal offence being well determined, there may be distinguished as many accessory offences as there are acts which may serve either to prepare or to manifest a projected crime. Now, the more these preparatory acts are distinguished, for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the criminal be not stopped at the first step of his career, he may be at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoitres all the external posts of the enemy, with the intention of stopping his enterprises. He places, in all the defiles, in all the windings of his route, a chain of works, diversified according to circumstances, but connected among themselves, in such manner that the enemy finds in each, new dangers and new obstacles.

If we regard legislators in their practice, we shall not find one who has worked systematically upon this plan, and not one who has not followed it to a certain point.*

Offences against the game-laws have been divided into many accessory offences, according to the nature of the snare, according to the kind of nets or other instruments necessary for taking the game, &c. Smuggling also has been attacked, by prohibiting many preparatory acts. Frauds, with regard to different kinds of coin, have been combated in the same manner.

The following are other examples of what may be done under the head of police: —

Against Homicide and other Corporal Injuries.

Prohibition of purely offensive arms, which are easily hidden. In Holland, it is said that a kind of instrument, shaped like a needle, is made, which is thrown from a tube, which occasions a mortal wound. The manufacture, the sale, the possession of these instruments, might be prohibited as accessaries to murder.

Pocket-pistols, which highway robbers have made use of in England, ought they to be prohibited? The utility of such a prohibition is problematical. Of all methods of robbery, that which is carried on by means of fire-arms is the least dangerous to the person attacked. In such a case, the simple threat is commonly sufficient for the accomplishment of the object. The robber who should pull his trigger after the party had delivered his money, would be guilty not only of useless cruelty, he would disarm himself; instead of which, by reserving his fire, he preserves his means of defence. He who employs a club or a sword, has not the same motive for refraining to strike: the first blow becomes even a reason for a second, that he may put his victim out of a condition to pursue him.

Prohibition of the sale of poisons requires that a catalogue be made of poisonous substances; the sale of them cannot, however, be altogether forbidden;† it can only be regulated and subjected to precautions requiring that the seller should know the purchaser, that he should have witnesses of the sale, that he should register the sale in a separate book, &c. These regulations, to be complete, would require considerable details. Would the advantages compensate for the trouble? This will depend upon the manners and habits of the people. If poisoning be a frequent crime, it will be necessary to take indirect precautions against it. They would have been proper in ancient Rome.

Accessory offences may be distinguished into four classes: — The first class implies an intention formed to complete the principal offence. Offences of this class may be comprised under the general name of attempts or preparations.‡

The second class does not suppose that the intention to commit the crime is actually formed, but that the individual is placed in a situation in which he will form the design for the future. Gaming, prodigality, idleness when joined with indigence, are offences of this class. Cruelty towards animals is the road to cruelty towards men, &c.

The third implies no criminality, either actual, intentional, or probable, but only possible, from accident. These kinds of offences are created, when police regulations are made which have for their object the prevention of calamities — when, for example, the sale of certain poisons, of gunpowder, &c. is forbidden. The violation of these regulations, separate from all criminal intention, is an offence of this third class.

The fourth class is composed of presumed offences; that is to say, of acts that are considered as proofs of an offence (evidentiary offences;) acts hurtful or not hurtful in themselves, furnishing presumptions of an offence having been committed. By an English sta-

* In the Code Theresa, under each head of offences, there is a head of *indicia*. These indications are distinguished into two classes: *indicia ad capturam; indicia ad torturam:* those which suffice to justify an arrest; those which suffice to justify the torture—a practice which was not yet abolished.

† Every active medicine, taken in a certain dose, is a poison.

‡ A soldier, in a review, puts a ball into his musket; it is discovered before the order to fire is given: this may be regarded as a preparatory act: if he had fired at a person or an assemblage of persons, this would have been an attempt — if he had killed any one, he would have committed the crime known under the name of homicide.

tute, a certain conduct on the part of a woman was directed to be punished as murder, because it was supposed that such conduct was a sure proof of infanticide. By another statute, it is made a capital crime for bands of men to go about armed in disguise, because this is considered a proof of a design to commit murder, in protecting smugglers from justice. By another statute, the possession of stolen goods, without being able to give a satisfactory account of the manner in which they were acquired, is made an offence, this circumstance being considered a proof of complicity. Again, by another statute, the obliteration of the marks upon shipwrecked effects is made an offence, this being considered a proof of an intention to steal them.

These offences, founded upon these presumptions, suppose two things:—1. Mistrust in the system of procedure; 2. Mistrust in the wisdom of the judge. In England, the legislature has thought that juries, being too much disposed to pardon, would not see in these circumstances a certain proof of a crime; and it has made the act itself, which furnishes the presumption, a separate offence—an offence independent of every other. In a country in which the tribunals should possess the entire confidence of the legislature, these acts would be placed under the head to which they belong, and would be considered as presumptions, the judge being allowed to draw from them his conclusions.

With respect to accessory offences, it is essential that the legislator should possess three rules by way of *memento*:—

1. For each principal offence which he creates, he ought to extend his prohibition to the preparatory acts; to simple attempts, generally under the sanction of a less punishment than is appointed for the principal offence. This is the general rule, and the exceptions ought to be founded upon particular reasons.

2. He ought, then, under the description of the principal offence, to place all the accessory, preliminary, and concomitant offences, which are susceptible of a specific and precise description.

3. In the description of accessory offences, he should take care not to impose too much restraint—not to trespass upon the liberty of individuals, so as to expose innocence to danger by his precipitate conclusions. The description of an offence of this kind is almost always dangerous, if it do not include a clause allowing the judge to estimate the degree of presumption which ought to be drawn from it. In this case, to create an accessory offence is almost the same thing as suggesting the fact in question to the judge, by way of instruction, under the character of an indicative circumstance, and not allowing him to draw any conclusion from it, if he see any special reason for regarding the indication as inconclusive.

If the punishment for an attempt, or preliminary offence, be equal to that of the crime, when completed, without making allowance for the possibility of repentance or prudential desisting, the offender, seeing himself exposed to the same punishment for the simple attempt, will see at the same time that he is at liberty to complete it without incurring any more danger.

CHAPTER XVI.

OF THE CULTIVATION OF BENEVOLENCE.

The principle of benevolence is in itself distinct from the love of reputation. Each of these may act without the other. The first may be a feeling of instinct, a gift of nature; but it is in great measure the produce of cultivation, the fruit of education. For where will be found the greater measure of benevolence—among the English or among the Iroquois—in the infancy of society or at its maturity? If the feeling of benevolence be susceptible of augmentation, which cannot be doubted, it must be by the assistance of that other principle of the human heart, the love of reputation. When a moralist paints benevolence under the most amiable characters, and selfishness and hardness of heart in the most hateful colours, what does he do? He seeks to unite to the purely social principle of benevolence, the demi-personal and demi-social principle of the love of reputation; he seeks to combine them, and give them the same direction—to arm the one by the other. If these efforts are successful, which of the two principles deserves the praise? neither the one nor the other exclusively, but their reciprocal concurrence—the love of benevolence as the immediate cause; the love of reputation as the remote cause. A man who yields with pleasure to the soft accents of the social principle, neither knows, nor desires to know, that it is a less noble principle which has given them their first tone. There is a disdainful delicacy in the better element of our nature, which wishes to owe its origin only to itself, and blushes at all foreign association.

1. To increase the force of the feelings of benevolence; 2. To regulate their application according to the principle of utility: such ought to be the two objects of the legislator.

1. Would he inspire the citizens with humanity? he should set them the first example; he should show not only the greatest respect for human life, but for all circumstances influencing sensibility. Sanguinary laws have a tendency to render men cruel, either from fear, from imitation, or from revenge; laws

dictated by a spirit of gentleness, humanize a nation, and the spirit of the government will be found in its families.

The legislator ought to interdict every thing which may serve to lead to cruelty. The barbarous spectacles of gladiators, introduced at Rome during the latter times of the republic, without doubt contributed to give the Romans that ferocity which they displayed in their civil wars. A people accustomed to despise human life in their games, could not be expected to respect it amid the fury of their passions.

It is proper, for the same reason, to forbid every kind of cruelty exercised towards animals, whether by way of amusement, or to gratify gluttony. Cock-fights, bull-baiting, hunting hares and foxes, fishing and other amusements of the same kind, necessarily suppose either the absence of reflection, or a fund of inhumanity, since they produce the most acute sufferings to sensible beings, and the most painful and lingering death of which we can form any idea. It ought to be lawful to kill animals, but not to torment them. Death, by artificial means, may be made less painful than natural death: the methods of accomplishing this deserve to be studied and made an object of police. Why should the law refuse its protection to any sensitive being? The time will come, when humanity will extend its mantle over every thing which breathes. We have begun by attending to the condition of slaves; we shall finish by softening that of all the animals which assist our labours or supply our wants.

I know not if the Chinese legislators, in instituting their minute ceremonial, designed to cultivate benevolence, or only to maintain peace and subordination. Politeness in China is a sort of worship — a ritual, which is the great object of education, and the principal science. The exterior movements of this great people, always regulated, always prescribed by etiquette, are almost as uniform as those of a regiment which repeats its exercise. This pantomine of benevolence may be as destitute of reality, as a devotion charged with trifling practices may be separated from morality. So much restraint seems ill to accord with the movements of the human heart; and these exhibitions at command, do not confer any obligation, because they possess no merit.

There exist some principles of antipathy, which are sometimes interwoven with the political constitutions of states, which it is difficult to extirpate. Such are religious enmities, which excite their partisans to hate and persecute each other; hereditary revenges between powerful families; privileged conditions, which form insurmountable barriers among the citizens—the consequences of conquests; when the conquerors have never become incorporated with and mingled with the conquered; animosities founded upon ancient injustice; government factions, which rise with victory and fall upon defeat. In these unfortunate states, hearts are more frequently united by the wants of hatred than of love. To render them benevolent, it is necessary to relieve them from fear and oppression.

The destruction of those prejudices which render men enemies, is one of the greatest services which can be rendered to morality.

The travels of Mungo Park in Africa have represented the negroes under the most interesting point of view: their simplicity, the strength of their domestic affections, the picture of their innocent manners, has increased the public interest in their favour.

Satirists weaken this sentiment. When any one has read Voltaire, does he feel disposed to favour the Jews? Had he possessed more benevolence with respect to them, by exposing the degradation in which they are held, he would have explained the less favourable points of their character, and have exhibited the remedy by the side of the disease.

The greatest attack upon benevolence has been made by religious exclusionists; by those who have incommunicable rites; by those who breathe intolerance, and represent all unbelievers as infidels and enemies of God.

In England, the art of exciting benevolence by the publicity given to its exhibition, is better understood than anywhere besides. Is it desired to undertake any scheme of benevolence—a charity which requires the concurrence of numbers? a committee is formed of its most active and distinguished supporters; the amount of the contributions is announced in the public papers; the names of the subscribers are printed there day by day. This publication serves many purposes: its immediate object is to guarantee the receipt and employment of the funds; but it is a feast for vanity, by which benevolence profits.

In these establishments of charity, the annual subscribers are called governors; the superintendence which they exercise, the little state which they form, interests them in promoting their welfare; individuals like to trace the good which has been done, to enjoy the power which is conferred; the benefactors are brought near to the parties relieved, and these being placed in view, strengthen benevolence, which cools when its object is removed to a distance, but is warmed by its presence.

There are more of these associations of benevolence in London, than there are convents in Paris.

Many of these charities have particular objects; the blind, the dumb, the lame, orphans, widows, sailors, the children of the clergy, &c. Every individual is touched with one kind of misery, more than by another; his

sympathy is always affected by some personal circumstance: there is art, therefore, in diversifying these charities, in separating them into different branches which apply to every kind of sensibility, so that none of them are lost.

It is surprising that more draughts have not been made upon this disposition from among females, among whom the sentiment of pity is stronger than among men. There are two institutions in France, well adapted to this end: the Daughters of Charity, who devote themselves to the service of the hospitals; and the Maternal Society, formed by the ladies in Paris, who visit poor women in the time of their confinement, and take care of the first days of infancy.

2. The feelings of benevolence are liable to be led astray from the principle of general utility. This can only be prevented by instruction: they cannot be commanded; they cannot be forced: they can only be persuaded and enlightened. Men are brought by little and little to distingish the different degrees of utility; to proportion their benevolence to the extent of its object. The finest model is drawn by Fenelon in that saying, in which he has so well painted his own heart: — "I prefer my family to myself, my country to my family, and the human race to my country."

The objects sought in these public instructions should be, to direct the affections of the citizens to this object; to repress the wanderings of benevolence; to make them feel their own interest in the general interest; to make them ashamed of that spirit of family—of that *esprit de corps* which militates against the love of country— of that unjust love of country which turns to hatred against other nations; to divert them from the exercise of unfounded pity towards deserters, smugglers, and other persons who offend against the government; to disabuse them of the false notion that there is humanity in favouring the escape of the guilty— in procuring impunity for crime — in encouraging mendicity, to the prejudice of industry; to seek to give to all these sentiments the proportion most advantageous for all, by showing the danger and littleness of the caprices, the antipathies, and momentary attachments which turn the balance against general utility and permanent interests.

The more we become enlightened, the more benevolent shall we become; because we shall see that the interests of men coincide upon more points than they oppose each other. In commerce, ignorant nations have treated each other as rivals, who could only rise upon the ruins of one another. The work of Adam Smith is a treatise upon universal benevolence, because it has shown that commerce is equally advantageous for all nations—each one profiting in a different manner, according to its natural means; that nations are associates and not rivals in the grand social enterprise.

CHAPTER XVII.

EMPLOYMENT OF THE MOTIVE OF HONOUR, OR OF THE POPULAR SANCTION.

To increase the strength of this power—to regulate its application: such are the two objects to be accomplished.

The strength of public opinion is in combined proportion to its extent and intensity: its extent is measured by the number of suffrages; its intensity by the degree of its blame or approbation.

For increasing the power of opinion in extent, there are many methods: the principal are, the liberty of the press, and the publicity of all acts which interest the nation — publicity of the tribunals, publicity of accounts, and publicity of the debates upon state affairs, when secresy is not required by some particular reason. The enlightened public—the depository of the laws and archives of honour, the administrator of the moral sanction, forms a supreme tribunal which decides upon all causes and all persons. By the publicity of affairs, this tribunal is in a condition to collect the proofs, and to judge—by the liberty of the press, to pronounce and to execute its judgment.

For increasing the power of opinion in intensity, there are also a diversity of methods, either by punishments which possess a certain character of ignominy, or by rewards which have for their principal object the investing with honour those who receive them.

There is a secret art of governing opinion, so that it shall not perceive, so to speak, the manner in which it is led. It consists in so disposing matters, that the act to be prevented cannot be performed, without also performing an act which popular opinion has already condemned.

Is a tax to be paid? according to the circumstances of the case, an oath, or a certificate, may be required, that it is correctly paid.

To take a false oath, to fabricate a false certificate, are offences which the public is prepared beforehand to mark with the seal of its condemnation, whenever there shall be occasion for it. This, then, is a sure method of rendering infamous an offence, which, without its accessary, can never exist.*

* The following anecdote is related on good authority. There was a riot at Madrid, under Charles III., occasioned by the prohibition against wearing round hats. This prohibition was not a matter of caprice. The large and slouched hats prohibited, served, when a cloak

Sometimes a simple change in the *name* of the objects suffices to change the sentiments of men. The Romans abhorred the name of *king*, but they suffered those of *dictator* and *emperor*. Cromwell would not have been able to place himself upon the throne of England; but he possessed, under the title of *protector*, an authority more unlimited than that of the king. Peter I. abdicated the title of despot for himself, and he directed that the slaves of the nobles should only be called subjects.

If the people were philosophers, this expedient would be worth nothing; but upon this point, philosophers are only men. How much deception is there in the words *liberty* and *equality!* What contradictions between that *luxury* which all the world condemns, and that *prosperity* which all the world admires!

The legislator should take care not to furnish arms to public opinion in those cases in which he finds it opposed to the principle of utility. For this reason, he ought to efface from the laws all remains of the pretended crimes of heresy and sorcery, that there may be no legal foundation for these superstitious ideas. If he dare not wound an error too widely extended, he ought at least not to give it a new sanction.

It is very difficult to employ the motive of honour in engaging the citizens in the service of the law against delinquents. Pecuniary rewards granted for informations have failed in their object: the desire of gain has been opposed by that of shame; the law, instead of gaining strength by offering a reward disapproved by public opinion, has been weakened. Individuals have been suspected of acting from a degrading motive. The ill-chosen reward, instead of attracting, has repulsed, and deprived the law of more gratuitous protectors, than it has procured for it mercenary servants.

The most powerful method of producing an important revolution in public opinion is to strike the mind of the people by some noble example. Thus Peter the Great, by passing gradually through all the gradations of the public service, taught his nobility to bear the yoke of military subordination. Thus Catherine II. surmounted the popular prejudice against inoculation, not by trying it upon some criminals, as was done in the reign of Queen Anne, but by submitting to it herself.

CHAPTER XVIII.

OF THE EMPLOYMENT OF THE RELIGIOUS SANCTION.

THE cultivation of religion has two objects: to increase the force of this sanction; to give to this force a suitable direction. If this direction be bad, it is evident that the less force this sanction possesses, the less evil it will do. With regard to religion, the first thing, therefore, is to examine into this direction: the increase of its force is only a secondary object.

Its direction ought to be conformable to utility. As a sanction, it is composed of rewards and punishments. Its punishments should be attached to actions hurtful to society, and to these actions exclusively: its rewards ought to be promised to actions whose tendency is advantageous to society, and to no others. Such is the fundamental dogma.

The only method of judging of its direction is to consider it solely with relation to the welfare of political society. Every thing besides this is indifferent; and every thing in religious belief which is indifferent, is liable to become pernicious.

But every article of faith is necessarily hurtful, so soon as the legislator, in order to favour its adoption, employs coercive or penal motives. The persons whom he seeks to influence may be considered as forming three classes: those who already are of the same opinion with the legislator; those who reject this opinion; those who neither adopt nor reject it.

With regard to the conformists, the law is not necessary: with regard to the nonconformists, it is useless: by the supposition itself, it does not accomplish its object.

When a man has formed his opinion, is it in the power of punishment to make him change it? The question appears ridiculous. Punishments tend rather to an opposite result: they tend rather to confirm him in his opinion, than to make him give it up; partly because the employment of force is a tacit avowal that reasons are wanting — partly because recourse to violent measures produces aversion to the opinions which it is sought to maintain in this manner. All that can be obtained by punishments is, not to engage a man to *believe*, but to *declare* that he believes.

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was thrown over the shoulders, completely to conceal the person. Under this disguise, a thief or an assassin could strike his blow, and never be recognised. The prohibition was therefore proper, but no preparation had been made for it: it wounded a general custom — it appeared to be an attack upon liberty. The people assembled round the palace; the guards wished to repulse them; the tumult became violent; blood was shed; the court was intimidated, and left Madrid, and the Minister was obliged to give way. A short time after this triumph of the round hats, the Count d'Aranda being made Minister, he enjoined all the executioners, in all the towns of Spain, to wear round hats. In a fortnight, no more round hats were seen. This is an example of indirect legislation, which may be referred to this head.

Those who, from conviction or honour, refuse to make this declaration, undergo the evil of the punishment—the persecution: for what is called *persecution*, is an evil which is not compensated for by any advantage—an evil in pure waste; and this evil inflicted by the hand of the magistrate is precisely the same in kind, but much stronger in degree, than if it had been inflicted by an ordinary malefactor.

Those who, less strong or less noble, escape by a false declaration, give way to the threats, to the danger which immediately presses upon them; but the momentary pain which is avoided, is converted, as to them, into pains of conscience, if they have any scruples, and into pains of contempt on the part of society, which charges with baseness these hypocritical recantations. In this state of things, what happens? One part of the citizens must accustom itself to despise the opinions of the other, in order to be at peace with themselves. They employ themselves in making subtle distinctions between innocent and criminal falsehood; in establishing privileged lies, because they serve as a protection against tyranny; in establishing customary perjuries, false subscriptions, and consider them as *articles of peace*. In the midst of these subtleties, regard for truth is neglected, the limits of right and wrong are confounded, a train of less pardonable falsehoods is introduced under favour of the first—the tribunal of public opinion is divided: the judges who compose it are not guided by the same laws; they no longer know clearly what degree of dissimulation they ought to condemn, nor what they ought to excuse; its voice is drowned in contradictions; and the moral sanction, having no longer an uniform regulator, is weakened and depraved. Thus the legislator, who requires declarations of faith, becomes the corrupter of his country. He sacrifices virtue to religion, instead of making religion an auxiliary to virtue.

The third class to be examined is that of those who, at the establishment of the penal law, had not yet formed any opinion either for or against. With respect to these, it is probable that the law will influence the formation of their opinion. Seeing danger on one side, and security on the other, it is natural that they should regard the arguments of the condemned opinion with a degree of fear and aversion, which they will not feel for the arguments of the favoured opinion. The arguments which they wish to find true, will make a more lively impression than those which they wish to find false: and by this means, a man may come to believe, or rather not to reject, not to misbelieve, a proposition which he would not have adopted if his inclination had been left free. In this last case, the evil is less than in the two former cases, but does not cease to be an evil. It may happen, but it does not always happen, that the judgment gives way entirely to the affections; but even when that happens, that is to say, when the persuasion is as strong as it can be, if fear form any part of the motives of this persuasion, the mind is never perfectly tranquil: what is believed to-day, it is feared may not be believed on the morrow. A clear moral truth is never doubtful, but the belief of a dogma is always more or less shifting. Hence arises irritation against those who attack it. Examination and discussion is dreaded, because we do not feel ourselves placed upon solid ground. It is not necessary to pull down anything in a building which is firmly put together. The understanding becomes weakened; the mind seeks only complete repose in a kind of blind credulity; it seeks out all the errors which possess affinity with its own; it fears clearly to explain itself upon what is possible and impossible, and wishes to confound all boundaries. It loves to entertain sophistry, and every thing which fetters the human mind, every thing which would persuade it that it cannot reason with entire certainty. It acquires an unhappy dexterity in rejecting evidence—in giving force to half proofs—in listening only to one side—in subtilizing against reason. In a word, under this system, it is proper to put a bandage over the eyes, that they may not be wounded by the brightness of day.

Hence, every penal method employed for increasing the force of the religious sanction, acts indirectly against that essential part of good manners, which consists in respect for truth, and respect for public opinion. All the enlightened friends of religion now think the same. There are, however, but few nations which have acted upon this principle. Violent persecutions have ceased, but there still exist secret persecutions, civil punishments, political incapacities, threatening laws, a precarious toleration—a humiliating situation for classes of men who owe their tranquillity only to a tacit indulgence, a continual pardon.

In order to obtain clear ideas as to the advantage which the legislator may derive from increasing the force of the religious sanction, it is necessary to distinguish three cases: 1. Those in which it is entirely subordinated to him; 2. Those in which others partake of this influence with him; 3. Those in which it depends upon a stranger. In this latter case, the sovereignty is really divided between two magistrates—the spiritual (as it is commonly called) and the temporal. The temporal magistrate will be in constant danger of seeing his authority contested or destroyed by that of his rival, and what he should do for increasing the force of the re-

ligious sanction, might prove a diminution of his own power: whilst as to the effects which might result from such a state of strife, they may be found on the tables of history. The temporal magistrate commands his subjects to perform one action; the spiritual magistrate prohibits it: whichever they obey, they are punished by the one or the other; proscribed or damned, they are placed between the fear of the civil sword, and the fear of eternal fire.

In Protestant countries, the clergy are essentially subordinate to the political power: their dogmas do not depend upon the prince; but those who interpret them, depend upon him. But the right of interpreting these dogmas is little less than the same thing as the right of making them. Hence, in Protestant countries, religion is more easily modelled upon the plan of the political authority. Married priests are more completely citizens; they do not form a phalanx among themselves, which can become formidable; they have neither the power of the confessional, nor that of absolution.

But in considering facts alone, whether in Protestant or Catholic countries, it must be acknowledged that religion has played too great a part in the miseries of nations. It appears to have been more often the enemy, rather than the instrument of civil government. The moral sanction has never more force than when it accords with utility; but, unfortunately, the religious sanction seems to have had most force in those cases in which it was most opposed to utility. The inefficacy of religion, when applied to the promotion of political good, is the constant subject of the declamations of those who have the greatest interest in exaggerating its good effects. Too little powerful for the production of good, it has often been too powerful in the production of evil. It was the moral sanction which animated Codrus, Regulus, Russell, and Sidney: it was the religious sanction which worked in Philip II. the scourge of the Low Countries; in bloody Mary of England; and in Charles IX., the executioner of France.

The ordinary solution of this difficulty is to attribute all the good to *religion*, and all the evil to superstition. But this distinction, in this sense, is purely verbal. The thing itself is not changed, because the name is changed, and it is called religion in the one case, and superstition in the other. The motive which acts upon the mind, in both the cases, is precisely the same: it is always the fear of evil and the hope of good from an Almighty Being, respecting whom different ideas have been formed. Hence, in speaking of the conduct of the same man on the same occasion, some will attribute it to religion, and others to superstition.

Another observation, as trivial as the first, and as weak as trivial, is, that it is unjust to argue against the *use* of any thing from its *abuse*, and that the best instruments are those which do the most evil when they are misused. The futility of this argument is easily pointed out. The good effects of a thing are called its use, the bad effects are called its abuse. To say that you ought not to argue against the use from the abuse, is to say that in making a just appreciation of the tendency of a cause, you ought only to regard the good it occasions, and not to consider the evil. Instruments of good, ill employed, may often become instruments of evil: this is true, but the principal character in the perfection of an instrument is, not to be liable to be ill employed. The most efficacious ingredients in medicine are convertible into poisons, I allow; but those which are dangerous are not so good upon the whole as those which render the same service, if such there be, without being liable to the same inconveniences: mercury and opium are very useful; bread and water are still more so.

I speak without circumlocution, and with entire freedom. I have elsewhere explained myself upon the utility of religion; but I must not omit to observe here, that it tends more and more to disengage itself from futile and pernicious dogmas, and to coincide with sound morality and sound policy. Irreligion, on the contrary, (I refuse to pronounce the word atheism) has manifested itself in our days under the most hideous forms of absurdity, immorality, and persecution. This experience is sufficient to show to all good minds in what direction they should exert their efforts. But if government act too openly in favour of this direction, it will fail in its object. It is freedom of inquiry which has corrected the errors of the ages of ignorance, and restored religion to its right direction: freedom of inquiry will continue still to purify it, and to reconcile it with public utility.

This is not the place to examine all the services which religion may render, either as a source of consolation under the ills which man is heir to; or as a moral teaching, best adapted to the most numerous class of society; or as a means of exciting beneficence,* and of producing useful acts of self-devotion, which could not be obtained upon purely human motives.

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* Care ought to be taken not to encourage that spirit of foundations and alms, which has too frequently arisen from the vulgar notions of Christianity. They increase the number of the poor, more than they relieve them. Such are the convents of the monks, and their daily distributions in Spain and Italy, which create a numerous class of beggars, and are equivalent to a law, whereby industry is taxed in favour of idleness.

The principal use of religion, in civil and penal legislation, is the giving a new degree of force to an *oath* — another foundation for confidence.

An oath includes two different bonds — the religious and the moral: the one obligatory upon all; the other only upon those who think in a certain manner. The same formulary which professes to expose a man, in case of perjury, to religious punishments, exposes him in the same case to legal punishments and the contempt of men. The religious bond is the most striking; but the greatest part of the force of an oath depends upon the moral bond: the influence of the first is partial; that of the second is universal. It would be, therefore, highly imprudent to employ the one, and neglect the other.

There are some cases in which an oath is of the greatest force: when it operates in concert with public opinion—when it has the support of the popular sanction. There are cases in which it has no force at all: when public opinion acts in opposition to it, or only does not second it. Such are custom-house oaths, and those which are required of the students in certain universities.

It is the interest of the legislator, no less than that of a military chief, to know the true state of the forces under his command. To shun the examination of a weak point, because the appearance of this weak part will not yield satisfaction, would be pusillanimity. But if the weakness of the religious bond in an oath has been thus laid open, it is the fault of the professors of religion: the abuse which they have made of it by lavishing it without measure, has robbed it of the efficacy which it possessed of itself, separated from the sanction of honour.

The force of an oath is necessarily weakened when it turns upon matters of belief, upon opinions: Why? because it is impossible to detect the perjury, and also because human reason, always fluctuating, always subject to variation, cannot pledge itself for the future. Can I be certain that my belief of to-day will remain the same ten years hence? All such oaths are a monopoly bestowed upon men with consciences of little scrupulosity, in opposition to those who possess consciences of more sensibility.

Oaths are degraded when they regard trifles, when they are employed upon occasions in which they will be violated by a kind of universal convention; and more especially when they are required in cases in which justice and humanity will make an excuse for, and almost a merit of, their violation.

The human mind, which always resists tyranny, confusedly perceives that God, on account of his perfections, cannot ratify frivolous or unjust laws. Indeed man, by imposing an oath, would exercise authority over God himself. Man ordains a punishment, and it is for the Supreme Judge to execute it: deny this position, and the religious force of an oath vanishes.

It is very astonishing that in England, among a nation otherwise prudent and religious, this great security has been almost destroyed by the trivial and indecent use which has been made of it.

To show to what an extent habit may deprave moral opinions in certain respects, I quote a passage extracted from Lord Kames, a judge of the Court of Session in Scotland, upon education: —*

"Custom-house oaths now-a-days go for nothing, not that the world grow more wicked, but because no person lays any stress upon them. The duty on French wine is the same in Scotland and in England. But as we cannot afford to pay this high duty, the permission underhand to pay Spanish duty for French wine, is found more beneficial to the revenue, than the rigour of the law. The oath, however, must be taken, that the wine we import is Spanish, to entitle us to the ease of the Spanish duty. Such oaths at first were highly criminal, because directly a fraud against the public: but now that the oath is only exacted for form sake, without any faith being intended to be given or received, it becomes very little different from saying in the way of civility, '*I am, sir, your friend, or your obedient servant.*' And, in fact, we every day see merchants dealing in such oaths, whom no man scruples to rely upon in the most material affairs."

Who would believe that this is the language of a moralist and a judge? The Quakers have raised their simple asseveration to the dignity of an oath; — a magistrate degrades an oath to the simple formula of a ceremony. The oath implies neither faith given, nor faith received. Why then require it? why take it? why this farce? Is religion, then, the last of objects? and if it be thus to be contemned, why should it be so dearly paid for? How great the absurdity of paying a religious establishment for preaching up the importance of an oath, and having judges and legislators who amuse themselves with destroying it! †

CHAPTER XIX.

USES TO BE DRAWN FROM THE POWER OF INSTRUCTION.

INSTRUCTION does not form a separate head, but the above title is convenient as a cen-

* Loose Hints on Education, p. 362.

† By an Act of William IV., the Treasury are authorized to dispense with all oaths which they do not consider necessary in the collection of the revenue, and to substitute declarations as to the acts in their stead.

tre, around which to collect sundry scattered ideas.

Government ought not to do every thing by force: by this it can only move the bodies of men; by its wisdom it extends its empire over their minds: when it commands, it gives its subjects a factitious interest in obedience; when it enlightens, it gives them an internal motive, which cannot be weakened. The best method of instruction is simply to publish facts; but it is sometimes proper to assist the public in forming its judgment upon those facts.

When we see government measures, which are excellent in themselves, fail from the opposition of an ignorant people, we at first feel irritated against the senseless multitude; but when we come to reflect—when we observe that this opposition might have been easily foreseen, and that the government, in proud exercise of authority, has taken no steps to prepare the minds of the people, to dissipate their prejudices, to conciliate their confidence, —our indignation is transferred from the ignorant and deceived people, to its disdainful and despotic leaders.

Experience has shown, contrary to general expectation, that newspapers are one of the best means of directing opinion—of quieting feverish movements—of causing the lies and artificial rumours, by which the enemies of the state may attempt to carry on their evil designs, to vanish. In these public papers, instruction may descend from the government to the people, or ascend from the people to the government: the greater the freedom allowed, the more correctly may a judgment be formed upon the course of opinion—with so much the greater certainty will it act.

Rightly to estimate their utility, it is necessary to refer to the times when public papers did not exist, and consider the scenes of imposture, both political and religious, which were played off with success in countries where the people could not read. The last of these grand impostors with a royal mantle, was Pugatcheff. Would it have been possible in our days to have supported this personage in France or in England? The cheat would have been discovered as soon as announced. These are crimes which are not attempted among enlightened nations—the facility of detecting impostors preventing their birth.

There are many other snares against which governments may guard the people by public instruction. How many are the frauds practised in commerce, in the arts, in the price and quality of goods, which it would be easy to cause to cease by unveiling them! How many dangerous remedies, or rather real poisons, are sold with impudence by empirics, as marvellous secrets, of which it would be easy to disabuse the minds of the most credulous, by publishing their composition!—How many mischievous opinions, how many dangerous or absurd errors, might be stopped in their birth, by enlightening the public! When the folly of animal magnetism, after having seduced the idle societies of Paris, began to spread throughout Europe, one report of the Academy of Sciences, by the force of truth alone, precipitated Mesmer into the crowd of despicable charlatans, and left him no other disciples than incurable fools, whose admiration served to complete his disgrace. Would you cure an ignorant and superstitious people? send into their towns and villages, in quality of missionaries, jugglers, workers of prodigies, who shall begin by astonishing the people, by producing the most singular phenomena, and shall finish by explaining them. The more we know of natural magic, the less shall we be the dupes of magicians. It were to be wished that, with certain precautions, the miracle of St. Januarius at Naples were repeated in all public places, and that it were made a toy for children.

The principal instruction which governments owe to the people, regards the knowledge of the laws. How can these be obeyed, if they are unknown? how can they be known, if they are not published in the simplest form—in such manner that each individual may find for himself what ought to regulate his conduct?

The legislator might influence public opinion by composing a code of political morality analogous to the code of laws, and divided, in the same manner, into a general and particular code. The most delicate questions relative to every profession might there be explained: he need not confine himself to cold lessons, but by mingling with them well chosen historical anecdotes, such a code might be made a manual of amusement for all ages.

To compose such codes would be, so to speak, to dictate the judgments which public opinion ought to pronounce upon the different questions of morals and politics. To these codes might, with the same intention, be added a collection of popular prejudices, with the considerations which might serve as their antidotes.

If ever sovereign power showed itself with dignity among men, it was in the Instructions which were published by Catherine II. for a code of laws. When this unique example is considered for a moment, and it is separated from the recollection of an ambitious government, it is impossible to see, without admiration, a woman descend from the car of victory for the purpose of civilizing so many semi-barbarous nations, and of presenting to them the noblest maxims of philosophy, sanctioned by the touch of the sceptre. Superior to the vanity of herself composing this work, she borrowed whatever was excellent from

the writings of the sages of the time; but by adding to their works the sanction of her authority, she did more for them than they had done for her. She seemed to say to her subjects — "You owe me so much the more confidence, since I have called to my counsels the noblest geniuses of my time. I fear not thus to associate with me these masters of truth and virtue, since they will make me ashamed before the universe if I dare to disgrace them." She was seen, animated with the same spirit, sharing with her courtiers the labours of legislation; and if she were often found in contradiction to herself, like Tiberius, who was fatigued with the servitude of the senate, and would have punished a movement of liberty, yet these solemn engagements, contracted in the face of the whole world, were as barriers which she had imposed upon her own power, and which she rarely ventured to break.

CHAPTER XX.

USE TO BE MADE OF THE POWER OF EDUCATION.

Education is only government acting by means of the domestic magistrate.

The analogies between a family and a kingdom are of a kind which are obvious at the first glance. The differences are less striking, but it is not less useful to indicate them: —

1. Domestic government may be more active, more vigilant, more occupied with details, than civil government. Without continued attention, families could not subsist.

Civil authority has nothing better to trust to than a reliance upon the prudence of individuals in the conduct of their personal interests. But the head of a family must continually supply the inexperience of those committed to his care.

It is here that censorship may be exercised; a policy which we have condemned in civil governments. Domestic government may keep, from those subject to it, knowledge which might become hurtful to them: it may watch over their connexions and their reading; it may accelerate or retard the progress of their knowledge, according to circumstances.

2. This continued exercise of power, which would be subject to so many abuses in a state, is much less subject to them in the interior of a family: indeed, the father or the mother have for their children a natural affection, much stronger than that of the civil magistrate for the persons who are subordinate to him. Indulgence is in them the most frequent movement in nature; severity is only the result of reflexion.

3. Domestic government may employ punishment in many circumstances, in which civil authority could not. The head of a family knows individuals; the legislator knows only the species. The one proceeds upon certainties, the other upon presumptions. A certain astronomer may perhaps be capable of solving the problem of the longitude: can the civil magistrate know this? ought he to direct him to solve it, and to punish him if he do not? But the private tutor may know if his pupil understand an elementary problem in geometry — that obstinacy has put on the mask of impotence. The tutor can scarcely be deceived; the magistrate necessarily would be so.

In the same manner, there are many vices which the public magistrate cannot repress, because it would require the establishment of offices of detection in every family. The private magistrate, having under his eyes, under his hands, those whom he is charged to conduct, may stop in their origin those vices which the laws can only punish in their last excess.

4. It is especially in the power of rewarding, that these two governments differ. All the wants, all the amusements of youth, may be clothed with a remuneratory character, according to the manner in which they are bestowed, upon certain conditions, after certain work is done. In the island of Minorca, the subsistence of the young boys is made dependent upon their skill with the bow. The honour of suffering in public was, among the Lacedemonians, one of the prizes for virtue among the youthful warriors. There is no government so rich as to do much by rewards: there is no father so poor as not to possess an inexhaustible store of them.

It is especially in youth, that season of lively and durable impressions, that the legislator ought to keep in view the directing of the course of the inclinations towards those things which are most conformable to the public interest.

In Russia, the young nobility have been seen engaged in the public service by means as powerful as they were well imagined. There have arisen, perhaps, fewer good effects as respects military spirit, than as respects civil life. They have been accustomed to order, to vigilance, to subordination. It has obliged them to leave their retreats, where they exercised a corrupting domination over slaves, and placed them upon a wider theatre, where they have met with equals and superiors. The necessity of association has given rise to the desire to please; the mingling of different conditions has diminished reciprocal prejudices; and the pride of birth has been obliged to bow before the gradations of service. An unlimited despotism, as that of Russia was, could not fail to gain by being converted into a military government, in which authority has its limits.

Hence, in the given circumstances of that

empire, it was difficult to discover a plan of general education which would answer more useful objects.

But in regarding education as an indirect mode of preventing offences, it requires an essential reform. The most neglected class must become the principal object of care. The less parents are able to discharge this duty, the more necessary is it for government to fulfil it. It ought not only to watch over orphans left in indigence, but also over the children whose parents no longer deserve the confidence of the law with regard to this important charge — over those who have already committed crimes, or who, destitute of protectors and resources, are given up to all the seduction of misery. These classes, absolutely neglected in most states, become the hotbeds of crime.

A man of rare benevolence, Le Chevalier Paulet, had formed an establishment at Paris for more than two hundred children, whom he took from among the most indigent class among the beggars. Every thing turned upon four principles:—To offer to the pupils many objects of study and labour, and allow the greatest possible latitude to their tastes;—to employ them in reciprocal instruction, by presenting to the pupil the honour of becoming master in his turn, as the greatest recompense for his progress;—to entrust all the domestic service to them, in order to unite the double advantage of their instruction and economy;—to govern them by themselves, and to place each one under the inspection of one older, in such manner as to render them securities for each other. In this establishment, every thing wore the appearance of liberty and happiness; there were no other punishments than forced idleness, and a change of dress.* The more advanced pupils were as interested in its success as its founder, and every thing advanced towards perfection, when the revolution overwhelmed this little colony amid its public disasters.

Greater extent might be given to institutions of this kind, and they might be rendered less expensive, either by multiplying the number of workmen in them, or by keeping the pupils until the age of eighteen or twenty-one, that they might have time to pay for the expense of their education, and to contribute to that of those who were younger.

Schools upon this plan, instead of costing the state any thing, might become lucrative enterprises. But it would be necessary to interest the pupils themselves in their labour, by paying them nearly the same as free labourers, and by forming for them a saving fund, to be given them when they leave the establishment.

* The two punishments employed were called, one the *little idleness*, the other the *great idleness*. Nothing could be more ingenious than thus giving to punishment itself the name and character of a vice: the salutary association of ideas which results from it, is immediately perceived.

CHAPTER XXI.

GENERAL PRECAUTIONS AGAINST THE ABUSE OF AUTHORITY.

I PROCEED to certain means that governments may employ for the prevention of the abuse of authority on the part of those to whom they confide a portion of their power.

Constitutional law has its direct and its indirect legislation. Its direct legislation consists in the establishment of offices among which all political power is divided; this is not considered in this work. Its indirect legislation consists in general precautions, which have for their object the prevention of the misconduct, the incapacity, or malversation of those who administer these offices, either in chief or in subordination.

A complete enumeration of these indirect methods will not be attempted. It is here only intended to direct attention towards this object, and perhaps to lessen the enthusiasm of certain political writers, who having caught a glimpse of one or other of these methods, have flattered themselves that they have established a science of which they have not even drawn the outline.

1. *Divide Power into different Branches.*

Every division of power is a refinement suggested by experience. The most natural plan, that which first presents itself, is that which places power altogether in the hands of a single individual. Command on the one side, obedience on the other, is a species of contract, the terms of which are easily arranged when the governor has no associate. Among all the nations of the east, the frame of government has preserved this primitive structure. The monarchial power descends without division from stage to stage, from the highest to the lowest, from the Great Mogul to the simple Havildar.

When the king of Siam heard the Dutch ambassador speak of an aristocratic government, he laughed at the idea as an absurdity.

This principal method is only indicated here: to examine into how many branches the power of government may be divided, and which of all the possible divisions deserves to be preferred, would be to write a treatise upon a political constitution. I only observe that this division ought not to form separate and independent powers: this would introduce anarchy into a state. An authority must be recognised, superior to all others, which receives no law, but only gives it, and

which remains master even of the rules themselves which it imposes upon its manner of acting.

2. *Distribute the particular Branches of Power, each among different copartners — Advantages and Disadvantages of this policy.*

In the provinces of Russia, before the regulations of Catherine II., all the different branches of power, military, fiscal, judicial, were placed in a single body, a single council. So far, the constitution of these subordinate governments sufficiently resembled the form of oriental despotism; but the power of the governor was a little limited by the powers of the council; and in this respect the form approached an aristocracy. At present, the judicial power is separated into many branches, and each branch is shared between many judges, who exercise their functions conjointly. A law, of the nature of the *habeas corpus* in England, has been established, for the protection of individuals against arbitrary power, and the governor has no more right to injure than a governor of Jamaica or Barbadoes.

The advantages of this division are principally these: —

1. It diminishes the danger of precipitation.
2. It diminishes the danger of ignorance.
3. It diminishes the danger from want of probity.

This last advantage can only be the constant result when the number of copartners is large; that is to say, when it is such that it would be difficult to separate the interests of the majority from the interests of the body of the people.

The division of powers has also its disadvantages, because it causes delays and foments quarrels, which may produce the dissolution of the government. It is possible to obviate the evil of these delays, by graduating the division according as the functions to which it is applied admit of more or less of deliberation. The legislative power and the military power form, in this respect, the two extremes, the first admits the greatest deliberation, and the second requires the greatest celerity. Whilst, as to the dissolution of the government, it is only an evil on one or the other of these two suppositions: — 1*st*, That the new government is worse than the old; 2*d*, That the passage from the one to the other is marked by calamities and civil wars.

The greatest danger in plurality, either in a tribunal or an administrative council, is, that it diminishes responsibility in many ways. A numerous body may reckon upon a kind of deference on the part of the public, and may allow itself to perpetrate injuries which a single person would not dare to do. In a confederation of many persons, the single individuals may throw the odium of a measure upon the others: it is done by all, it is acknowledged by none. Does public censure rise against them? the more numerous the body, the more it is fortified against external opinion; the more it tends to form a kingdom within a kingdom — a little public, having a peculiar spirit, and which protects by its applause those of its members who have incurred general disgrace.

Unity, in all cases in which it is possible, that is, in all cases which do not require the combined knowledge and wills of many, as in a legislative body—unity, I say, is desirable, because it makes the whole responsibility, whether moral or political, to rest upon a single head. It divides with no one the honour of its actions; it bears, at the same time, the whole weight of the blame; it sees itself set against all, with no other support than integrity of conduct, no other defence than general esteem. When the individual is not honest from inclination, he becomes so in opposition to himself, in virtue of the position in which his interest is inseparable from his duty.

Besides, unity in the subordinate person employed, is a certain means for enabling the sovereign to discover, in a short time, the real capacity of individuals. A false and limited mind may hide itself for a long time in a numerous company; but if it act alone upon a public theatre, its insufficiency is soon unmasked. Men of mediocrity or inefficiency, always ready to seek for places where they may shelter themselves under the merit of others, will be afraid to expose themselves in a dangerous career, in which they will be reduced to their own value.

But it is possible to unite, in certain cases, the advantages which result from combination, and those which necessarily belong to the responsibility of an individual.

In subordinate councils, there is always an individual who presides, and upon whom the principal reliance is placed. Associates are given to him, that he may profit by their advice, and that there may be witnesses against him when he neglects his duty. But it is not necessary, for the accomplishment of this object, that they should be his equals in power, nor that they should have a right of voting; all that is necessary is, that the chief should be obliged to communicate to them all that he does, and that each one should make a declaration in writing respecting each of his acts, testifying his approbation or blame. — Such communication, in ordinary cases, ought to be made before an order is given; but in those which demand particular celerity, it would be sufficient if made immediately after. This arrangement could not fail in general to obviate the danger of dissensions and delay. *

* This is the plan adopted by the East India Company. Formerly it was the Council of Ma-

3. Place the power of Displacing in other hands than the power of Appointing.

This idea is borrowed from an ingenious pamphlet, published in America in 1778* by a deputy of the Convention, charged with examining the form of government proposed for the State of Massachusetts.

The pride of man is interested in not condemning his own choice. Independently of all affection, a superior will be less disposed to listen to complaints against one of his own nominees, than he would be against an indifferent person, and will have a prejudice arising from self-love in his favour. This consideration serves in part to explain those abuses of power so common in monarchies, when a subaltern is charged with great authority, for which he has only to render an account to the same individual who appointed him to his office.

In popular elections, the part that each individual has in the nomination of a magistrate is so small, that this kind of illusion hardly exists.

In England, the choice of the ministers belongs to the king; but the parliament can effectively displace them, by forming a majority against them. This, however, is only an indirect application of this principle.

4. Suffer not Governors to remain long in the same Districts.

This principle particularly applies to considerable governments, in distant provinces, especially when separated from the principal body of the empire.

A governor armed with great power may, if leisure be given him, seek to establish his independence. The longer he remains in place, the more he may strengthen himself, by creating a party, or by uniting himself with a previously existing party. From oppression towards some, and partiality for others, though he may have no party, he may render himself culpable by a thousand abuses of authority, without any one daring or seeking to complain to the sovereign. The duration of his power gives birth to hopes or fears, which are equally favourable to him. He makes some his creatures, who regard him as the sole distributor of favours; whilst those who suffer, fear lest they should suffer more, if they offend a chief whom they have no hope to see changed for many years.

This will be true, especially with regard to offences which are more hurtful to the state than to individuals.

The disadvantage of rapid changes is, that it removes a man from his employment when he has acquired knowledge and experience as to its business. New men are liable to err through ignorance. This inconvenience will be palliated by the institution of a subordinate and permanent council, which would continue the progress and routine of affairs. What you gain by this means, is the diminution of a power that may be turned against you: what you risk, is the diminution of the degree of knowledge. There is no equality between these two dangers, when revolt is apprehended.

The arrangement ought to be permanent, to avoid giving umbrage to individuals. It is proper to accustom the minds of men to regard the change as fixed and necessary at determinate periods. If it take place only in certain cases, it may serve to provoke the evil it is destined to prevent.

The danger of revolt on the part of governors, only exists in feeble and ill-constituted governments. In the Roman empire, from the time of Cæsar to Augustus, nothing else is seen but governors and generals raising the standard of independence. It was not that this means of which we speak was neglected: changes were frequent: but either they knew not how to make a good use of this preservative, or they wanted vigilance and firmness, or, from other causes, they knew not how to hinder the frequency of revolt.

The want of a permanent arrangement of this nature is the most evident cause of the continual revolts to which the Turkish empire is subject, and nothing more completely proves the stupidity of this barbarous court.

Among the European governments which have stood in need of this policy, may be mentioned Spain in her American colonies, and England in the East Indies.

In the better civilized Christian states, nothing is more uncommon than the revolt of a governor. That of prince Gagarin, the governor of Siberia, under Peter I., is, I believe, the only example which can be cited in the last two centuries; and this happened in an empire which has not even yet lost its Asiatic character. The revolutions which have burst forth, have owed their origin to a more powerful and more reputable principle — the opinions, the sentiments of the people, the love of liberty.

5. Renew the Governing Body by Rotation.

The reasons for not allowing a governor to remain long in office, all apply, with still more force, to a council or a body of directors.

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dras or Calcutta which decided every thing by a plurality of votes. At present, the Governor ought to consult the Council, and each member ought to give his opinion in writing; but they have no vote—they are simply advisers: the Governor decides every thing in the last resort. Consequently, it is not sufficient for him to gain a majority in the Council, to elude the responsibility which rests altogether upon him.

* Reprinted in *Almon's Remembrancer*, No. 84, p. 223.

Render them permanent: if they agree among themselves, with regard to the generality of their measures, it is probable that, among these measures, there are many whose object is to serve themselves and their friends, at the expense even of the community which has confided its interests to them. If they divide, and are afterwards reconciled, it is highly probable that the price of their reunion will still be at the expense of the community. But, on the contrary, if you remove a certain number at a time, and there are abuses, you have a chance of seeing them reformed by the new-comers, whom their associates will not have had time to corrupt. One portion ought always to be left, to continue the current of affairs without interruption: ought this reserved part to be greater or less than the part renewed? If it be greater, it is to be feared that the ancient system of corruption will maintain itself in vigour; if it be less, it is to be feared that a good system of administration may be overturned by capricious innovations; whichever it be, the simple right of removal will scarcely answer the end, especially if the power of replacing belongs to the body itself. This right should never be exercised but upon extraordinary occasions.

Those who have been removed, ought they to be ineligible for ever, or only for a time? If they are ineligible for a time only, it will happen in the end that they will be re-elected, and that the spirit of federation will run its course in the body. If they are ineligible for ever, the community will be deprived of the talents and experience of its most skilful servants. Upon the whole, this species of policy appears only an imperfect substitute for other means which will be hereafter mentioned, and especially for the publicity of all proceedings and all accounts.

This arrangement of rotation has been adopted in England, in the great commercial companies; and, for some years past, it has been introduced into the direction of the East India Company.

This political view is not the only one which has been taken of rotation. It has often been adopted for the simple object of effecting a more equal distribution of the privileges which belong to office.

The great political work of Harrington (Oceana) turns almost entirely upon a system of rotation among the members of government. A man of wit, who does not see the full extent of a science, seizes a single idea, developes it, applies it to all cases, and sees nothing beside it. It is thus that, in medicine, the less the extent of the art is perceived, the more are people inclined to believe in an elixir of life, a universal remedy, a marvellous secret. Classification is useful, for the purpose of directing the attention successively to all the means.

6. *Admit Secret Informations.*

Every one knows, that at Venice secret informations were received. Boxes were placed in different situations about the palace of St. Mark, whose contents were regularly examined by the inquisitors of state. According to these anonymous accusations, it is pretended that certain persons have been seized, imprisoned, sent into exile, and even punished with death, without any ulterior proof. If this were true, there was nothing more salutary and more reasonable than the first part of the institution — nothing more pernicious and abominable than the second. The arbitrary tribunal of the inquisitors has been a reasonable ground of reproach to the Venetian government, which must have been in other respects wise, since it maintained itself for so long a period in a state of prosperity and tranquillity.

It is a great evil when a good institution has been connected with a bad one: all eyes are not able to use the prism which separates them. In what consists the evil of receiving secret informations, even though anonymous in the first instance? Without doubt, it would not be right to hurt a hair upon a man's head upon a secret information, nor to give the slightest uneasiness to an individual; but, with this restriction, why should the advantage which may result from them be lost? The magistrate considers if the object denounced deserve his attention: if it do not deserve it, he disregards the information; in the contrary case, he directs the informer personally to appear. After examining the facts, if he find him in error, he dismisses him, praising his good intentions, and concealing his name; if he have made a malicious and perfidious accusation, his name and accusation ought to be communicated to the party accused. But if his accusation has foundation, judicial proceedings commence, and the informer is obliged to appear and give his depositions in public.

Is it asked, upon what principle an institution of this kind may be advantageous? Precisely upon the same principle that votes are collected by ballot. In the course of the procedure, the defendant ought certainly to be informed who the witnesses are who depose against him; but where is the necessity that he should know them before the process commences? In this last case, a witness who may have any thing to fear from a delinquent, would not expose himself to a certain inconvenience, for the chance of rendering a doubtful service to the public. It is hence that offences remain so frequently unpunished, because individuals will not make personal enemies to themselves, without being sure of serving the public.

This means has been considered under the head of abuses of authority, because it is in

opposition to official persons that its efficacy is most marked; seeing that in this case, the power of the supposed delinquent is one more weight in the scale of dissuasive motives. In this kind of case, the superior having received a warning which puts him upon his guard, may pass by the first offence, and discover the guilty party in the commission of a second.

The resolution to receive secret and even anonymous informations, would be good for nothing, unless publicly known: but once known, the dread of these informations will soon render the occasion of their occurrence most rare, and thereby diminish their number. And whom will this fear affect? only the guilty, and those who intend to become so; for with publicity of procedure, the innocent cannot be endangered, and malice will be confounded and punished.

7. *Introduce the Lot, in requests addressed to the Sovereign.*

When informations reach the Minister only, they may have their use; but to secure their utility, they ought to come to the knowledge of the Sovereign.

Frederick the Great received directly the letters of the lowest of his subjects, and often wrote the answer to them himself. This fact would be incredible, if it were not well attested.

It must not be concluded from this example, that the same thing could be done under all governments.

In England, every one has liberty to present a petition to the King; but the destination of these petitions, delivered at the same moment to a gentleman of the chamber, is proverbial: they furnish curl papers for the maids of honour. It may be believed after this, that such petitions are not frequently presented; but they also are not very necessary in a country in which the subject is protected by the laws, which do not depend for their execution upon the sovereign. There are other means for the private man to obtain information; there are other channels of information for the prince.

It is in absolute monarchies that it is essential to keep a constant communication open between the subject and the monarch. It is necessary for the subject, that he may be sure of protection; it is necessary for the monarch, that he may be sure of being free.

Though the people may be called *canaille*, populace, or what you will, the prince who refuses to listen to the lowest individual of this populace, very far from increasing his power by so doing, in reality diminishes it. From this moment, he loses the faculty of governing by himself, and becomes an instrument in the hands of those whom he calls his servants. He may imagine that he does what he likes — that he determines for himself: but, in fact, it is they who determine for him; for to determine all the causes which a man has for action, is to determine all his actions. He who can neither see nor hear, but as it pleases those who surround him, is subject to all the impulses which they may choose to give him.

To place an unlimited confidence in ministers, is to place an unlimited confidence in the hands of those who have the greatest interest in abusing it, and the greatest facility for so doing.

Whilst, as to a minister himself, the more upright he is, the less need will he have of such confidence: and it may be affirmed without a paradox, that the more he deserves it, the less will he desire to possess it.

The sovereign who cannot read all these petitions, without sacrificing precious time, may have recourse to different expedients for relieving himself from dependence upon those in whom he confides, and assuring himself that they do not withdraw the most important from him. He may take certain ones at hazard; he may have them distributed under different heads, and have them presented without selection. The details of such an arrangement are neither sufficiently important, nor sufficiently difficult to require a particular developement. It is sufficient to have suggested the idea.

8. *Liberty of the Press.*

Listen to all counsel: you may find yourself the better for it; you run no risk of being the worse. This is what good sense says. To establish the liberty of the press, is to admit the counsels of every body: it is true, that on many occasions the public judgment is not listened to before a measure is determined upon, but after it is executed. This judgment, however, may always be useful, either with reference to measures of legislation which may be reformed, or with respect to those of administration which may have to be repeated. The best advice given to a minister alone may be lost; but good advice given to the public, if it serve not upon one occasion, may serve upon another; if it be not employed to-day, it may be employed in future; if it be not offered in a suitable form, it may receive from the hands of another those ornaments which shall make it relished. Instruction is a seed, which, so to speak, must be tried in a diversity of soils, and cultivated with patience, because its fruits are often of slow growth.

This measure is far preferable to that of petitions, as a means of emancipating the sovereign. Whatever may be his discernment in the choice of his ministers, he can only take them from a small number of candidates, whom the chances of birth or fortune present to him. He may therefore reasonably think that there are other men more enlight-

ened than them; and the wider he extends his faculty of knowing and hearing, the more he extends his power and his liberty.

But insolence and drollery may mingle themselves with the manner of giving this advice. In place of confining an examination to measures, its criticisms may extend to persons. And, indeed, how difficult is it to keep these two operations properly separated! How can a measure be censured, without attacking, in some degree, either the judgment or the probity of its author? There is the rock. Hence it is, that the liberty of the press is as rare as its advantages are manifest. It has ranged against it all the fears of self-love. Joseph II. and Frederick II., however, had the magnanimity to establish it. It exists in Sweden; it exists in England: it might exist everywhere, with some modifications, which would prevent its greatest abuses.

If, owing to the habits of the government, or from particular circumstances, the sovereign cannot permit the examination of the acts of his administration, he ought at least to permit the examination of the laws: though he claim the privilege of infallibility for himself, he need not claim it for his predecessors. If he be so jealous of the supreme power as to make every thing respected which has been touched by the sceptre, he might leave open to discussion mere science, principles of right procedure, and subordinate administration.

If the liberty of the press may have its inconveniences, arising from pamphlets and loose sheets being spread among the public, addressed to the ignorant as well as to the enlightened part of a nation, the same reason need not be applied to serious works of greater length — to books which can only have a certain class of readers, and which cannot produce any immediate effect, but which allow time to prepare an antidote.

Under the ancient French regime, it was sufficient that a book of moral science had been printed at Paris, to raise an unfavourable prejudice against it. The instructions of the Empress of Russia to the assembly of deputies were prohibited in France: the style and the sentiments were too popular to be tolerated under the French monarchy.

It is true, that in France, as elsewhere, negligence and inconsistency palliated the evils of despotism. A strange title served as a passport to genius. The rigour of the censorship serves only to drive the trade in books to other nations, and to render the satire which it seeks to suppress only the more severe.

9. *Publish the Reasons and the Facts which serve as the Foundation for the Laws and other Acts of Government.*

This is a necessary link in the chain of a generous and magnanimous policy, and an indispensable accompaniment to the liberty of the press. The one of these institutions is due to the people; the other is due to the government. If the government disdain to inform the nation of its motives upon important occasions, it thereby announces that it depends upon force, and counts the opinion of its subjects for nothing.

The partisan of arbitrary power does not think thus: he does not wish that the people should be enlightened, and he despises them because they are not enlightened. You are not able to judge, he says, because you are ignorant; and you shall always be kept ignorant, that you may not be capable of judging. Such is the eternal circle in which he entrenches himself. What is the consequence of this vulgar policy? General discontent is formed and increased by degrees, sometimes founded upon false and exaggerated imputations, which are believed from want of discussion and examination. A minister complains of the injustice of the public, without thinking that he has not given them the means of being just, and that the false interpretations given of his conduct are a necessary consequence of the mystery with which it is covered. There are only two methods of acting with men, if it be desired to be systematic and consistent: absolute secresy, or entire freedom — completely to exclude the people from the knowledge of affairs, or to give them the greatest degree of knowledge possible — to prevent their forming any judgment, or to put them in a condition to form the most enlightened judgment — to treat them as children, or to treat them as men: a choice must be made between these two methods.

The first of these plans has been followed by the priests of ancient Egypt, by the Bramins in Indostan, by the Jesuits in Paraguay; the second is practically established in England; it is established by law in the United States of America only. The greater number of European governments fluctuate continually between the one and the other system, without having the courage to attach themselves exclusively to either, and never cease placing themselves in contradiction to themselves, by the desire of having industrious and enlightened subjects, and the dread of encouraging a spirit of examination and discussion.

In many branches of administration it would be useless—it might be dangerous, to publish beforehand the reasons which determine measures. It is requisite only to distinguish the cases in which it is necessary to enlighten public opinion, to prevent its going astray; but in matters of legislation, this principle is always applicable. It may be laid down as a general rule, that no law ought ever to be made without a reason either expressly assigned or

tacitly understood. For what is a good law, if it be not a law for which good reasons can be given? There must always be a reason, good or bad, for making a law, since there is no effect without a cause. But oblige a minister to assign his reasons, and he will be ashamed not to have good ones: he will be ashamed to offer you base coin, when he is required to present you with a touchstone to ascertain its quality.

It is a means whereby a sovereign may reign after his death. If the reasons for his laws are good, he gives them support that they can never lose. His successors will be obliged to maintain them from a sentiment of honour. Thus the more happiness he has bestowed upon his people, the more happiness will he secure to his posterity.

10. *Exclude Arbitrary Power.*

"Clotaire made a law," says Montesquieu, "that an accused person should not be condemned without being heard: this proves that a contrary practice prevailed in particular cases, or among a barbarous people."— *Esprit des Lois*, chap. xii.

Montesquieu dared not speak out. Could he have written this passage without thinking of *lettres de cachet* and the administration of the police, such as it was in his time? A *lettre de cachet* might be defined to be — an order to punish without any proof for a fact against which there is no law.

It was in France and at Venice that this abuse reigned with the greatest violence. These two governments, in other respects moderate, have calumniated themselves by this foolery. They exposed themselves to imputations often false, and to the reaction of terror; for these precautions themselves, by inspiring alarm, created danger. Behave yourself well, it is said, and the government will not be your enemy. But how may I assure myself of this? I am hated by the minister, or by his valet, or by his valet's valet. If I am not hated to-day, I may be to-morrow, or some other day — and I may be taken for another person; it is not upon my conduct that I depend, but upon the opinion of men more powerful than me. Under Louis XV., *lettres de cachet* were an article of commerce. If this could happen under a government which passed for gentle, what would it be in countries where manners are less civilized?

In default of justice and humanity, it seems to me that the pride of governments ought to suffice for the abolition of these remains of barbarity.

Lettres de cachet may have been established under the veil of maxims of state: at the present day, this pretence has lost its magic. The first thought which presents itself to the mind is that of the incapacity and weakness of those who employ them. If you dared to hear that accused person, you would not close his mouth; if you keep him silent, it is because you fear him.*

11. *Direct the Exercise of Power by Rules and Forms.*

This is another head of police with regard to subordinate offices, no less applicable to absolute monarchies than to mixed governments. If the sovereign consider himself interested in remaining independent of the laws, he is not interested in communicating this same independence to all his agents.

The laws which limit subordinate officers in the exercise of their power, may be distinguished into two classes: — To the first belong those which limit the causes with regard to which they are permitted to exercise certain powers; to the second, those which determine the formalities with which they shall exercise them. These *causes* and these *formalities* ought to be all specifically enumerated in the body of the law: this being done, the subjects ought to be informed that these are the causes, and these the only causes, for which an attack can be legally made upon their security, their property, their honour. Hence the first law with which a great code ought to be begun, should be a general law of liberty — a law which should restrain delegated powers, and limit their exercise to certain particular occasions, for certain specific causes.

Such was the intention of *Magna Charta*, and such would have been its effect, without that unfortunate indeterminate expression, "Lex terræ," &c.; an imaginary law, which spreads uncertainty over the whole; because, by unceasingly referring to the custom of ancient times, examples and authorities have been sought among the abuses which it was intended to prevent.

12. *Establish the Right of Association; that is to say, of Assemblies of the Citizens for the expression of their sentiments and their wishes upon the public measures of Government.*

Among the rights that a nation ought to reserve to itself, when it institutes a government, this is the principal, as being the foundation of every other. However, it is almost useless expressly to mention it here: the people who possess it, need not to be told to preserve it; and those who do not possess it, have little hope of obtaining it; for what is there which can induce their chiefs to give it them?

At first sight, this right of association

* This does not extend to extraordinary circumstances, similar to those under which the *habeas corpus* act has been suspended in England, with known precautions.

would appear incompatible with government; and I allow, that to consider the right as a means of repressing government would be absurd and contradictory: but the case is very different. If the slightest act of violence be committed by one or many of the members of the association, punish them as if it had been committed by any other individual. If you find that you want the power to punish them, it is a proof that the association has made such progress as it could not have made without just cause; indeed, that it is not an evil, or that it is a necessary evil. I suppose that the government possess a public force, an organized authority, everywhere. If, then, these associations have become so strong as to intimidate it in the midst of all its regular sources of power — if it have not formed associations on its own side, though it possess such superior means for establishing them, it is an infallible sign that the calm and reflecting judgment of the nation is in opposition to such government. This being settled, what reason can be offered for continuing in the same state — for not satisfying the public wish? I cannot find any. Without doubt, a nation, being composed of men, is not infallible: a nation, as well as its chiefs, may be deceived as to its true interests; nothing is more certain: but if the great majority of a nation be found on one side, and its government on the other, may it not be presumed, in the first instance, that this general discontent is founded upon real grievances?

Far from being causes of insurrection, I consider associations as the most powerful means of preventing this evil. Insurrections are the convulsions of weakness, which finds strength in the moments of despair. They are the efforts of men who have not been permitted to express their feelings, or whose projects could not have succeeded, had they been known — of conspirators, who, being opposed to the general feelings of the people, can only succeed by surprise and violence. Those who frame them can therefore only hope for success by means of force; but those who can believe that the people are on their side — those who can flatter themselves with the hopes of triumph through the influence of public opinion, — why should they employ violence? why should they expose themselves to manifest danger without utility? I am therefore persuaded, that men who have full liberty of associating, and who can do so under the protection of the laws, will never have recourse to insurrection, except in those rare and unfortunate cases, in which rebellion is become necessary. Whether associations are permitted or prohibited, rebellions will never break out sooner.

The associations which were openly formed in Ireland, in 1780, produced no evil, but served rather to maintain tranquillity and security in the country; though this country, half civilized, was torn by every possible cause of civil war.

I even believe that associations might be permitted, and become one of the principal means of government, in the most absolute monarchies. These kinds of states are more tormented than others by revolts and risings; every thing is done by sudden movements: associations would prevent disorders. If the subjects of the Roman empire had been in the habit of association, the empire and the life of the emperor would not have been continually sold by auction by the prætorian guards.

Associations, however, cannot be permitted to slaves: too much injustice has been done them, not to afford reason to fear every evil from their ignorance or their resentment. It is not in the West Indies, it is not in Mexico, that the people may be armed and permitted to associate; but there are countries in Europe in which this strong and generous policy might be set up.

It must also be acknowledged, that there is a degree of ignorance which renders associations dangerous: this proves that ignorance is a great evil, and not that associations are not a great good. Besides, this measure itself may serve as an antidote against its ill effects: in proportion as an association gains in extent, being formed in security, all its bases are discovered; the public is enlightened; the government employs every means in disseminating the knowledge of facts, and dissipating errors; freedom and instruction join hand in hand; freedom facilitates the progress of knowledge, and the progress of knowledge represses the wanderings of freedom.

I know not how the establishment of this right can give uneasiness to the government There is no one which does not fear the people, which does not consider it necessary to consult their wishes, and to accommodate itself to their opinions: the most despotic are the most timid. What sultan is so quiet, so secure in the exercise of his power, as the king of England? The janissaries and the populace make the seraglio tremble: in London, the voice of the people is heard in legitimate assemblies; in Constantinople, it speaks in outrages: in London, the people speak by petitions; at Constantinople, by fires.

The case of Poland may be presented as an objection, in which associations produced so many evils: but this is deceptive; the associations were produced by anarchy, and did not produce it. Besides, in speaking of this means as a restraint upon governments, an established government is supposed — a medicine, and not the daily food, is spoken of.

I observe again, that even in the states in which this right exists, circumstances may

arise, in which it will be proper, not entirely to suspend, but to regulate its exercise. An absolute and inflexible rule is not requisite in this respect. We have seen, in the course of the last war, the British Parliament restraining the right of assembling; not allowing political unions, till the object had been publicly announced, and sanctioned by the magistrates, who possessed the power of dissolving them; and these restrictions taking place at the same time that the citizens were called upon to form military bodies for the defence of the state, and whilst the government announced the noblest confidence in the general spirit of the nation. When these restraints ceased, every thing remained in the same condition: it might have been supposed that the restrictive law continued. It was because a people, secure of its rights, enjoys them with moderation and tranquillity: if it abuse them, it is because it is doubtful of them: precipitation is the effect of fear.

CHAPTER XXII.

MEASURES TO BE TAKEN AGAINST THE ILL EFFECTS OF AN OFFENCE ALREADY COMMITTED — CONCLUSION OF THE SUBJECT.

THE general result of the principles which have been laid down in relation to penal legislation, present a happy prospect and well-founded hopes of reducing the number of crimes, and mitigating punishments. This subject at first only presents to the mind sombre images of suffering and terror; but in considering this class of evils, these doleful sentiments soon give place to gentle and consoling sentiments, when it is discovered that the heart of man has not within it any original and incurable perversity; that the multiplicity of offences arises only from errors in legislation, easy to be reformed; and that even the evil which results from them is capable of being repaired in many ways.

The great problem in penal legislation is—

1. To reduce as much as possible all the evil of offences to that which a pecuniary compensation will cure; 2. To throw the expense of this cure upon the authors of the evil, and, in their default, upon the public. What may be done in this respect goes far beyond what is imagined at the first glance.

The term cure is employed, the individual or community injured being considered under the character of an invalid, who has suffered from a crime. The comparison is just, and indicates the most suitable procedure, without mingling with them popular passions, and the antipathies which the ideas of crime are too apt to awaken among legislators.

There are three principal sources of crime: incontinence — enmity — rapacity.

The crimes to which incontinence gives birth, are scarcely of a nature to be cured by a pecuniary compensation: this remedy may be applied, in certain cases, to seduction, and even to conjugal infidelity; but it never cures that portion of the evil which consists in the attack upon the honour and peace of families.

It may be observed, that in opposition to other offences, whose evil effects are more surely arrested the more completely they are published, the offences of incontinence only become hurtful when made public. Thus a good citizen, who would esteem it a duty to publish an act of fraud, would take care to conceal a secret fault arising from love. To leave a fraud undetected, is to become an accomplice in its success. To publish, in open day, an unknown weakness, is to do an injury without compensation: since it lacerates the sensibility of those who are held up to shame, and repairs nothing. I reckon among the establishments which do honour to the humanity of our age, the secret asylums for accouchements, and hospitals for foundlings, which have so often prevented the evil effects of despair, by covering with the shades of mystery the consequences of a transient wandering. The rigour which rises up against this indulgence is founded upon a false principle.

The crimes to which enmity gives birth are often such, that a compensation in money cannot be applied to them. Even this compensation, when it can be applied, is rarely complete: it cannot undo what is done; it cannot restore a limb which is lost; it cannot restore a son to his father, a father to his family: but it may act upon the condition of the party injured: it may furnish him with a lot of good, in consideration of a lot of evil; and in balancing the account of his prosperity, place an *item* upon the favourable side, to balance an *item* upon the disadvantageous side.

The most essential observation with respect to these offences is, that they are daily diminishing, from the progress of civilization. It is wonderful to observe, among the greater number of European states, how few crimes are produced by the angry passions so natural to man, and so violent in the infancy of society. How noble an object of emulation for those tardy governments, which have not yet attained this degree of police, and among whom the sword of justice has not yet vanquished the stilettoes of revenge!

But the inexhaustible source of crimes is *rapacity*. Here is an enemy always active, always ready to seize all advantages—against whom it is necessary to wage continual war. This war demands tactics, whose particular principles have been much misunderstood.

Be indulgent to this passion, so long as it confines itself to attacking you by peaceful

means; attach yourself to taking away all the unjust profit that it makes; become severe with regard to it, in proportion as it carries on its enterprises openly — when it has recourse to threats and violence. Still, however, reserve means of additional severity, when it gives way to atrocities, such as murder and incendiarism. It is in the proper management of these gradations, that the art of penal legislation consists.

It must never be forgotten, that all penal police consists in a choice of evils. The wise administrator of punishments will always have the balance in his hands; and in his zeal for the exclusion of small offences, will not imprudently give birth to greater ones. Death is almost always a remedy which is not necessary, or which is inefficacious: it is not necessary with respect to those whom an inferior punishment may deter from crime — whom simple imprisonment can restrain from it: it is not efficacious with respect to those who precipitate themselves upon it, so to speak, as an asylum against despair. The policy of the legislator who punishes every thing with death, resembles the pusillanimity of the child who crushes the insect which he dares not look upon. But if the circumstances of society—if the frequency of a great crime, require the employment of this terrible punishment, dare, without aggravating the torments of death itself, to give to it a more formidable aspect than that of nature; surround it with mournful accessaries — the emblems of crime, and the pomp of tragic ceremonies.

Be hard, however, to be convinced of the necessity of putting any one to death. By avoiding it as a punishment, you will also prevent its occurrence as a crime. When a man is placed between two crimes, it is important to give him a sensible interest not to commit the greater. It is proper, in a word, to convert the assassin into a pickpocket; that is to say, to give him a reason for preferring the crime which can be repaired, to that which cannot be repaired.

Everything which can be repaired is nothing. Everything which may be compensated by a pecuniary forfeiture, is almost as non-existent as if it had never existed; for if the injured individual always receive an equivalent compensation, the alarm caused by the crime ceases entirely, or is reduced to its lowest term.

The desirable object is, that the funds for compensation on account of crimes should be drawn from the mass of delinquents themselves — either from the goods they have acquired, or from labour imposed on them. If this were the case, security would be the inseparable companion of innocence, and sorrow and anguish would only be the portion of the disturbers of the social order. Such is the point of perfection which should be aimed at, though there may be no hope of attaining it but by degrees, and by continued efforts. The goal is pointed out: the happiness of reaching it will be the reward of an enlightened and persevering administration.

During the insufficiency of this source, it is proper to draw compensation, either from the public treasure or private insurances.

The imperfection of our laws is very evident, under this point of view. Has a crime been committed? those who have suffered by it, either in their person or their fortune, are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them, however, an indemnity, when its protection has not been effectual.

When an individual has prosecuted a criminal at his own expense, even in his own cause, he is no less a defender of the state than he who fights against foreign enemies: the losses he experiences in defending the state ought to be compensated at the public expense.

But when an innocent person has suffered from an error of the tribunals—when he has been arrested, detained, rendered suspected, condemned to all the anxieties of a trial and a long captivity, it is not only on his own account, but on account of justice itself, that he ought to receive an indemnity. Instituted for the redress of wrongs, is it desirable that the wrongs they perpetrate should be without redress?

Governments have not provided for either of these indemnities. In England some voluntary associations have been formed to supply them. If the institution of assurance* be good in a single case, it is good in all, under the precautions requisite for the prevention of negligence and fraud.

The inconvenience of frauds is common to all funds, public and private. They may diminish the utility of assurances, without destroying it. Shall no fruit-trees be cultivated, because the crop may be destroyed by

* Assurance is good, because the assurer is prepared to sustain the loss, and considers the premium he has received as the equivalent for the risk which he runs.

But this remedy is imperfect in itself, because it is always necessary to pay the premium, which is a certain loss, in order to guarantee one's self against an uncertain loss. In this point of view, it is to be desired that all unforeseen losses which can fall upon individuals without their fault, were covered at the public expense. The greater the number of contributors, the less sensible is the loss for each one.

It must be observed on the other side, that a public fund is more exposed to fraud and waste than the funds of individuals. Losses which fall directly upon individuals give the greatest possible force to the motives to vigilance and economy.

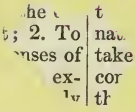
a thousand accidents? Banks of piety have succeeded in many countries. An establishment of this kind, formed in London in the middle of the past century, failed at its commencement, from the unfaithfulness of its directors; and this robbery has left a prejudice, which has hindered all other attempts of this kind. According to the same logic, it might be proved that ships are bad war machines, because the Royal George, whose port-holes were left open, sunk whilst at anchor.

Assurances against crimes might have two objects:—1. To create a fund for the indemnification of parties injured, in case the delinquent were unknown or insolvent; 2. To defray, in the first instance, the expenses of judicial prosecution; and might even be extended, in favour of the poor, to causes purely civil.

But the method of settling these indemnities would be foreign to the present subject: it has been treated of elsewhere. I confine myself here to an enunciation of the general result of this work: It is, *That by good laws almost all crimes may be reduced to acts which may be repaired by a simple pecuniary compensation;* and that, when this is the case, *the evil arising from crimes may be made almost entirely to cease.*

This result, simply announced, does not at first strike the imagination: it is necessary to meditate upon it, in order to perceive all its importance and solidity. The brilliant society of the world cannot be interested by a formula almost arithmetical: it is to statesmen that it is presented as a subject for consideration; and it belongs to them to judge of it.

The science, whose foundations we have explored, can only please those elevated minds with whom the public good is a passion. This is not a subversive and shuffling policy, which prides itself upon clandestine projects—which builds its glory upon misfortunes—which beholds the prosperity of one nation in the abasement of another, and mistakes the convulsions of government for the conceptions of genius. It has reference to the greatest interests of humanity—to the art of forming the manners and characters of nations—to the means of insuring the highest degree of security to individuals—and of deriving results equally advantageous from different forms of government. Such is the object of this noble and generous political science, which seeks only to be known—which desires nothing exclusive—and which knows no more certain method of perpetuating its benefits, than sharing them among all the great family of nations.



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